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MICHIGAN CONSULTATION:

FOCUS ON AFFIRMATIVE ACTION

The Michigan Advisory Committee to the

United States Commission on Civil Rights

March 1997

These papers presented at a consultation conducted by the Michigan Advisory Committee to the U.S. Commission on Civil Rights were prepared for the information and consideration of the Commission. Statements and viewpoints in the papers should not be attributed to the Committee or the Commission, but only to the individual authors.

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Contents

Introduction

I. The Michigan Advisory Committee

The Michigan Advisory Committee believes that, as part of its obligation to advise the United States Commission on Civil Rights on relevant information within the jurisdiction of the Commission, it was imperative to examine the most contentious current civil rights issue—affirmative action. Articles on the issue appear in the press, it is discussed on radio and television, and it has become an important political issue. Often, however, neglected in these dialogues is a clearness both of the term and its implementation.

The examination of affirmative action is not new to the U.S. Commission on Civil Rights. The Commission did the first study of affirmative action in a 1969 report on the administrative functions of the Office of Federal Contract Compliance, U.S. Department of Labor. Since that time, the Commission and State Advisory Committees to the Commission have completed 11 reports on affirmative action.[1]

The essential purpose of the Advisory Committee's examination and report on affirmative action is both to clarify the arguments and to illuminate the debate in a nonpartisan manner. The Michigan Advisory Committee is structured to be philosophically, socially, and politically diverse. It includes representation from both major political parties and is independent of any national, State, or local administration or policy group. In exploring the issue of affirmative action, Advisory Committee members carefully sought presenters in a genuine spirit of openness and bipartisanship. Each member of the Advisory Committee was to invite two participants to present a position and/or a perspective paper on affirmative action, with the invited individuals known to be knowledgeable in the principles of equal opportunity, nondiscrimination, and civil rights.

For purposes of this consultation, the Advisory Committee uses the United States Commission on Civil Rights definition of affirmative action:

> 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.[2]

Twenty-two individuals and organizations accepted invitations from the Advisory Committee and presented papers. These are collected in five sections: (1) Affirmative Action and Its Implementation, (2) Academic Examinations of Affirmative Action, (3) Community Perspectives Regarding Affirmative Action, (4) Community Organization Positions on Affirmative Action, and (5) Position Statements on Affirmative Action from National Organizations. This consultation is one of a series of six projects in 1996 on affirmative action being conducted by the Midwestern State

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1 *See* U.S. Commission on Civil Rights reports: *Toward Equal Educational Opportunity: Affirmative Admissions Programs at Selected Law and Medical Schools* (1978); *Affirmative Action in Salt Lake's Criminal Justice Agencies* (1978); *Private Sector Affirmative Action: Omaha* (1979); *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* (1981); *Consultations on the Affirmative Action Statement of the U.S. Commission on Civil Rights* (1981); *Affirmative Action and Equal Employment, Knoxville and Oak Ridge* (1982); *Affirmative Action in Michigan Cities* (1982); *Bringing An Industry into the 80s, Affirmative Action in Seafood Processing* (1983); *Local Affirmative Action Efforts—Missouri* (1983); *Selected Affirmative Action Topics in Employment and Business Set-Asides* (1985); and *The Enforcement of Affirmative Action Compliance in Indiana Under Executive Order 11246* (1996).

2 *See generally* U.S. Commission on Civil Rights, Statement on Affirmative Action, at 2 (October 1977).

Advisory Committees to the United States Commission on Civil Rights.[3]

II. Background

In the 1960s government entities at Federal and local levels began taking an active role to eliminate discrimination on the basis of race, color, religion, sex, and national origin. These initiatives included antidiscrimination measures in areas such as employment, housing, and education. Some efforts also included affirmative action.

The preeminent antidiscrimination legislation of the civil rights era is the Civil Rights Act of 1964.[4] Title VII of that act prohibits employment discrimination, but it neither requires nor prohibits affirmative action measures.[5] The most recent Federal civil rights legislation, the Civil Rights Act of 1991,[6] expressly preserves lawful affirmative action plans, leaving the courts to decide the proper parameters of such plans.

The principal legal requirements of affirmative action at the Federal level include Executive Order 11246,[7] as amended, the Rehabilitation Act of 1973,[8] and the Vietnam Veterans Era Readjustment Assistance Act of 1974.[9] Executive Order 11246, signed by President Lyndon B. Johnson in 1965 and amended in 1967 to include gender as a protected status, is considered the defining authority of affirmative action for Federal contractors, ordering the inclusion of an equal opportunity clause in every contract with the Federal Government.

> All Government contracting agencies shall include in every Government contract hereafter entered into the following provisions: During the performance of this contract, the contractor agrees as follows: (1) The contractor will . . . take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.[10]

Similarly, the Rehabilitation Act of 1973 and the Vietnam Veterans Readjustment Act of 1974 contain affirmative action language mandating that firms with Federal contracts to undertake personnel actions to employ and advance qualified handicapped individuals and veterans of the Vietnam era and disabled veterans. Section 503(a) of the Rehabilitation Act of 1973 reads:

> Any contract . . . entered into by any Federal department or agency . . . shall contain a provision requiring that . . . the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals.[11]

The Vietnam Veterans Era Readjustment Assistance Act of 1972 contains an affirmative action requirement identical to section 503(a) of the Rehabilitation Act.

At the Federal level, the affirmative action obligation of firms with Federal contracts to provide equal employment opportunity to minorities and women is monitored by the Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor. The OFCCP considers affir-

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3 *See also* U.S. Commission on Civil Rights State Advisory Committee reports: *Illinois Consultation: Focus on Affirmative Action* (1996); *Indiana Consultation: Focus on Affirmative Action* (1996); *Wisconsin Consultation: Focus on Affirmative Action* (1996); and *Ohio Consultation: Focus on Affirmative Action* (1996).

4 Pub. L. No. 88–352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a et seq. (1988 & Supp 1994)).

5 42 U.S.C. §§ 2000e–2000e-17 (1988 & Supp. 1994).

6 Pub. L. No. 102–166, 105 Stat. 1076.

7 Exec. Order No. 11246, 3 C.F.R. § 339 (1964"65), *reprinted in* 42 U.S.C. § 2000e note (1988).

8 Pub. L. No. 93–112, 87 Stat. 55.

9 Pub. L. No. 92–540, § 503(a), 86 Stat. 1074, 1097 (codified at 38 U.S.C. §§ 2011–2013 (1988)).

10 Exec. Order No. 11246, § 202(1), 3 C.F.R. 339 (1964–1965 *reprinted in* 42 U.S.C. 1000e note (1988)).

11 Pub. L. No. 93–112, 87 Stat. 355.

mative action as the active effort by employers to eliminate existing barriers to equal employment opportunity. Specifically, the OFCCP defines affirmative action as:

> In the employment context, affirmative action is the set of positive steps that employers use to promote equal employment opportunity.... It refers to a process that requires a government contractor to examine and evaluate the total scope of its personnel practices for the purpose of identifying and correcting any barriers to equal employment opportunity.[12]

The Indiana Advisory Committee to the United States Commission recently studied the enforcement of affirmative action by the OFCCP and issued a report with findings on the agency's operations in the State.[13] The study found that the Federal Government did mandate hiring goals for companies with Federal contracts. However, affirmative action as enforced by the OFCCP was not found to be a program of preferences for less qualified minorities and women. The program required Federal contractors to actively seek and consider minorities and females with the requisite abilities and qualifications. The use of inflexible hiring quotas to achieve a certain numerical employment position are proscribed by the OFCCP.[14]

Hiring goals in job groups where minorities and/or females were underutilized according to their availability were required by the OFCCP, and to meet these goals Federal contractors had to undertake a specific affirmative recruitment of qualified minorities and females so that such individuals would be included as applicants in the selection pool. Reviews of Federal contractors by the OFCCP assessed the good faith effort of the employer in recruiting minorities and females and the application of nondiscrimination in its personnel practices.

In addition to the affirmative action obligations on Federal contractors, the Federal Government has also issued regulations calling for affirmative action in apprenticeship programs and programs serving migrant and seasonal farmworkers. Federal regulations set out affirmative action requirements for apprenticeship programs administered by the Department of Labor;[15] other Federal regulations call for state agencies participating in the administration of Services for Migrant and Seasonal Farmworkers to develop affirmative action plans.[16]

Although not specifically referred to as "affirmative action," government efforts to increase minority and female participation in contracting and government-assisted programs may be considered affirmative action initiatives. Under these programs "set-asides" or "participation goals" for members of racial or ethnic minorities and businesses owned or controlled by these or other disadvantaged persons have been implemented at the Federal, State, and local levels.

The legality of such Federal initiatives were recently scrutinized by the U.S. Supreme Court in *Adarand Constructors Inc. v. Pena*.[17] Although upholding the constitutionality of set-asides, the Supreme Court's decision requires governmental race-based affirmative action programs be reviewed under the strict scrutiny standard, limiting the authority of government entities to adopt and implement race conscious measures in the absence of specific findings of discrimination.

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12 OFCCP, U.S. Department of Labor, "OFCCP Defines the Terms!," released March 1995.

13 *See* "The Enforcement of Affirmative Action Compliance in Indiana Under Executive Order 11246," report of the Indiana Advisory Committee to the United States Commission on Civil Rights, August 1996 (hereinafter referred to as *Indiana SAC Affirmative Action Report*).

14 Ibid.

15 20 C.F.R. § 30.3-30.8.

16 20 C.F.R. § 653.111(a),(b)(3)(1994). *See* Congressional Research Service, "Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals or Other Preferences Based on Race, Gender, or Ethnicity," Feb. 17, 1995.

17 115 S. Ct. 2097 (1995).

The strict scrutiny standard requires that such "affirmative action" efforts by government entities be narrowly tailored to meet a compelling governmental interest. [These efforts must be: (1) supported by a pattern and/or practice of discrimination, (2) narrowly tailored in application, temporary in duration, and not intended to achieve or maintain a specified gender or racial balance, and (3) not trammel unnecessarily on nonminorities.]

In Michigan the Elliott-Larsen Civil Rights Act is the defining civil rights act for the State. It legislates against discrimination and establishes the State's civil rights commission and the Michigan Department of Civil Rights.[18] Under the Act, employers, employment agencies, and educational institutions are proscribed from discriminating on the basis of religion, race, color, national origin, age, sex, height, weight, or marital status. Section 202 (1)(a) reads:

> An employer shall not do any of the following:
> (a) fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. . . .[19]

In addition, educational institutions are proscribed from using quotas along racial, gender, or religious lines in their admission practices.

> An educational institution shall not . . . announce or follow a policy of denial or limitation through a quota or otherwise of educational opportunities of a group or its members because of religion, race, color, national origin, or sex.[20]

The Elliott-Larsen Act makes a specific provision for individual firms, institutions, and government agencies to voluntarily develop and implement affirmative action programs. However, such plans are permitted only if prior approval is obtained from the Michigan Civil Rights Commission.

> A person subject to this article may adopt and carry out a plan to eliminate present effects of past discriminatory practices or assure equal opportunity with respect to religion, race, color, national origin, or sex if the plan is filed with the commission under rules of the commission and the commission approves the plan.[21]

Several decisions have been made regarding the legality of affirmative action programs under State's civil rights law.

(1) The courts have held that an employers' affirmative action plan which has not been approved by the Michigan Civil Rights Commission is not necessarily void, nor is an action taken pursuant to such a plan discriminatory per se, nor does reliance on an unapproved plan insulate an employer from charges that it violated the State's nondiscrimination law.[22]

(2) The courts have ruled that the provision that all voluntary affirmative action plans must be submitted to the Michigan Civil Rights Commission holds for plans adopted by local governments.[23] The courts have further held that while local governments are not precluded from enacting laws in the field of civil rights, they are precluded from requiring the adoption and use of affirmative action plans approved only by the local government entity.[24]

In a challenge under the civil rights act to the legality of the city of Detroit's affirmative action

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18 1976 Mich. Pub. Act 453, as amended by 1992 Mich. Pub. Acts 124 and 258.

19 Ibid., § 202(1)(a).

20 Ibid., § 402(e).

21 Ibid., § 210.

22 *See* Kulek v. City of Mount Clemens, 164 Mich. App. 51 (1987) and Ruppal v. Department of Treasury, 163 Mich. 219 (1987).

23 *See* Van Dam v. Civil Serv., 162 Mich. App. 135 (1987).

24 *See* J.F. Cavanaugh & Co. v. Detroit, 126 Mich. App. 627 (1983).

promotion program, in *Baker v. City of Detroit*, white officers alleged they were discriminated against by the department's affirmative action plan, under which equal numbers of white and black police sergeants were promoted to rank of lieutenant. The court upheld the validity of the plan under both Title VII and the Constitution, finding that it was a temporary measure to eliminate a manifest racial imbalance and did not unnecessarily trammel the rights of white employees.[25]

In *Detroit Police Officers' Assn. v. Young* white police officers challenged the affirmative action program after they were passed over for promotion to the rank of sergeant, and black officers with lower standing on the eligibility list received promotions. The District Court held that the plan violated title VII and the Equal Protection Clause of the 14th Amendment.[26] The 6th Circuit, however, reversed based on the uncontroverted evidence of prior discrimination by the department. The court upheld the validity of the affirmative action plan under title VII to remedy a manifest imbalance.[27]

More recently the courts again heard a constitutional challenge by white police officers to the affirmative action plan covering promotions to sergeant. In 1993 the court held the affirmative action plan to at an end, finding that the goal of 50 percent black sergeants had virtually been attained, the 19-year term of the plan had been excessive, and the plan would work a severe hardship on white officers if continued.[28]

III. Present Controversy

Affirmative action has moved beyond provincial legal and academic inquiries and into open public and political discussion. A 1995 hearing on affirmative action before a subcommittee of the House of Representatives Judiciary was described as "tense and sometimes rancorous" as House Republicans considered purging sex and race preferences from Federal laws.[29]Emotions surrounding affirmative action have been chronicled by the press. In 1995, in a cover story of *Newsweek* was devoted to affirmative action, Howard Fineman wrote:

> But the most profound fightthe one tapping deepest into the emotions of everyday American lifeis over affirmative action. It's setting the lights blinking on studio consoles, igniting angry rhetoric in state legislatures and focusing new attention of the word "fairness."[30]

In 1995 President William J. Clinton directed Federal agencies to review existing affirmative action programs.

> Let us trace the roots of affirmative action in our never ending search for equal opportunity. Let us determine what it is and what it isn't. Let us see where it has worked and where it has not, and ask ourselves what we need to do now. Along the way, let us remember always that finding common ground as we move toward the 21st century depends fundamentally on our shared commitment to equal opportunity for all Americans....
>
> The purpose of affirmative action is to give our nation a way to finally address the systemic exclusion of individuals of talent on the basis of their gender or race from opportunities to develop, perform, achieve, and contribute.... This review concluded that affirmative action remains a useful tool for widening economic and educational opportunity.... Let me be clear about what affirmative action must not mean and what I won't allow it to be. It does not mean—and I don't favor—the unjustified preference of the unqualified over the qualified of any race or gender. It doesn't mean—and I don't

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25 *See* Baker v. City of Detroit, 483 F. Supp. 930 (E.D. Mich. 1979), *aff'd* 704 F. 2d 878 (1983), *cert. denied*, 464 U.S. 1040 (6th Cir. 1984).

26 *See* Detroit Police Officers' Assn v. Young, 446 F. Supp. 979 (E.D. Mich).

27 608 F. 2d 671 (6th Cir. 1979), *cert denied*, 452 U.S. 938 (1981).

28 *See* Detroit Police Officers' Assn. v. Young, 989 F. 2d 225 (6th Cir. 1993).

29 Nancy E. Roman, "Affirmative action spurs exchanges tinged with rancor," *The Washington Times*, Apr. 4, 1995, p. A10.

30 Howard Fineman, "Race and Rage," *Newsweek*, Apr. 3, 1995, p. 24.

favor—numerical quotas. It doesn't mean—and I don't favor—rejection or selection of any employee or student solely on the basis of race or gender without regard to merit.[31]

Critics argue that affirmative action is not working and is moving the society to a position at odds with the original intent of recent civil rights legislation-a color blind society. Senator Robert J. Dole (R,KS), former Senate majority leader, introduced the Equal Opportunity Act of 1995, legislation designed to end race and gender considerations in employment and contracting.

Commenting on the need for a new civil rights agenda in the *Wall Street Journal*, Senator Dole wrote:

> We are now engaged in a contentious and difficult debate over the merits of affirmative action and the role of preferential policies in our society.
>
> Perhaps the most striking aspect of this debate is not its passion or its complexity, but its irrelevance. The simple truth is that preferential policies don't mean anything to the millions of Americans who each day evade bullets, send their kids to substandard schools, and wade through the dangerous shoals of our nation's underclass.
>
> Making government policy by race only diverts us from the real problems that affect all Americans of whatever race and heritage. Rather than having a potentially divisive argument over affirmative action, our most pressing need is to develop a civil rights agenda for the 1990s, one that is relevant to the needs and challenges of our time.[32]

The issue of affirmative action has been growing in intensity in Michigan. In February 1996, a jury in Brighton awarded a state trooper $850,000, finding that he had been passed over for promotions because he was white. In April 1996, a Lansing police officer complained publicly that the city pays for police training for minority cadets but not for whites; city officials defended the practice.[33]

In June 1996, the House Judiciary and Civil Rights Committee of the Michigan legislature voted 11–2 to amend the Elliott-Larsen civil rights act, putting more stringent requirements on the affirmative action programs of public employers.[34] First, the amendment expressly precludes any "preferential" practice on the basis of race, gender, religion, or national origin by any employer or institution.[35] Second, under the proposed legislation, the affirmative action plans of public employers may only be adopted if local government entities publicly admit the past discriminatory practices which necessitated the need for the affirmative action plan. In addition, the affirmative action plan would have to be reviewed and approved by the Michigan Civil Rights Commission and show it was designed to eliminate the effects of specific past discrimination. The proposed legislation specifically requires:

> (A) The public employer submits a proposal of the plan or significant changes to an approved plan to the commission, provides public notice of that proposal in accordance with rules promulgated by the commission, and additionally posts copies of that public notice in conspicuous locations at the site or sites to be affected by the proposal.
> (B) the proposed plan documents with specificity the present effects of past discriminatory practices that are to be remedied by the plan, the actions, practices, or methods to be used to remedy the present effects of past discrimination or to assure equal opportunity, and the facts that demonstrate the necessity of the plan to assure equal opportunity under this section . . .

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31 Remarks by the President on Affirmative Action, The White House, Office of the Press Secretary, July 19, 1995.

32 Bob Dole and J.C. Watts, Jr., "A New Civil Rights Agenda," *The Wall Street Journal*, July 27, 1995.

33 *See* Chris Andrews, "Affirmative action under fire," *Lansing State Journal*, June 5, 1996, p. 1.

34 House Bill No. 4972, a bill to amend the title and section 210 of Act No. 453 of the Public Acts of 1976, entitled as amended, Elliott-Larsen civil rights act.

35 Ibid.

(E) . . . the commission may approve the proposed plan only after determining both of the following:

(*i*) that a compelling governmental interest is met by the proposed plan.

(*ii*) that the proposed plan is narrowly tailored solely to further the compelling governmental interest described in subparagraph i.

(F) the commission limits its approval of the plan for a period of not more than 5 years.

(G) the commission makes the plan available for public review.[36]

The Advisory Committee's consultation evoked diverse sentiment on affirmative action. In listening to a variety of presenters on affirmative action, the Advisory Committee heard the current debate on affirmative action as a continuation of this country's struggle with race relations.

Dealing successfully with the problems of race relations remains difficult. Few deny that discrimination on the basis of race, color, religion, gender, ethnicity, and disability still exists in this society and continues to be a barrier to equal opportunity. Affirmative action, as one of the tools employed to deal with some aspects of racial and gender inequities, is embroiled in controversy. Both at the national level and in the State of Michigan there is a continuing debate on whether affirmative action is an effective policy tool in providing equal opportunity.

Some of the controversy concerning affirmative action stems from differences in an understanding of the term's definition and its implementation. Such differences often translate into different conclusions about the program's effectiveness and efficacy.

In presenting this report, it is the intent of the Advisory Committee to impartially illuminate the debate on the role of affirmative action as a policy tool in providing equal opportunity.

36 Ibid.

I. Affirmative Action and Its Implementation

The General Motors' Journey: From Affirmative Action to Managing Diversity

By William C. Brooks

I. Background Information

Affirmative action, both its legislative vehicles and its moral imperative, is under attack. From the Supreme Court's decision of *Adarand v. Pena* in (summer) 1995 to the California Civil Rights Initiative (CCRI) on the ballot in November 1996, individuals and groups are challenging affirmative action's validity and usefulness in the 1990s. Thirty years ago, our culture was experiencing social and moral upheaval, causing us to change the way we related to each other as individuals, as groups, as company to customer, and as employer to employee. Affirmative action was implemented as one response to demands for change. Its original intent was to eliminate discrimination in hiring and promoting women and minorities in our places of work. Prejudice was widespread in our culture, and it walked into our offices and factories, shops and institutions, with our bosses, our supervisors, and our workers. We had different notions about who should do what kind of work and how we should work together. Federal regulation and social coercion were necessary to open doors and quicken the pace of change that was being called for in the streets and in Congress.

Do we still need to prop open those doors with legislation? Has affirmative action shifted from service as a vehicle for change to something else? There is a loud and vigorous debate that suggests we need to, at the very least, reevaluate what is affirmative action's role in making our work places and institutions more competitive, more diverse, more open, and more reflective of today's society.

II. The Affirmative Action Debate Today

The debate on affirmative action today is often cast as a political one, but affirmative action legislation has been supported by Democrats and Republicans alike since the sixties. From Kennedy and Johnson to Nixon, Ford, and Bush we have legislated relationships when our culture change was too slow to keep pace with society's demands. We needed to change some behaviors and we enacted "rules" that required us to act differently. Among the concerns of both Republicans and Democrats are the costs of such programs to business, the complexity of paperwork and enforcement, and the occasional appearance of unfairness.

A frequently cited myth around affirmative action is that it establishes quotas or preferences in hiring and promoting, yet Executive Order 11246 never mentions specific targets. Quotas only become requirements when companies or institutions have to address rampant discrimination in response to lawsuits. There is currently only one government program with the controversial set-aside *goal* of 5 percent of contracts to women and minorities.

Nor is the affirmative action debate a simple racial/gender issue. Blacks and whites, men and women, fall on both sides of the debate. Some women and minorities resent the perceived view that they are unqualified for their positions and they believe that they would fare better without affirmative action. On both sides of the debate is the perception that affirmative action is no longer needed by women or minorities, because significant numbers have broken through the glass ceiling. Yet numbers from the Glass Ceiling Commission and the Bureau of Labor statistics suggest that while there has been improvement, women and minorities continue to trail white males in both level of achievement and pay.

So, while legislation has helped to change behavior to hire and promote more women and mi-

norities, it has not necessarily addressed our beliefs about qualifications, experience, or the value of the skills of all our people.

III. Historical Perspective

Where has General Motors stood on actions that deliberately affirm specific groups? General Motors has responded to affirmative action legislation and pressures from minority and gender interest groups as a leader. We have recognized new legislation and new requirements as opportunities to improve our relationships with our employees and our communities. We have seen affirmative action as necessary steps to keep pace with a changing society.

Before affirmative action was a model for employee/community relations, GM responded to society's and government's call to diversify its work force, hiring women and minorities during World War II and instituting intensive training programs for these new workers to ensure quality products were being delivered to the front lines of the war. In 1962, post-Kennedy's Executive Order 10925 mandating affirmative action in government contracts, GM participated in the "Plans for Progress" of the President's Committee on Equal Employment and committed itself to take such actions as required to begin to eliminate discrimination.

When Congress passed the Civil Rights Act of 1964, GM Chairman Donner committed GM to continue its program of equal employment opportunity in a letter to President Johnson. During the late 1960s and early 1970s, General Motors continued to expand its efforts to improve the effectiveness of education for the disadvantaged and to hire qualified minorities and women. GM's efforts in the education arena continue today with such programs as the Executive Orientation and Business Briefing provided to all GM executives. This session builds understanding with GM leaders of why managing diversity is a key business strategy to GM. These educational and other community-centered actions evolved out of legislated affirmative action, but continue today because of the rapidly changing requirements in our external environment—requirements as to how we compete in the marketplace.

Following the government-mandated path has been a challenge for GM, and we do admit that we, too, have found change difficult, as leaders and as members of the larger community. That is clearly why we have supported, and continue to implement, affirmative action programs. We have worked with our unions to expand opportunities for our hourly work force. In 1983, for example, GM committed approximately $45 million over a 5-year period to continue to strengthen existing personnel and educational programs, implement several innovative ones, and carry out other expanded affirmative action efforts designed to address what GM and the EEOC believed to be the real concerns of minorities and women regarding equal opportunity in the workplace.

GM also is, and will remain, absolutely committed to the minority supplier community, and we are vigorously working to expand our minority dealer base, regardless of the outcome of the affirmative action debate. Our history speaks for itself. In 1988, GM purchased $1.1 billion of goods and services from 495 minority suppliers. We now have 650 minority suppliers in 35 states, with purchases in the amount of nearly $1.5 billion in 1995. We proceed along this path because it makes good economic sense. Minority suppliers, like all our GM suppliers, provide high-quality products at competitive prices.

IV. What Are the Issues Facing Businesses Today?

As in the sixties and seventies, today, too, we are facing a kind of social upheaval. This time it is an economic one. Today's businesses face tremendous challenges in the marketplace. The buzz word in American industry is "competitiveness." American companies of all shapes and sizes have been forced to wake up and face the fact that they are competing in a global market. GM has been accused of being a "sleeping giant," ignoring the changing environment. Well, we are awakened now and we are actively engaged in an intensive process of streamlining our operations to improve competitiveness. We are determined to restore our company to profitability by satisfying our customers with the best products and services. We recognize that this process must include maintaining the highest standards in our products, services, and processes.

It is particularly important in today's environment that businesses understand the needs and wants of their customers. Customer research can identify strategic direction, product positioning,

media mix, and so on. But those on the inside who mirror the marketplace and have real-time experience using a product can often provide more feedback about such issues as product design, advertising impact, product improvement, and safety issues than those who do not. And who are those insiders? They are our employees, our suppliers, our dealers, and our communities in which we operate. And that describes another reality that businesses are facing—the growing diversity of America. Throughout our society, we see evidence of increasing ethnic and cultural diversity in almost every community and geographic locale. We see this diversity in our work force, in our supplier and dealer base, and in our customers. Consider these statistics:

- Throughout the 1990s, minorities, women, and immigrants will account for 85 percent of the net growth in our nation's labor force.
- By the year 2000 (4 years from now!), women will account for more than 47 percent of the total work force—61 percent of all American women will be employed.
- Our American work force is aging, with those in the 35 to 54 age group increasing by more than 25 million— from 38 percent of the work force in 1985 to 51 percent by the year 2000. The 16 to 24 age group will decline by 8 percent.
- Among the top 25 urban markets throughout the United States, minorities make up the majority population in 16.
- In 1994, less than 1 percent of the $3 trillion spent in corporate purchases was purchased from minority vendors; contrast that to the nearly $400 billion in goods and services spent each year by African Americans alone.
- We are a global company with operations in about 50 countries. Of 1700 International Service Personnel (ISP), about 860 are U.S. employees in overseas assignments. The rest are non-U.S. employees in assignments here, in Mexico, Germany, Canada—in a total of 16 countries overall. That is a diversity mixture!

As the face of this country changes as noted by the demographic projections, the real challenge for corporate America, of course, is to truly embrace diversity with a passion and turn it into a competitive advantage. To embrace diversity, however, you must embrace change.

V. The Future State of Affirmative Action

In General Motors, we are involved with change. Our diverse work forces, customers, and communities are fundamentally changing the way we do business, because they are fundamentally changing our culture. The affirmative action initiatives currently under debate are also butting up against culture change in our society and in our organizations. In an organizational context, cultural values are the attitudes, mindsets, beliefs, and understanding that impact how work is accomplished and how employees deal with each other. Corporate cultural values prompt the way an organization achieves its business objectives. They are the subtle control mechanisms that informally sanction or prohibit behavior.

Affirmative action legislation functions as explicit control mechanisms—formal sanctions or rewards. Both the informal and the formal behaviors and practices, beliefs, and unstated values are what make up an organization's culture. We believe that the best way for us to manage our increasingly diverse employees, customers, suppliers, and dealers is to change our culture. That means we need to address both the formal and informal aspects of our culture. Which is why we will continue to support affirmative action initiatives but will push our organization to manage diversity by creating and maintaining an environment that naturally enables all participants to contribute to their full potential in pursuit of organizational objectives. That includes our customers, our employees, our supplier and dealer communities, and the communities in which we live and operate.

In today's environment, an organization's culture must be flexible. Inflexible cultures with practices that do not fit an organization's work force can lead intelligent people to behave in ways that are destructive and that systematically undermine an organization's ability to survive and prosper. We are concerned that affirmative action initiatives are no longer flexible enough to address our diversity issues. As we change our organization's culture to create an environment that works naturally for a growing diverse population, the new values are:

Customer enthusiasm, continuous improvement, integrity, teamwork, and innovation. Other important values will be global thinking, trust, flexibility, boundaryless, customer focused, learning organization, change hardy, risk taker, caring for people and the business, cooperation, tolerance, creativity, empowerment, and win-win solutions.

In other words, flexible cultures include values that promote excellent performance over long periods of time. They contain norms and values that help people and organizations adapt to their changing environment. And most of all, they have effective leaders to make cultural change into customer opportunity.

These changes will take exceptional commitment from our leadership. General Motors' leadership is motivated to change the strategies and culture to make our organization more competitive, despite the tendency to resist change and the tremendous challenge of unlearning practices that are rooted in an old mindset, changing the way the organization operates, shifting organizational culture, revamping old policies to align with the new vision, and creating the flexible organization that adapts well to a changing, diverse environment. Affirmative action benchmarks our progress against old practices and entrenched mindsets. But learning to manage our diversity, recognizes the potential of every member of our business family to contribute their creative energy, knowledge, skills, and insight to meeting our goals for the future.

Using Affirmative Action as a tool for creating a diverse work force is needed for the short term. Managing diversity is the future state tool that will allow GM to effectively compete on a global basis to ensure world leadership in transportation products and services.

Michigan Department of Civil Rights Review of State Affirmative Action Programs

By Winifred Avery and Charles Rouls

I. State Affirmative Action Overview

The Michigan Civil Rights Commission has a statutory mandate to approve affirmative action plans, to extend equal employment opportunity to minorities, women and handicappers. A long history of unequal opportunities can only be overcome by action designed to remedy past unlawful discrimination, but whatever remedial action is taken may become the subject of grievances and litigation. A well-documented record of past discrimination and research of still developing case law in the area of civil rights are essential to the implementation of appropriate affirmative action.

The department of civil rights, under the direction of the Michigan Civil Rights Commission, is engaged in the following programs that have affirmative action components.

A. Affirmative Commission Orders as Remedies in Proven Discrimination Cases

Orders may include affirmative remedies where the evidence supports such a need. Both the Constitution and the Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq; (ELCRA) authorize such orders. A recent example involved approval of an agreement by a labor union to admit two African Americans into an apprentice program and monitoring of disparities in hours worked between African American and non-African American members.

Such orders are based on an evidentiary record, and they can be appealed to and reviewed by State courts.

B. Commission Approved Affirmative Action Plans

The department of civil rights has undertaken activities that compliment the Commission's constitutional and legislative mandates such as the ELCRA, article 2, section 210 (employment) which provides for approval of affirmative action plans by the Michigan Civil Rights Commission. Article 2, section 208 (employment) of the Handicappers Civil Rights Act MCL 37.1101 et seq; (HCRA) provides for the adoption of affirmative action plans by employers, unless they have been disapproved by the civil rights commission.

Legislatures and executives have long recognized that voluntary compliance is the preferred remedy to unlawful discrimination. Five separate provisions of the Elliott-Larsen Civil Rights Act and the Handicappers Civil Rights Act authorize plans to eliminate the present effects of past discriminatory practices or assure equal opportunity. The standards for review of such plans have been approved by the civil rights commission, and the Michigan Supreme Court in *Victorson v. Michigan Department of Treasury* said:

> We believe that by enacting the Civil Rights Act, specifically Section 210, it was the intention of the Legislature to encourage persons subject to the act to voluntarily take steps toward assuring equal opportunity in employment and to be free from charges of discrimination by requiring such plans to be filed with and approved by the Civil Rights Commission before implementation. We also believe that the Legislature, by requiring pre-approval, intended to be sure that these plans did not unnecessarily trammel the rights of non-minority employees.[1]

The court also found that plans not submitted for approval in advance were not necessarily unlawful.

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1 439 Mich 131, 140 (1992).

The opportunity to obtain review of a plan, and approval by the commission is a significant assurance that the plan does not violate either statutory or constitutional standards, and use of these provisions should be strongly encouraged.

C. State Equal Employment Opportunity Plans

Beginning in 1986, State departments and agencies submitted their annual affirmative action plans to the civil rights commission for review and approval under section 210 of the Elliott-Larsen Civil Rights Act and section 208 of the Handicappers Civil Rights Act. The plans have been reviewed for consistency with current legal and administrative regulations on equal employment opportunity and affirmative action.

State government has had a bipartisan commitment to equal employment opportunity for over 25 years. The Michigan Civil Rights Commission and Michigan Department of Civil Rights have officially recognized the substantial progress in hiring and promotion of minorities, women, and handicappers. As one of the largest employers in Michigan, continued monitoring to assure equal employment opportunity and end discrimination is essential. The annual equal employment opportunity plans, required by Executive Order 1994-16, provide an opportunity for State departments and agencies to continue EEO efforts.

D. Contract Compliance Plans

Government has an obligation to assure that the tax monies it administers are not used to perpetuate unlawful discrimination.

The Michigan Civil Rights Commission has the legal responsibility of assuring that all persons seeking State contracts and receiving public monies comply with equal employment opportunity standards established by the law and public policy of the State of Michigan. The commission carries out its enforcement responsibility through its contract compliance program which entails the review of the contractor's work force and a determination as to whether the contractor meets the equal employment standard of reasonable representation of minority and female employees in the work force.

1. Component I—Affirmative Commission Ordered Remedies in Proven Discrimination Cases

The Michigan Civil Rights Commission is authorized, by the State Constitution and by the ELCRA, to issue remedial orders when it makes a finding that unlawful discrimination has occurred. Such a finding is made on the basis of evidence admitted at a public hearing. The hearing is conducted after issuance of a charge of alleged discrimination and opportunity to respond. The charge is issued following complaint investigation which results in evidence indicating that unlawful discrimination has occurred, and that there has been an unsuccessful effort to resolve the matter through settlement.

2. Component II—Commission Approved Affirmative Action Plans

The Michigan Department of Civil Rights has undertaken activities that compliment the constitutional and legislative mandates such as ELCRA article 2, section 210 (employment) which provides for approval of affirmative action plans by the Michigan Civil Rights Commission. Article 2, section 208 (employment) of the Handicappers Civil Rights Act provides for the adoption of affirmative action plans by employers, unless they have been disapproved by the civil rights commission.

The Michigan Equal Employment and Business Opportunity Council (MEEBOC) reviews plans under the authority of Executive Order 1994-16. The order also requires departments and agencies to submit their equal opportunity plans to the civil rights commission for approval.

"Basic Steps to Develop Effective Equal Employment Opportunity Programs" was originally adopted by the Michigan Civil Rights Commission in 1975, and later, readopted in 1989 as a standard for the review of voluntary affirmative action plans presented for approval under the statutes.

The department provides assistance to public and private employers in the development of affirmative action plans that are technically and legally sufficient to meet the standards adopted by the commission.

The department offers consultative service to employers, among others, in the development of legal affirmative plans. The civil rights commission has approved 61 such plans between 1987

and 1995, from 23 State government departments and agencies, 24 community colleges, and 14 local units of government.

Since 1988, the appropriation acts for community colleges have required the community colleges to develop and submit affirmative action plans to the civil rights commission for approval. Many of these colleges used this requirement to review and improve their equal opportunity practices and procedures, including developing an affirmative action plan, where appropriate.

The department and the commission have attempted to assist employers in diversifying their work forces with minority and women employees without excluding others from consideration. A thorough work force analysis is required in every affirmative action plan. The analysis must take into account the geographic area and available labor pool with the required education and experience and compare that to the current employment profile. Only if there is a substantial imbalance or significant difference between the availability and the current work force will the employer be allowed to establish temporary and flexible goals to overcome the absence of minority, women, and handicapper employees.

To encourage voluntary efforts to provide equal opportunity and control illegal discrimination, employers monitor the recruitment and selection process for open and fair personnel practices. This EEO effort requires that each employer:

*complete employment surveys,
*develop a work force analysis,
*establish an EEO policy statement,
*appoint an EEO official,
*publicize the affirmative action program,
*analyze recruitment and selection procedures,
*establish program goals, and
*develop monitoring to determine effectiveness of program.

Any legislation or executive order that prohibits its fundamental EEO programs, such as those mentioned above, would seriously hamper the private and public sector efforts of Michigan to provide equal employment opportunity. Major employers have found it makes good business sense to practice a policy of inclusion.

3. Component III—State Equal Employment Opportunity Plans and the Michigan Equal Employment Opportunity Council (MEEOC)

a. MEEOC Background

In August 1971 the Michigan Departments of both Civil Rights and Civil Service, at the request of the executive office, completed an exhaustive review of equal opportunity in State classified employment. The final report included extensive statistical information and accounts of onsite reviews in every department.

Based upon the statistical evidence, the Michigan Civil Rights Commission concluded that the combined efforts of the department of civil service and the department of civil rights with the full support of the executive office would be required if equal employment opportunity were to become a reality.

In September 1971 Governor Milliken issued Executive Directive 1971-8 assigning responsibility to the department of civil service. The department of civil service began by requiring an affirmative action plan for each department with goals and timetables through 1975. Civil service commission rules which posed barriers were modified.

In late 1975 statistics from the 1970–71 review were updated by civil rights staff. Progress toward equal opportunity was found to be uneven at best and particularly slow in the departments where representation was the least satisfactory. Representation with departments was compared to minority representation in the Michigan population, based on updated figures from the 1970 census. Fourteen executive departments had not met the standard of 12.4 percent; 11 of these agencies had not yet achieved their own goals in the lowest classifications, 01 to 05, for minority representation. A total of 15 departments had token minority representation at the 12 and above.

The highest representation continued to be within or near the city of Detroit in the departments of social services, MESC and mental health. Ten departments had not met the 1970 availability of women in the civilian labor force, 37.1 percent.

Executive Directive 1975-3, issued in July 1975, established the Michigan Equal Employment Opportunity Council (MEEOC) to provide

direction to the Executive Office and departments in developing and implementing affirmative action plans. MEEOC was comprised of the directors of the Departments of Civil Rights, Civil Service, Management and Budget, the Attorney General and chaired by the Lieutenant Governor. A Federal grant provided funds for a full-time coordinator. Liaison staff was assigned on a part-time basis by the four departments represented on the council. Guidelines on affirmative action in the State classified service were issued to the departments under the direction of MEEOC.

Executive Directive 1979-2 added a fifth council member to be appointed annually by the Governor and named a staff person from the Executive Office to serve as executive director of MEEOC, replacing the coordinator. The council was also directed to "review in advance each appointment to a classified position in State government equivalent to the 12 level and above, or any other classified positions as determined by the council."

Between November 1976 and July 23, 1980, MEEOC issued seven policy statements on affirmative action programs. By April 1978, MEEOC had reviewed and approved affirmative action plans for all of the principal executive departments.

b. MEEBOC Background

Executive Directive 1979-2 expired on December 31, 1982. The new administration issued Executive Order 1983-4 on March 30, 1983, establishing the Michigan Equal Employment and Business Opportunity Council (MEEBOC), and designating the Lieutenant Governor as the State of Michigan affirmative action officer. The membership of MEEBOC was continued on the new council (MEEBOC) with several added department directors - commerce, labor, transportation and Social Services—and the Governor's legal advisor. The director of the Office of the State Employer was named an ex-officio member. The MEEBOC executive director, a staff position, was housed in the Lieutenant Governor's office. A second area of equal opportunity for minorities and females, in the procurement of State contracts under Public Act 428 of 1980, was included for the first time.

Executive Order 1985-2, issued May 12, 1985, reauthorized MEEBOC and maintained the requirement for each department and agency to submit its EEO plans to the council for review. The Order also continued the requirements to "review and advise the Department of Civil Service, in advance, of final action on every proposed appointment in the classified service equivalent to the 15 level and above," and that every effort was made in assuring equal employment opportunity in recruitment, selection, promotion, and retention of all classified positions.

4. Component IV—Contract Compliance Plans

The State's obligation is to assure that State tax monies are not used to perpetuate unlawful discrimination in public contracting or related employment. The State's position was described in the *State Code of Fair Practices* first issued by the Michigan Civil Rights Commission with Governor George Romney's approval in 1965. A study of the construction industry in Michigan showed a history of exclusion. The Department of Civil Rights began its program in 1966, and the resolutions of the State administrative board were authorized in 1967 and 1968, in an effort to meet the State's responsibility to nondiscrimination.

The commission carries out its enforcement responsibility through its contract compliance program which entails the review of the contractor's work force and a determination as to whether the contractor meets the equal employment standard of reasonable representation of minority employees in the work force. In determining compliance for contract awardability, consideration is given to the availability of minority group persons, women, and handicappers, and the need for new or additional employees during the evaluation. If the contractor's work force meets the standard, or if an affirmative action plan designed to achieve a reasonably representative work force is provided, the contractor is declared awardable to bid on and receive State contracts.

a. Legal Authority

The program is based on article I, section 2 and article V, section 29 of the 1963 Michigan State Constitution, the Elliott-Larsen Civil Rights Act,[2] the Michigan Handicapper's Civil Rights Act,[3] the Michigan State Code of Fair Practices promulgated and published in 1965, and the resolutions of the State administrative board adopted January 17, 1967 and April 16, 1968.

The 1967 State Administrative Board Resolution spelled out the nondiscrimination clause required in all State contracts and imposed the obligations for bidders and contractors to "take affirmative action to insure that applicants are employed, and that employees are treated during employment without regard to their race, religion, color, national origin, age or sex." The resolution further states "the contractor will comply with all published rules, regulations, directives and orders of the Michigan Civil Rights Commission."

The resolution also requires that "the contractor will furnish and file compliance reports within such time and upon such forms as provided by the Michigan Civil Rights Commission; said forms may also elicit information as to the practices, policies, program, and employment statistics of each subcontractor, as well as the contractor himself; and said contractor will permit access to his books, records and accounts by the . . . Commission."

Considerable gains have been made in minority employment in the building and construction trades as a result of Department action through its contract compliance program. The gains represent increases in minority employment with contractors and the extension of equal employment opportunity by those contractors as required by their agreement with the Department to implement affirmative action plans as a condition of awardability.

b. Contract Compliance Program

The purpose of this program is to provide equal opportunity in Michigan's contracting process through the review of contractor and bidder employment practices. The major objectives of equal employment opportunity reviews are:

* to increase job opportunities for racial and ethnic minorities, women and handicappers,
* to eradicate unlawful discrimination practices, and
* to assure full participation by all citizens in employment which the government finances through contract awards.

Historically, businesses, institutions and organizations have failed to employ work forces which include reasonable representation of women and minorities despite their availability and skill level within the community at large. While there had been a provision in Act 251 (Fair Employment Practices Act, enacted by the State legislature in 1955), requiring that all contracts let by the State and any political or civil subdivisions thereof contain a nondiscrimination clause, little, if anything, was done to enforce the letter or spirit of this law until the civil rights commission inaugurated its current program in August 1967.

c. 1965 Study of Construction Industry in Michigan

The Michigan Civil Rights Commission has, since its beginning, recognized the need for additional approaches to the problems of discrimination in employment. The traditional case approach gives relief to a limited number of individuals who recognize practices of discrimination and who are aware of the existence of a State agency with power to enforce antidiscrimination laws. The pervasiveness of employment discrimination and/or its historical effects required the consideration of new affirmative action programs on an industry wide or regional basis if minority group participation was to be significantly increased.

In September of 1965 the department's staff began a study on the work force and employment practices of the construction industry.

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2 1976 Mich. Pub. Acts 453, as amended.

3 1976 Mich. Pub. Acts 220, as amended.

Specific instances of verified illegal discrimination in the construction industry were minimal, yet the pattern of minority group participation in the work force remained virtually unchanged. This pattern of exclusion in several of the skilled craft areas with major concentrations of minority group members in the unskilled classifications was the result of past practices. In order to change this pattern, one must define the process through which entry into the industry is achieved, determine the number of minority group persons currently participating in the industry and assess future labor needs in the same industry.

The proposal to conduct a study of the building and construction industry was based upon the following:

1. the efforts of the Commission to encourage affirmative activity in 1965 had not affected the pattern of employment;
2. the minority community continued to allege that practices of discrimination led to the exclusion of minority group members; the leadership of the construction industry continued to defend its position and indicated that changes in procedures and attitudes have indeed occurred;
3. the construction industry was in a period of expansion; the employment expansion was perhaps not as great as dollar expansion, it was nevertheless substantial, and there was credible evidence that a genuine shortage of skilled workers existed in Michigan;
4. there was no recent picture of the employment practices in this industry to support either side of the present controversy and procedures within the individual building trade classifications were little understood outside of the industry itself, hence there was a need to gather factual data in this area.

The study reported on recruitment and needed actions.

(1) Recruitment—It was evident that the industry must consider new avenues of recruitment if the over-all pattern was to be changed. The internal, informal practices that were used to attract new members to this industry could be expected to produce the same pattern and distribution of white and nonwhite workers.

(2) Comprehensive Action Needed—Any attempt to alter the employment patterns found in this study must, of necessity, involve comprehensive affirmative action planning on the part of local, State and national levels of government, labor unions, employer organizations, educational administration, and the minority community. Without the energetic commitment of the industry itself, the probability of change was slight.

d. Obligations of Public Officials and Contracting Parties

The Department will continue to monitor the employment practices of State bidders and contractors, to determine their awardability for State contracts. The contractor remains the chief person responsible for taking affirmative actions when needed, to achieve compliance with State equal opportunity principles.

The Department has long recognized that special problems do confront bidders and contractors in their efforts to recruit and hire a diverse employment force. Contract compliance activities include networking with construction contractor associations and trade unions to achieve full compliance with equal opportunity standards of the State. Greater participation in employment by Michigan citizenry results in increased State revenues and decreases reliance on State assistance programs. Education and increased awareness of civil rights laws help prevent unlawful discrimination.

(1) **Review procedure**—The equal employment practices of all contractors, vendors, subcontractors, and suppliers doing business with the State of Michigan and/or who propose to do business with the State are subject to a review by the Michigan Department of Civil Rights.

If, as a result of such review, the contractor's minority and female work force and the distribution of such work force by employment categories and crafts are equal to or exceed the minimum standard of reasonable representation, the contractor will not be required to develop an affirmative action program.

If, as a result of such review, the contractor appears not to be in compliance with the standard, such contractor shall be required to prepare an adequate written plan of action which shall include specific, effective steps to be taken that

will result in meeting the standard of reasonably representative integration of its work force in each job category. In the preparation of such a written plan of action, consideration shall be given to the availability of minority group persons, women, and handicappers and the need for new or additional employees by the contractor.

(2) **Standard**—The equal employment opportunity standard for each contractor is reasonable representation of minorities and women at all levels of the contractor's work force as determined by comparison with the approximate percentage of minorities and women among the available pool.

The review of the employer's personnel polices and practices is conducted in accordance with "Directive to State Contractors and Bidders" adopted by the Civil Rights Commission. A contractor has not and will not be denied solely on the basis of a lack of minority or female representation. The department monitors their good faith efforts to comply with reasonable EEO requirements.

(3) **Not Quotas**—Factors which are considered in establishing "reasonably representative integration of the work force" include the hiring requirements of the employer and the availability of minority group applicants in the area from which the work force is drawn. Where employers do not have reasonable representative integration of their work force, an individual agreement is negotiated with each employer dependent on the two factors mentioned above.

(4) **Not Required to Hire/Regardless of Need**—Agreements toward achieving compliance are negotiated, taking into consideration any new hiring by the contractor of the upgrading of existing employees.

(5) **Not Required to Dismiss**—Employers are never required to dismiss employees in order to hire minority, female, or handicapped workers. Not only is this never done in the contract compliance program, but even where there is an aggrieved individual who has filed a complaint with the Commission and where the investigation had revealed discrimination and the claimant has "equity," the Commission has never required that a person currently employed be fired and replaced by a minority, woman, or handicapped individual.

(6) **Available Pool**—The available pool is determined in light of U.S. Supreme Court cases when determining minimum utilization levels for women, minorities and handicappers. For women and minorities a civilian labor force figure is used for entry level jobs with skills that are readily available or easily acquired. When jobs require high skill levels or license, availability is based on persons possessing the requisite skill levels.

(7) **Not Required to Hire/Regardless of Qualifications**—Where skilled minority group workers are not available, the employer is asked to consider the hiring of apprentices or upgrading minority group people presently on the job.

e. Statistics

The contract compliance records included 6,139 entities at the close of the 1994–95 year. Contractors and/or bidders requesting reviews increased 6 percent during the fiscal year. In 1994–95, a total of 1,487 reviews were completed, and 1,230 certificates of awardability, signifying eligibility for contracts, were issued.

f. Equal Employment Opportunity in Education

The 15 public universities in Michigan report annually to the U.S. Equal Employment Opportunity Commission on their employment profiles. The reports include black, white, Hispanic, American Indian, Asian and female employment profiles in several job categories, including faculty, executives, and professionals.

There are 6,975 tenured faculty at Michigan's 15 universities, of whom 233 or 3.3 percent are black, 12 or 0.2 percent are Native American, 437 or 6.2 percent are Asian, 82 or 1.1 percent are Hispanic and 1,381 or 19.8 percent are women.

There are an additional 2,370 faculty on a tenure track, of whom 172 or 7.2 percent are Black, 12 or 0.5 percent are Native American, 224 or 9.4 percent are Asian, 73 or 3.1 percent are Hispanic and 910 or 38.4 percent are women. This higher representation for minorities and women reflects a desire to increase the diversity on college campuses and provides a better pool for advancement to tenured professor. It also points out the difficulty in overcoming a history of inaction on affirmative action and shows there are still barriers to achieving the final goal for academicians—tenure.

The universities also report 3,145 executives, administrators, and managers of whom 299 or 9.5 percent are black, 11 or 0.3 percent are American Indian, 49 or 1.5 percent are Asian, 32 or 1.0

percent are Hispanic, and 1,368 or 43.5 percent are women. Among 10,676 professionals, 888 or 8.3 percent are Black, 43 or .4 percent are American Indian, 543 or 5.1 percent are Hispanic and 6,702 or 62.7 percent are women.

E. State Study of Equal Opportunity in State Government

In response to public testimony during 1992 concerning alleged discriminatory reorganizations and layoffs in State government employment, the Michigan Civil Rights Commission passed a resolution proposing a joint study of equal employment opportunity in State government. The Michigan Civil Service Commission passed a similar resolution soon thereafter. The joint study has three components: a legal review, a statistical methods review and a work force comparison and EEO compliance study.

The Michigan Department of Civil Rights has expressed a need to compare current work force data to the 1971 joint review data and draw conclusions about the progress, lack of it or remaining problem areas. However, there may be relevant work force data available today that exceeds or is different from the 1971 data. Additionally, new statistical methodologies and approaches to the data have developed in the last 20 years and should be applied.

Governor John Engler issued Executive Order 1994–16 reestablishing MEEBOC and appointing the State employer as the chief equal employment opportunity office of the State of Michigan. The executive order calls for each department and agency of State government to submit an annual EEO plan to the council for review. A work force analysis will be conducted to determine the continued need for any remedial affirmative action plans or mechanism to achieve equal employment opportunity.

Since 1986, State departments and agencies have submitted their annual affirmative action plans to the Michigan Civil Rights Commission for review and approval under section 210 of the Elliott-Larsen Civil Rights Act and section 208 of the Handicappers' Civil Rights Act. The plans have been reviewed for consistency with current legal and administrative regulations on equal employment opportunity and affirmative action.

Several departments have undertaken special initiatives to overcome the present effects of past discrimination. The department of transportation created the program Aim for Civil Engineering (ACE) to bridge the lack of minorities in the civil engineering classification within the department. ACE offers minority high school graduates on-the-job training in various areas of civil engineering. The department of natural resources provides a 7-week course to introduce minority high school and college students to careers in wildlife management, parks and recreation, and environmental science. The department of agriculture supports the Minority Apprenticeship Program at Michigan State University each summer to introduce them to introduce minority and disabled students to the food and agriculture industry.

The Practice of Affirmative Action by the Wayne County Commission

By Ricardo A. Solomon and Victor L. Marsh

Wayne County encompasses Detroit, Michigan, and has 2.2 million residents. The Wayne County Commission has legislative oversight for the county's $1.6 billion budget, representing 42 cities, villages, and townships.

The Wayne County Commission has a county executive form of governance and it is the executive branch of government charged with equal employment opportunity and affirmative action monitoring and enforcement of the county's policies in this regard.

Wayne County is proud of its record in affirmative action. In February 1969 the county allocated its first dollars to this effort and created the office of human relations. In March 1969 the first director of the department was appointed. The human relations department is currently led by Irma Clark.

In March 1973 Wayne County endorsed and subsequently adopted the "Detroit Plan" as the most effective means of achieving equitable minority participation in the construction trades industry. The "Detroit Plan" was formally adopted as the affirmative action plan for Wayne County on March 13, 1973.

On December 12, 1993, the equal contracting opportunity ordinance—developed by commission chairman Ricardo Solomon—created a small business purchasing program in Wayne County.

Activities of the Human Relations Division

The duties of the human relations division are established by the board of commissioners of Wayne County. Presently, the human relations division is responsible for the operation and performance of five programs and investigative review of discrimination complaints inside and outside county government.

The resolution establishing contract compliance procedures for the implementation of the Fair Employment Practices Program was established May 4, 1970. The remaining programs are: (1) the county-based enterprise, (2) small business enterprise, (3) minority/women-owned business enterprise registration, and (4) the United States Department of Transportation disadvantaged business enterprise programs. These programs are the result of the original purchasing resolution (83-138), adopted June 16, 1983, and amended on August 2, 1992 by resolution 92-168 to address the needs for county-based and small business enterprises recognition.

Additionally, the minority/women-owned business enterprise registration program was established to identify the goods and services these firms could provide to Wayne County. The purchasing resolution, which identifies additional duties and responsibilities for human relations was amended on July 7, 1994, with resolution 94-457 to adjust the apportionment of credit given to a county based firm per contract.

The human relations department has also been assigned the responsibility of certifying firms as disadvantaged business enterprises for the airport, as inscribed in Federal regulation 49 CFR part 23 for the Federal Aviation Administration.

The May 4, 1970, resolution establishing fair employment practices requires human relations to make investigative inquiries into the equal employment opportunity practices of vendors and contractors to insure Wayne County's guidelines are being met.

Chronology of Affirmative Action Contracting under County Charter

2/03/83	Adoption of the Small and Minority Business Contracting Ordinance of 1978. (83–18)
	Amending and republishing the Small and Minority Business Contracting Ordinance of 1978 to be known as the "Small, Minority and Women-owned Business Contracting Ordinance." (83–187)

9/22/88 An enrolled ordinance *repealing* the Small and Minority Business Contracting Ordinance of 1978, as amended in 1983. (88–512B)

Note: This was repealed while a court action was pending challenging the Set-aside provisions on a roofing contract at Metropolitan Airport by unsuccessful bidders.

Chronology of Other Related Affirmative Action Issues

2/03/83 Purchasing Ordinance—when adopted included a county-based Enterprise provision which provides comparing bids with non-county based firm; the county-based firm's bid that is within 5 percent on contracts up to $100,000 and 2½ percent on contracts over $100,000 shall be deemed low bidder.

3/05/92 Purchasing Ordinance—County-based advantage provisions included 6 percent on contracts up to 100,000 and 3 percent on contracts over $100,000. (92–168)

12/16/93 Equal Contracting Opportunity Ordinance-developed by Commission Chairman Ricardo A. Solomon with legal services of Richard White of the firm of Lewis, White and Clay to create a small business purchasing program. [Mr. White is currently vice president and general counsel to the Michigan Automobile Association (AAA)]

Chronology of the Wayne County Office on Human Relations Division

2/20/69 Allocation of funding for a director and secretary for the new department.

3/06/69 Joyce F. Garrett appointed director of the Wayne County Office of Human Relations.
Additional staff approved September and October 1969.

4/14/70 "Fair Employment Practices" resolution approved to assure equal employment opportunity for all citizens.

3/15/73 Endorsing the Detroit Plan as the most effective means of achieving equitable minority participation in the construction trades industry and accepting the Detroit Plan as the affirmative action plan for Wayne County.

4/04/74 Appointment of Myrtle Williams as acting director.

7/25/74 Appointment of Don Gray as Director.

7/02/78 Small and Minority Business Ordinance adopted; forwarded to and approved by the Governor.

Affirmative Action: Diverse University Policy Benefits Everyone

By James J. Duderstadt

A significant truth is being lost in attacks on academic affirmative action programs. These programs help not just minority groups or women or the disabled. They have benefitted all groups—whites included.

More than a dozen States, including Michigan, are considering legislative initiatives to end affirmative action in university admissions, hiring, and financial aid. The Nation's courts also are curbing these programs.

A Federal court last month barred the University of Texas from considering race as a factor in admissions, although that ruling has been stayed temporarily. The University of California has been ordered to dismantle its time-tested and effective affirmative action policies by next year.

The University of Maryland has lost a long legal struggle to defend a scholarship program restricted to black students. And the U.S. Supreme Court recently set a higher legal threshold for justifying race-related Federal programs.

Yet colleges and universities across the country have found that efforts to improve their outreach to high schools with large numbers of minority students often lead to increases in the number of white students accepted from those schools. Affirmative action plans designed to help minority students help majority students improve their academic performance, too.

That is the case at the University of Michigan, where we have worked hard to improve our recruitment of students of color, they now make up 25 percent of our student body.

The University of California at Berkeley also has made great progress—without illegal quotas in admissions—according to a recently released 7-year Federal investigation. The investigation reported that "all the students were highly qualified for admission, meeting rigorous UC standards" and that overall academic performance improved during the period under study.

Universities always have considered a variety of factors in admitting students who otherwise qualify academically. Preference is sometimes given to children of alumni. We strive for geographic representation. Athletic skill is a plus. Students who stand out because of special experiences or outstanding talents in art, music or writing often are favored.

Universities try to assemble an entering class that is diverse in many ways because this enriches the educational experience for everyone, in the classroom and in extracurricular activities. This is especially important in today's international marketplace, where employees will work with people from many disciplines. Employers are demanding graduates who can manage and interact with people of diverse backgrounds.

Just as important, white students often benefit directly from academic programs designed to help minorities. Through these programs, we are learning to improve our teaching methods and to vary them to accommodate different learning styles, for the good of all students.

The gains can be dramatic. Special programs at Michigan, Stanford, the University of California at Berkeley, and other institutions have shown that in difficult introductory science, math, and economics courses, computer-based instruction designed to assist minority students raise the performance of *all* students by as much as a full grade point.

Michigan's experimental 21st Century Program provides an academically enriched and nurturing living environment for entering students. Launched to help minority students, it is demonstrating improvements in everyone's classroom performance—majority and minority alike.

Our undergraduate research opportunity program, begun to assist minority students, offers first- and second-year students the opportunity to be a part of the university's research community, through the establishment of student-faculty partnerships. This year, 800 students will participate in the program.

The women in science and engineering program at Michigan is helping to attract and support women who otherwise might not consider or prepare for scientific careers. It has strengthened the university's relations with junior high and

high school science teachers and guidance counselors across the State. As a result, they are improving courses and giving all students better information about career requirements and opportunities in science.

Students are not the only ones who benefit from affirmative action reforms. Faculty hiring is a more open, rigorous, and fair process than ever before. This enhances professional opportunity for white males as much as anyone else. No longer can a hiring decision be sealed by a single phone call to a colleague. Thanks to affirmative action initiatives, policies and practices are in place that assure a more objective evaluation of qualifications for hiring staff and administrators as well as faculty. These policies and practices do not involve quotas.

This pattern of added value arising from affirmative action is evident at institutions of higher learning across the country. Universities have labored long and hard to improve minority representation in thoughtful ways that enhance campus life for everyone. Our historic role has been to provide a world-class educational opportunity to all students who have the ability and will to succeed. Let us not slam the door shut, when it is only beginning to open for so many.

Addendum A[1]

"Blacks Show Gains in Getting College Degrees"
by Peter Applebome

Black students are showing striking gains in attending and graduating from colleges and universities and last year received a record number of Ph.D.s, according to two recent studies of minorities in higher education.

Supporters of affirmative action hailed the results as evidence that programs aimed at identifying, encouraging, and providing resources for talented minority students are working and that their dismantling could come at a high cost. But critics said the results were not the product of affirmative action but of improved educational opportunities.

Even proponents of affirmative action said that the studies' figures reflected general demographic trends as well as the success of specific programs. But that the figures, which include a 17 percent increase last year in the number of Ph.D.s awarded to black graduate students are likely to raise the stakes in the national debate.

"These figures aren't just a result of affirmative action; the racial composition of the country is changing and these figures reflect that," said Deborah J. Carter, associate director of the Office of Minorities in Higher Education of the American Council on Education. The council released its study on minorities in higher education on Monday. "But there are a number of graduate fellowship programs specifically targeting African-Americans and other underrepresented minorities, and I'm sure they're a significant factor in what we're seeing now."

In addition, preliminary figures released by an independent Federal advisory panel, the National Research Council, which will be part of a full report on Ph.D. achievement due out in October, show a record number of Ph.D.s earned by black students in 1995.

The recent figures carry some mixed messages. Black students remain underrepresented in higher education in relation to their numbers in the population and their high school dropout rates in college. And black males trail black women and other minority members in showing gains.

Still, the study by the American Council on Education, a nonprofit group which does research and speaks on behalf of colleges and universities, showed that while total higher education enrollment fell in the 1994–95 school year because of a decline in the number of college-age youths minority enrollment increased by 4.9 percent, or 159,000 students, nearly double the rate of the previous year.

College enrollment of black students grew by 2.5 percent last year, and white enrollment fell, and since 1990 black enrollment has grown by 16.1 percent.

Dr. Ralph Atwell, who has headed the council during 12 of its 14 annual studies, said that this

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1 *The New York Times*, June 12, 1996.

year's results were "the most encouraging" he had seen during his tenure but that the gains remained fragile, particularly at a time when programs targeted at minorities are under attack. "Affirmative action programs have made a significant contribution to minority advancement, and we must resist the efforts to dismantle them," he said.

The National Research Council report shows 1,287 Ph.D.s awarded to black who were United States citizens. In 1994, the figure was 1,097. After declines in the mid-80's, the figure as late as 1987 was 771.

Among other ethnic groups, Asian Americans received 1,138 doctorates last year, compared with 949 in 1994, and Hispanic students earned 916, up from 884.

Blacks earned Ph.D.s disproportionately in education and the social sciences. But blacks went from 319 science and engineering doctorates in 1987 to 557 in 1995.

"These are very encouraging figures," said Susan Hill, senior analyst in the National Science Foundation's division of scientific resource studies. "Look at some of the numbers, 24 black Ph.D.s in electrical engineering in one year," she said. "It's unheard of. It's never happened before."

Critics of affirmative action contend that the success stories have little to do with such programs and that whatever advantages they produce are negated by a stigma of preferential treatment.

"I am hopeful the figures are going up for two reasons, that overall educational opportunities are improving and that if there was any discrimination in higher education in recent years, it is certainly gone," said Clint Bolick, litigation director of the Institute for Justice, a conservative legal organization.

Besides philosophical issues, budgetary ones are threatening some programs aimed at minority scholars. The Patricia Roberts Harris Fellowship Program, which for years has provided $20 million in Federal assistance to around 1,200 minority scholars pursuing post-graduate work was eliminated by Congress.

Addendum B[2]

People are Talking: Race

"More blacks have college degrees, census shows pay scales, however, remain about the same; some see little change in status"

America has more black residents and they're better educated than five years ago, a new set of Census Bureau statistics shows.

The report, being released today, shows 33.5 million blacks in the United States as of 1995, up from 30.3 million in 1990.

Nearly three-quarters of blacks aged 25 and over have completed high school, 73.8 percent. The 1990 Census found 63.1 percent of blacks in that age group with high school diplomas.

And the share with bachelor's degrees climbed from 11.3 percent to 13 percent in the same period.

The survey calculated that the median income of black men working year-around, full-time, was $25,350 in 1994; 72 percent of the equivalent figure for non-Hispanic white men.

For black women, the median full-time income was $20,610, 85 percent of what non-Hispanic white women earned.

Comparable figures for 1990 in constant dollars, showed black men earning $25,360 and women being paid $21,570. While those figures indicate a decline in earning over the period, officials said the difference may be too small to be statistically significant,

Margaret Simms of the Washington-based Joint Center for Political and Economic Studies saw little real change for blacks.

"I don't see any differences in the pattern of poverty rates," Simms said from the nonprofit think tank, which specialized in issues of importance to American blacks.

More than a quarter of all black families were below the poverty level, compared with about 7 percent of white families. Median income for black families was $24,698, compared with $42,549 for white.

Unemployment rates for African Americans were about twice as high as those for whites, the

2 *The Detroit News*, June 11, 1996, from Reuters and Associated Press.

census figures showed. African Americans were about half as likely as whites to be in managerial jobs and about twice as likely to work as laborers or factory employees.

Addendum C[3]

"Figures Show Blacks are Better Educated"

The United States has more black residents than it did five years ago, and they are better educated, new Census Bureau statistics show.

The new report shows that there were 33.5 million blacks in the United States in 1995, up from 30.3 million in 1990. Among blacks 25 and older in 1995 73.8 percent had completed high school. The 1990 census found 63.1 percent of blacks in that age group had high school diplomas.

The share with bachelor's degrees climbed to 13 percent from 11.3 percent in the same period, the statistics show.

The bureau is updating its data using information collected in the Current Population Survey to aid Government agencies, marketers and organizations studying various groups. The reports include only numerical tables, not analysis.

A new set of information covering blacks is being published on Tuesday. Data on people of Hispanic, Asian and Pacific Island descent are expected later.

The survey calculated that the median income of black men working year-round, full time, was $25,350 in 1994, 72 percent of the figure for non-Hispanic white men.

For black women, the median full-time income was $20,610 a year, 85 percent of what non-Hispanic white women earned.

Comparable figures for 1990 showed black men earning $25,360 and women $21,570. While those figures indicate a decline in earnings over the period, officials said the difference might be too small to be statistically significant.

Note: James J. Duderstadt was president of the University of Michigan at the time of the consultation in June 1996. He has since resigned the presidency and returned to the faculty of the university. This position paper also appeared in the *Detroit Free Press* on May 1, 1996. Paula Allen-Mears presented this paper to the Advisory Committee on behalf of President Duderstadt. Three news stories were also submitted as addendums to the paper.

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3 *The New York Times*, June 11, 1996, from the Associated Press.

The Folklore of Preferential Treatment

By Kenneth Wells Smallwood

A recent report of the U.S. Department of Labor found that 97 percent of senior managers are white men even though women and minorities make up 57 percent of the working population.[1] And this is 30 years after President Lyndon B. Johnson signed Executive Orders 11246 and 11375. Most white Americans stand tall on the shoulders of generations of socioeconomic superiority. With the conclusions of *The Bell Curve, Intelligence and Class Structure in American Life* by Hernstein and Murray, many Whites may feel that they deserve their advantages. For many this comfort zone inhibits interest in separating the real science from the wishful thinking. Scientist/educator Mano Singham says it is essential that we understand clearly the rules (and limits) of scientific logic and inference and how to apply them. He reminds us that there is no clean biological definition of race that selects out only those groups historically perceived as different races.[2]

The original United States Constitution clearly emphasized that America was a white country. This meant whites would have a dominant position and a tremendous head start over the other races in the pursuit of happiness. Most white families have benefitted from generations of 100 percent quotas for white males in professional, managerial, administrative, and executive positions. Whites also had preference as managers and recipients of government socioeconomic infrastructure development programs, and in access to investment capital, the best farmlands and the natural resources taken from the American Indian. Today the wealth of the average black family is only 10 percent of the wealth of the white family. The net worth of white households is $44,408; black households, $4604; and Hispanic households, $5,345.[3]

In the 17th century Europeans controlled the royal corporations granted exclusive colonial privileges by the king. In the 18th century the American Revolution decolonized white men. Almost one-third of the delegates to the Philadelphia Convention in 1787 were slaveholders. Together they held 1400 Africans in bondage. In the 19th century the plantation yielded to the Northern industrial revolution—the victor in the Civil War. The Union emancipated the African slaves and allowed swift change to peonage and poverty for them. After the Civil War the government acted to service the needs of white business through land tenure, monetary policy, immigration, tariff, and patent policies, erecting legal affirmative action so business could flourish. Federal troops left the South in 1876 and 1877. Blacks died at the hands of lawless and vengeful white men. Peonage was not banned by the Supreme Court until the 20th century, in 1911 by *Baily v. Alabama*.[4]

During the first half of this century black ghettos were created by whites. The white primary, a southern political strategy barred to blacks was not struck down by the Supreme Court until 1927. A law against peonage came much later with the Anti-Peonage Act of 1967. Most blacks were serfs by 1890. White homesteaders found a better life in the mid-west and the western prairies because of the 1862 Homestead Act.

I. History

The status quo of workers in our largest industry—construction, did not change after the Civil Rights Act of 1964. Before this 60 to 70 percent of white journey workers were trained on-the-job

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1 *Fact Finding Report of the Federal Glass Ceiling Commission*, Washington, D.C., March 1995, p. 12.

2 Mano Singham, "Race and Intelligence, What Are the Issues?," *Phi Delta Kappan*, December 1995.

3 *USA Snapshots*, "Networth of U.S. Households," *USA Today*, June 30, 1994, from U.S. census data.

4 219 U.S. 219 (1911).

(OJT) without serving an apprenticeship. After 1964 the OJT door was closed. Formal apprenticeship was the eye-of-the-needle for blacks that produced more dropouts than journeyworkers. It is a successful program for most whites, maintaining a 95 percent white male share of the $50,000 a year skilled mechanical craft jobs. Today, white union construction officials and their members do not find it in their best interest to recruit, respect, nurture, and properly train black apprentices. A white operating engineer in New York said 23 years ago—we saw a proliferation of blacks in professional football, baseball, and basketball and we were not going to let it happen in our trade.[5]

The racist legacy of the American Federation of Labor (AFL) founder Samuel Gompers survives today. Historically the genesis of the closed shop appears long before the emergence of the labor unions. The transfers of tradesman and craftsmen to America from the continent and England was necessarily accompanied by the transfer of their skills, attitudes, and habits. The colonial period thus evidences important, although infrequent instances of the closed shop both in principle and practice.

As much as men in America detest monopoly and abhorred the evils prevalent in England until the reign of Elizabeth, the needs of the times induced them to foster the feudal privileges of granting exclusive rights to (white) men to manufacture a product, to manage a business or to produce and supply a commodity. Not only the product but also the market was protected. In 1643, Boston offered the exclusive right of grinding corn to the builders of the mill. Massachusetts granted timber, tar, pitch, rosin, oil or turpentine, and mastic rights in 1671, and paper rights in 1728. Under such conditions, the closed shop—with its control of trade inspection, and regulation—found fertile soil.[6]

The cycle of feudalism evolving into present day nepotism and token integration will continue as long as mechanical craft unions control entry through apprenticeship training. Unions have been protected and racism subsidized by government support of (for blacks) failed apprenticeship programs.

Unions were protected, if not fostered, by the National War Labor Board during the First World War. The closed shop in the building trades in Chicago was enforced by direct violence—bomb throwing, slugging and shooting in the 1920s. Behind every crooked business agent there was a crooked contractor. The closed shop in New York was responsible for this dangerous and chaotic condition and lies largely at the door of the Building Trades' Employers Association in New York. Although the term is of relatively recent origin the problem which the term "closed shop" is designed to express existed long before the origin of trade unions. This becomes readily evident in an examination of the English medieval guild system, a system more nearly reflecting the characteristics of our present-day employers' association than those of trade unions.

The fathers and grandfathers of white males voted into leadership union officials who upheld and fought for lily-white unions. These "innocent" white men negotiated de facto closed shop arrangements on an ethnocentric basis with the concurrence of white contractor associations signing the contracts. The Taft-Hartley Act of 1947 outlawed the closed shop but those who control entry and referral to work have managed to restrict the participation of blacks to token levels.

Government subsidies to big business in America averages $100 billion a year. It is welfare. Farm subsidies total $10 billion since 1985. American social engineering and welfare or loans to Lockheed, Chrysler, the Continental Illinois National Bank and Trust Company and the savings

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5 *See* Herbert Hill, "Labor Union Control of Job Training: A Critical Analysis of Apprenticeship, Outreach Programs, and the Hometown Plans," *Institute for Urban Affairs and Research*, vol. 2, no. 1, 1974.

6 Jerome L. Toner, "The Closed Shop," *American Council of Public Affairs*, Washington, D.C., 1944.

and loan fiasco have saved many white businessmen from ruin.[7]

In the late 20th century, from sea to sea, America has become a paradigm of black ghettos (urban and suburban resegregation) created by white America. Massey and Denton in their book *American Apartheid* state:

> For conservatives, the cause of desegregation turns on the issue of market access. We have marshalled extensive evidence to show that one particular group—black Americans—is systematically denied full access to a crucial market. Housing markets are central to individual social and economic well-being because they distribute much more than shelter; they also distribute a variety of resources that shape and largely determine one's life chances. Along with housing, residential markets also allocate schooling, peer groups, safety, jobs, insurance costs, public services, home equity, and ultimately, wealth. By tolerating the persistent and systematic disenfranchisement of blacks from housing markets, we send a clear signal to one group that hard work, individual enterprise, sacrifice, and chance is based upon the color of one's skin.

Experts want to know what can be done about the values of poor, segregated black children. This is surely a question that needs asking in a democracy. But the experts do not ask what can be done about the values of a society that created and perpetuates the economic and social apartheid pathology we live in.

II. Government Support for Business

An example of socioeconomic engineering benefiting big white business was the Supreme Court decision in 1886 in *Santa Clara v. Southern Pac. Rl. Co.*[8] that ruled that a corporation was an artificial individual entitled to the protection of the 14th Amendment to the Constitution. This social engineering fostered interlocking directorates controlled by white captains of industry and white robber barons. The holding company was affirmative action to circumvent the antitrust laws.

By 1952, 66 corporations of the more than 660,000 corporations in the U.S. held 28.3 percent of all assets of all corporations through interlocking directorships, affiliates, or through financial interconnections; they controlled over 75 percent of all corporate assets in the U.S.

Many of the learned critics of affirmative action maintain that what began as a worthy policy has deteriorated into something alien to the American tradition by moving from concern for the individual to that of the group. A corporation is defined as a group of people authorized to act as an individual.[9] It is an invisible legal robot created by Federal law, defined by the Supreme Court as an artificial being, invisible, intangible, and existing only in contemplation of law. The law did this to protect corporations from arbitrary local taxation without due process. This lends credibility to affirmative action remedies for protected groups of individuals. Given the black historical experience, African Americans are a common law corporation which may legally be defined as an authentic "individual." The single individual remedial approach has been like the meek inheriting the earth a pebble at a time.

In 1988 George Dimitruck of Utica, Michigan, wrote in an article in the *Detroit Free Press*:

> A recent letter writer who stated that less government was a desired direction requires a reply which includes more background information. This country was certainly not built on the initiatives of its unregulated citizens since those early settlers had government aid when they grabbed land illegally from the original Americans and then, used government troops and force to remove those rightful owners of the land.
>
> Many Southerners had the free use of labor from the government approved slavery system, and this again refutes the statement of unregulated citizens building this country.

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7 *Billionaire Corporations, Their Growth and Power*, Labor Relations Association International Publishers, New York, New York, 1954.

8 118 U.S. 394 (1886).

9 This definition of a corporation is from *Instant Business Dictionary*, Career Publications: Little Falls, N.Y., 1954.

The fugitive-slave laws permitted by the Constitution was government protection and sanction of slavery and its human property.

III. Resistance to Affirmative Action

Some white males became paranoic soon after blacks and women had opportunities to perform exceptionally well as managers. blacks were supervising white males in the late 1960s and 1970s and continue to do so. But some white males lost in competition for a promotion to better qualified blacks and women. Psychologically the culture of white supremacy had ill-prepared them to deal with this "status incongruity." In some post offices this had tragic consequences. Not all new supervisors make the grade. Many crash programs to upgrade blacks were designed to crash. If he was white it was the Peter Principle. If he was black it was civil rights nonsense. Some strong black managers prevail despite tension and polarization, and a relentless media inspired backlash. Weak minorities and women have been programmed to fail to prove affirmative action a wrong concept. This is strategic planning gone bad.

One in five Americans were unemployed some time in 1993. Since then overstaffed firms continued to lay off millions of workers to become more profitable and efficient and thus increase the value of their stock. This downsizing has been called class warfare from the top down. The top 1 percent of the population with average wealth of $2.35 million each, holds 46.2 percent of all stocks and 54.2 percent of all bonds, according to New York University economist Edward Wolff.

Congressional pay of representatives and senators was increased $30,000 in 1989, during a time when the minimum wage fell to a 40-year low in regard to inflation. Minimum wage means cheap labor for firms which cannot protect their employees from poverty. The United States is the only major industrial Nation in the world without universal health care for all its citizens. Thirty-five million Americans are without health insurance and more than 2 million are homeless. There are 13 million children in poverty, disproportionately black. Fourteen million children are owed 36 billion in child support payments. And 800,000 of these children are on welfare. Twenty-seven million Americans get food stamps and some of the recipients work for the minimum wage—a way of subsidizing marginal businesses. Facing this situation affirmative action for the middle-class becomes a peripheral issue.

In a July 10, 1995 article, "The Crackdown on African Americans," in *The Nation*, Andrew Hacker describes the turnabout of white liberals feeling it was time for making socioeconomic policy changes which result in making life more stressful for some blacks. A crackdown means more animus than benign neglect. Yet few argue that generations of preferential treatment for whites has been harmful to creed values or to white self-esteem. It has reinforced their sense of superiority. Affirmative action for blacks we are told perpetuates the perception of inferiority.

The emergence of the post-industrial information age coincides with a conservative agenda to end protection and subsidies, and to deregulate some traditionally protected industries. This cutback would also include special interest groups—farmers, businessmen, and more recently minorities, women, the disabled and senior citizens. The task of balancing Federal aid to many group pressures was more manageable when the economy was expanding at a faster rate. Today the growth rate is inadequate to fulfill the expectations, and the educational needs for a level playing field in today's society.

Paul R. Ehrlich and S. Shirley Feldman in their book *The Race Bomb* also said the problems of race relations were difficult enough in an era when it seemed that the pie was ever expanding and sooner or later there would be abundance for everyone.[10] Now that this vision of abundance is fading fast, the probabilities of racial conflict may well be increasing for, as psychologist Gordon Allport put it, "Downward mobility, periods of unemployment and depression, and general

10 *See* Paul Ehrlich and S. Shirley Feldman, *The Race Bomb, Skin Color, Prejudice, and Intelligence*, Quadrangle/The New York Times Book Co., New York, N.Y., 1977.

economic dissatisfaction are positively correlated with prejudice.

Most Americans do not own large blocks of stocks and bonds. Many are peers or neighbors of people in the University of Michigan study, "Five Thousand American Families," William Ryan commented:

> It is not merely the poor who stand in economic peril, it is the majority of Americans.
>
> The position of this vulnerable majority, made up of those primarily dependent on wages, salaries, and transfers payment, is deteriorating. And we now know that, with respect to progress or decline in the world of money individual ability and effort don't count.
>
> One of the uncomfortable truths of the Michigan study is that individual characteristics such as ambition, planning ahead, saving money, the drive to achieve—all the tried virtues that have been so definitely certified as the high-octane fuel for the journey from poverty to plenty—are essentially unrelated to economic status or economic progress.[11]

Many pharisees nobly engaged in the affirmative action debate know little of the history of merit based systems in this country. They are not aware that a keystone of the Civil Service Act of 1883 was a quota system whereby each of the then 48 States had a numerical share of certain jobs in the headquarters of Federal agencies in Washington, D.C. These jobs were called "departmental" positions as opposed to "field" positions in Federal agencies outside of Washington for which there were no quotas. The law was called the Apportionment Act. It was apportionment of headquarters jobs according to population in each State. The statue stated "as nearly as the conditions of good administration" the headquarters "departmental" jobs were to be divided amongst the States according to population. What happened was that the States of Virginia and Maryland and the District of Columbia filled thousands of jobs over their allotted quotas by the 1950s, because of the close geographic proximity to the capital. The States in the far west were thousands under their quotas.

The government did not pay travel expenses to job applicants to come to Washington. Since Maryland and Virginia were way over their quotas, a job seeker from a State under its quota with an examination rating of 75 would go ahead of the Maryland or Virginia candidate with a score of 90. The apportionment law was waived for veterans. After World War II and the Korean War we reached a total of 20 million veterans making the impact on the merit systems negligible.

Today we have a merit system of written tests for mail clerks while some Supreme Court justices are selected on the basis of ideology, sometimes ignoring the recommendations of the American Bar Association and prominent legal scholars.

If the cream pops to the top in our competitive "meritocracy" why it is that a major justification for leveraged corporate buyouts or takeover is that it gives the raiders an opportunity to replace mediocre white executives with winners. How did all those losers reach their lofty positions in the first place? If they had been black and had operated their empires inefficiently it would have been blamed on affirmative action. Obviously an American CEO has more to worry about than raiders, global competition or "reverse discrimination." Consider the Texaco debacle where the board of directors, because of an error lost a $10 billion lawsuit to Pennzoil for breaching its 1984 contract to buy Getty.

Dr. Joe Feagin and Clarence Booker Feagin have a logical analysis of "reverse discrimination." They forced us to look at the whole historical picture of the American caste system rather than at individuals as a true class context for defining reverse discrimination. Here's what it would really look like if total control and power was in the hands of blacks.

If blacks had the power to oppress whites for as long as whites have hurt blacks, that would be real reverse discrimination. It would mean that for generations many whites would have lived in substandard housing and neighborhoods and have suffered billions of dollars in economic losses while seeing blacks prosper from white sweat. Whites would be enslaved and raped and suffer

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11 *See* William Ryan, *Equality*, Vintage Books: New York, N.Y., 1982.

peonage white codes and discrimination. They would earn lower wages, have menial jobs, and have double the unemployment rate of blacks, and whites would be the last hired and first fired. They would be subject to political disenfranchisement, inferior schools, police brutality, lynching, poor health care, shorter life expectancy, more imprisonment, and expected disproportionately more. Blacks would hold most of the decisionmaking positions as college deans, judges, senators, governors, board chairpersons and CEO's of Fortune 500 corporations. Seventy percent of senior managers would be black and they would use their power to discriminate against whites for generations. This, said Feagin, is real reverse discrimination.

Many of the cases of "reverse discrimination" involved white female victors in a promotion process. Women now constitute a majority of college students and are well represented in accounting, engineering, law, and medical schools. They currently hold 5.4 percent of board seats at 760 major corporations and blacks hold 1.8 percent, according to Directorships, a Westport, Connecticut consultant firm. The *Detroit Sunday Journal*, in a December 4, 1995 editorial discussed the failure of anti-affirmative action bills to win floor action or were defeated in 12 states, including Michigan:

> So whatever happened to the snowball effect that was to be fueled by all this anti-affirmative action public opinion? Where did all those so-called angry white males go? Aren't they still upset that African Americans are taking their jobs? Or has somebody finally informed them that the largest beneficiary of affirmative action programs are white women as in mothers, wives, daughters, sisters and aunts of all those angry white males? Perhaps a few of white women.
>
> Waging war against the enemy is never easy, but it's even harder when the enemy turns out to be someone you know.

IV. Affirmative Action Dilemmas

The Fall 1995 issue of *Dissent* magazine carried a symposium of pieces entitled "Affirmative Action Under Fire." I recommend reading these short articles. Richard Rodriquez asks:

> Why despite affirmative action are black teenagers killing each other a few blocks from the Capitol?

He points out that "minority" has lost its meaning:

> ... And then one saw the odd parade that continues today, that parade of middle-class Americans demanding to be included among "minorities." White women became minorities. And Asians. And Hispanics—who are an ethnic group—began to impersonate a racial group, a new brown race. Who was a minority? It was easy for any bureaucrat to tell you. If your group was numerically underrepresented, then you qualified. Which meant, in the end, that the only group that didn't qualify was the white male heterosexual.

Several of the contributors to the symposium recommended enforcement of the civil rights acts. Strict enforcement of these laws has never happened. The original Federal Fair Housing Act could only pass Congress with the normal wound of compromise—no enforcement for a generation, and then an inadequate budget. Jennifer Hochschild blames the majoritarian tradition itself.

The editors of *Dissent* asked the writers to answer four questions. Here are the questions and the answers I'd have given:

Who benefits from affirmative action? White women first, then other middle-class females; then middle-class minority males. In entry into union construction via apprenticeship it is white males first. The savings and loan fiasco proved that in obtaining millions of venture capital through the "old boy" network and with little or no collateral, the white male benefitted the most.

What price does it exact? Minimal for blacks compared to the price paid by blacks for three centuries of affirmative action for white men, necessary to nation-building, whereas black development was always considered a threat to whites, even in a global market.

Can it be improved upon or is an alternative needed? Yes, it can be improved if the highest priority is given to poor blacks who remain the most neglected and the most deserving potential beneficiaries. The next priority would be all others in poverty including white men, women, and children. The tandem alternative operation needed is equal access for all blacks to good residential zip codes. Finally, the education of successful whites about how preferential treatment and an unlevel field got them to where they are today. And:

What would happen without affirmative action? Black middle-class growth would slow down. Fewer minorities would go to the better universities. Whites will make the same progress as now as both middle-class spouses have career development expectations which white networking will not deny. White women are also the largest block of voters. The gap between black and white household net worth would widen. The poor are poor with affirmative action, so they have nothing to lose.

A *Michigan University Law Review* article stated in part: Preferential remedies granted to end employment discrimination may be likened to starting one controlled forest fire in order to bring a raging one under control. At first the idea may seem illogical, but the remedial principle is sound. And, of course, if the goal of equal employment to opportunity is to be achieved then we must find remedies that work.

The cost of environmental clean up is staggering. The Clean Water Act mandated the building of waste water treatment plants across the land. Most of the people who polluted the physical environment are dead. It is the job of all to make the sacrifice to clean up the mess we did not make. It is the only way to ensure healthy future generations. To have democracy we must achieve equal employment opportunity and training for poor blacks that works. Such an initiative would be a waste treatment plant for the socioeconomic environment. Affirmative action plans that work filter out centuries of cultural sewage—the carcinogens of racism and sexism, from the employment process. Andrew Hacker's essay in the *Dissent* issue contained the following:

The admissions director of an Ivy league school recently told me that his office grants millions of dollars in aid to erst-while middle-class children whose parents have divorced. This is an apt example of how other institutions have to foot bills for personal decisions that have social consequences.

Some of the innocent will also have to make sacrifices to remedy the failure of the Nation to deliver the 40 acres and a mule and making the melting pot off limits to blacks Americans. Most of us did not participate in or benefit from the savings and loan ruin. Now all citizens have to pay a share of the $600 billion to salvage this failure of white high rollers.

The late Roy Wilkins, former executive director of the NAACP said in reference to black separatism and black power, words which apply to whites exercising decisionmaking authority over the life chances of blacks: (which should be part of the content of the character of all Americans):

Even if, through some miracle, if (black power) should be enthroned briefly in an isolated area, the human spirit, which knows no color or geography or time, would die a little, leaving for wiser and stronger and more compassionate men the painful beating back to the upward trail.

The cutting edge for change is coming from black community organizations like Harlem Fight Back in New York, headed by Jim Haughton; the Detroit Area Minority Construction Workers Task Force led by ironworker Ronnie Hereford, the Chicago Black United Communities led by Eddie Read, and the Brotherhood Crusade in Los Angeles led by Danny Bakewell. Haughton wants community hiring halls for city construction jobs. These halls would be controlled by community leaders. Haughton works tirelessly for jobs, not jails from massive city housing construction. Some 300,000 New Yorkers are on the waiting list for public housing. Read is organizing black construction workers into their own national union. In Los Angeles where 40-50 percent of the African American men are unemployed, Bakewell is fighting for construction jobs with the slogan voiced by Fight Back and ex-marine Tyree Scott of the United Construction Workers Association in Seattle, "Nobody works, unless we work." Ronald Walters of Howard University says:

The linkage of poverty—which spurs the militancy of urban workers—is important because poverty constitutes the only alternative and the underground, illegal economy the only recourse for income, if other options are either closed or few. In this sense the Miami boycott (Mandella visit not recognized by city) and the con-

struction protests are only symptoms of a massive disease which affects all areas of urban life.[12]

Whites use examples of the black overclass to support the old myth of a meritocracy on a level playing field. These professional blacks need the material success, but to be people of value they should reject the price of having to "blame the victim" regarding the poor, in order to be acceptable to some whites. Black loyalty to a bogus meritocracy is undermined by the knowledge that they the middle-class got affirmative action because it was much cheaper than programs to eliminate ghettos or making inner-city schools as good as suburban schools. Sooner or later whatever success and affluence a black achieves the gut issue never goes away—that masses of disadvantaged black people trapped in ghetto—reservations are what Willheld calls: "the waste products of the industrial system." Mechanized off southern plantations to rust belt jobs now gone they have little moral support besides their churches and Jim Haughton's message:

> It's necessary for people who are oppressed to fight back, no matter how formidable the obstacles. If they don't do that, they will be totally reduced to nothing.

12 Ronald Walters, "The Imperatives of Popular Black Struggle: Three Examples from Miami, Los Angeles, and Chicago," Howard University, unpublished manuscript, 1994.

Affirmative Action—A Success Story for One Minority-Owned Business

By Vijay Mahida

Affirmative action, equal employment opportunity, minority business enterprises, women-owned business enterprises, and disadvantaged business enterprises, are all programs to reduce and alleviate past and present—and perhaps future—discrimination— (past/present, and maybe in the future), regardless of whether one is employed or has a business.

To these Americans who fall into the following categories: African Americans, Hispanic Americans, Native Americans, Asian and Pacific Islanders, and women, discrimination is a real, day-to-day thing. It is there, but very difficult to prove.

I, an Asian American (Asian Indian), felt discrimination for quite some time in my status as an "employee." It was subtle, and I could not prove it. I felt frustrated. I looked to the Federal, State, and local governments for help. In this process I learned about the Federal, State, and Wayne County antidiscrimination, affirmative action, and set-aside programs. These programs convinced me that if I started my own firm—having excellent education and experience—the set-aside program could jump start the business enterprise. I am convinced without these programs I would have very little chance of success.

The programs of the Federal, State, and county governments did help me and my associates succeed in making a brand-new business into a going concern. My associates and I are very grateful for all this assistance.

Today, we are a successful, reputed firm. We have a real goal of nondiscrimination, and encourage and assist all minorities, women, and nonminorities to better themselves with us.

I wish to make two points regarding: (1) the phasing out term limit in SBA programs, and (2) the definition of small business.

Phasing Out Term Limit

The Small Business Administration section 8(a) program is correct about the term limit. Once a firm is a going concern, the term limit of 10 years is fair.

Small Business Definition

The small business definition is an average sales of $1.5 million for the previous 3 years. This definition is nearly 10 years old and is obsolete. Sales of $1.5 million 10 years ago is not the same as $1.5 million in sales today. This limit should be adjusted for inflation. With such an adjustment, $3 million in average sales would today meet the small business definition of 10 years ago.

II. Academic Examinations of Affirmative Action

Reconsidering Strict Scrutiny of Affirmative Action

By Brent E. Simmons

I. Introduction

One hundred years after its adoption of the now discredited "separate but equal" doctrine in *Plessy v. Ferguson*,[1] the U.S. Supreme Court is once again directing the future course of race relations in the country.[2] By narrow majorities, the Court has been meticulously laying the groundwork for a new and untested "colorblind" jurisprudence,[3] with the ultimate aim of invalidating government use of race-conscious affirmative action as an instrument of public policy for dismantling entrenched patterns of "systemic" discrimination against minorities and women. As noted by the Clinton administration:

> The primary justification for the use of race- and gender-conscious measures is to eradicate discrimination, root and branch. Affirmative action, therefore, is used first and foremost to remedy specific past and current discrimination or the lingering effects of past discrimination. . . . Affirmative action is also used to prevent future discrimination or exclusion from occurring. It does so by ensuring that organizations and decision-makers end and avoid hiring or other practices that effectively erect barriers. . . .[4]

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1 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). In *Plessy*, the Supreme Court held that State laws requiring "separate but equal" public accommodations for blacks and whites did not violate the Equal Protection guarantee of the 14th amendment. As Justice Harlan accurately predicted in dissent, "[T]he judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case." 163 U.S. at 559.

2 *See* Kenneth Jost, *After* Adarand, A.B.A. J., Sept. 1995, at 70, 70:

> [T]he Supreme Court [has] made it clear that the future of affirmative action is more likely to be decided in the courts instead of in the political arena. By a 5-4 vote, the Court ruled, in *Adarand Constructors, Inc. v. Pena*, No. 93-1841, that federal affirmative action policies as well as state and local programs must meet the highest level of constitutional review—strict scrutiny.

3 *See*, e.g., *Shaw v. Hunt*, 861 F.Supp 408, 429 (E.D.N.C. 1994), *rev'd*, ___ U.S. ___, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996):

> The whole thrust of the [Supreme] Court's description of the remanded claim is to locate it within post-Croson "color-blind" Equal Protection jurisprudence, in which strict scrutiny is triggered simply by the fact that legislation "classifies" citizens by race—whatever its asserted purpose. . . .

But as noted by Justice Brennan (concurring in part, dissenting in part) in *Regents of University of California v. Bakke*, 438 U.S. 265, 336, 98 S.Ct. 2733, 2771, 57 L.Ed.2d 750 (1978), "no decision of this Court has ever adopted the proposition that the Constitution must be colorblind." *See also*, Andrew Kull, *The Color-Blind Constitution* 1 (1992):

> The comfortable metaphor [of colorblindness] stands for an austere proposition: that American government is, or out to be, denied the power to distinguish between its citizens on the basis of race. A blanket prohibition of racial classifications is impossible to locate in a literal reading of the constitutional text, and it has never been acknowledged by the Supreme Court as a requirement of the 'equal protection of the laws' guaranteed by the Fourteenth Amendment. Yet the color-blind idea persists nevertheless, forming a seemingly indispensable theme in the constitutional law of race.

4 Report to President Clinton, *Affirmative Action Review*, July 19, 1995. See also, Statement of the U.S. Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, Clearinghouse Pub. 70 (November 1981), quoted below.

However, a key premise of the Court's new colorblind jurisprudence is that the equal protection clause protects *individuals*, rather than groups.[5] Thus, for example, an *individual* white male, for example, may successfully challenge a race or gender-based affirmative action program in employment, even though *white males as a group* may be overrepresented in the work force as a result of the very historic and systemic discrimination against minorities and women that the affirmative action program is intended to correct. Moreover, an individual white male plaintiff can successfully challenge an affirmative action program, even though he has not yet suffered actual discrimination or financial injury.[6] The mere fact that government has taken race or gender into account may suffice to establish an Equal Protection violation.

As a discussed below, the Supreme Court's new colorblind jurisprudence imposes a virtual absolute bar on the compensatory use of racial classifications, in complete disregard of the remedial objectives of the equal protection clause. It therefore represents a radical departure from the last 58 years of Equal Protection jurisprudence.

The process of constructing that jurisprudence began with the Court's adoption of "strict scrutiny" in *Richmond v. J.A. Croson Co.*,[7] where—for the first time—a majority of the Court held that government use of voluntarily adopted race-conscious remedies[8] is *presumptively* invalid under the equal protection clause of the 14th amendment. Such programs must be subjected to the same exacting judicial scrutiny previously reserved for *invidious* forms of racial discrimination. But the decision to strictly scrutinize race-conscious remedial programs was not a foregone

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5 *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). But see Justice Marshall's dissent in *Bakke*, 438 U.S., at 400:

> . . . [I]t is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. . . .

See also, Marshall, *A Comment on the Nondiscrimination Principle in a "Nation of Minorities,"* 93 Yale L.J. 1006, 1007 (1984):

> . . . [D]iscrimination is not, contrary to the premise of the nondiscrimination principle, against individuals. It is discrimination against a people. And the remedy, therefore, has to correct and cure and compensate for the discrimination against the people and not just the discrimination against the identifiable persons. . . .
>
> . . . [T]he policy of limiting remedies to individually identified victims of racial discrimination is neither compelled nor justified by consititutional considerations. The equal protection clause is not primarily concerned with the protection of individuals against invidious discrimination. On the contrary, it cannot sensibly be interpreted in any other way than . . . in terms of its protection of groups, and of individuals only by reason of their membership in groups.

6 *See Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 656, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993):

> To establish standing . . . a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.

7 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

8 Authority is still divided in the lower courts over whether strict scrutiny applies to *gender*-based affirmative action. Compare, for example, *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), *cert. denied*, 510 U.S. 1164, 114 S.Ct. 1190, 127 L.Ed.2d 540 (1994) (applying strict scrutiny to gender-based affirmative action), and *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033, 112 S.Ct. 875, 116 L.Ed.2d 780 (1992) (rejecting strict scrutiny and applying intermediate scrutiny to gender-based affirmative action). In *United States v. Virginia*, ___ U.S. ___, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), the Supreme Court has reaffirmed the use of intermediate or "skeptical scrutiny" for gender classifications, in a nonaffirmative action context.

conclusion, nor one easily reached.[9] For more than a decade after the it's 1978 decision in *Regents of University of California v. Bakke*[10]—the Court was sharply divided over the constitutional standard of review to be applied in affirmative action cases. It was not until the Court's 1989 decision in *Croson* that a politically conservative, yet judicially "activist" majority[11] adopted the standard of strict scrutiny for State and local government use[12] of race-conscious affirmative action.

At the time, *Croson* sparked intense debate over its constitutional significance[13] and long-term impact.[14] It is now clear, however, that *Croson* was indeed a "significant" decision and a crucial first step by the Court in effecting a fundamental change in equal protection jurisprudence. With the Supreme Court's latest insistence on race neutrality and colorblindness, strict scrutiny

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9 *See* Parts III A and B of Justice O'Connor's opinion in *Adarand Constructors v. Pena*, ___ U.S. ___, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

10 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

11 *See* Robert Glennon, *Will the Real Conservatives Please Stand Up?*, A.B.A.J., August 1990, at 49-50:

> . . . To understand the character of the Rehnquist Court, it is important to distinguish between political conservatism and judicial conservatism. . . .
>
> Judicial restraint keynotes conservative judicialism. The text of the Constitution or statutes ought to limit judicial discretion. Judges should avoid unnecessary constitutional rulings. Decisions ought to be narrowly focused rather than general essays on political philosophy. Deference to the other branches of government is a hallmark of judicial conservatism.
>
> . . . What of the Rehnquist Court? I would like to suggest that we have the specter of politically conservative *results* and liberal judicial [i.e., activist] *methods* combined in an unusual fashion. The character of the Rehnquist Court is *not* simply that case results serve ideologically conservative ends. The methods used are frequently those of judicial liberals.
>
> This combination is unexpected because, for the last 20 years, presidents and conservative commentators have been calling for the repudiation of judicial activism. . . .

See also, Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 314-316 (1991), explaining why "the Court's recent hostility toward affirmative action," and its adoption of strict scrutiny for minority racial preferences, "seems inconsistent with the strict constructionist constitutional philosophy that many of the Justices purport to espouse."

12 Voluntary affirmative action by private employers are subject to somewhat less rigorous standards under Title VII of the 1964 Civil Rights Act. In general, a private employer demonstrate: 1) a manifest imbalance in traditionally segregated job categories; 2) that the affirmative action plan will not unnecessarily trammel the rights of non-targeted groups, nor benefit unqualified individuals; and 3) that the plan is temporary, flexible, and is not designed simply to maintain a racially balanced work force. See generally, the EEOC's Guidelines on Affirmative Action, 29 C.F.R. Part 1608.

13 *See*, e.g., Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J.A. Croson Co., 98 Yale L.J. 1711 (1989); Charles Fried, *Affirmative Action After* City of Richmond v. J.A. Croson Co.*: A Response to the Scholars' Statement*, 99 Yale L.J. 155, 156 (1989); and *Scholars' Reply to Professor Fried*, 99 Yale L.J. 163 (1989).

14 *See*, e.g., Michel Rosenfeld, *Decoding Richmond: Affirmative Action And The Elusive Meaning of Constitutional Equality*, 87 Mich. L. Rev. 1729, 1729-1732, (1989):

> . . . (A)lthough it is certainly too early to assess the full impact of *Croson*, the clear change in direction signaled by the holding in *Croson seems likely to strike a major blow against longstanding, concerted efforts to narrow the economic gap between black and white entrepreneurs.* (Emphasis added).

of affirmative action has meant aggressively "activist" review by both State and Federal courts,[15] the likes of which has not be seen since the early 20th century era of *Lochner v. New York*.[16] It has also meant renewed frustration of the original remedial objectives embodied in the 14th amendment and its Equal Protection guarantee.

To contend that strict scrutiny is required because "race" is involved only begs the question. Prior to *Croson*, it was by no means self-evident that stringent judicial scrutiny was warranted, or even appropriate, in reviewing the remedial use of racial and gender classifications in government sponsored programs. Indeed, it was not until the mid-1960s that the court first "espoused the notion that racial classifications were presumptively unconstitutional."[17] Throughout the entire contentious history of the equal protection clause, the Supreme Court has vacillated on both the extent to which State government would be permitted to use racial and gender classifications, and the corresponding level of judicial scrutiny to be applied.[18]

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15 *See*, e.g., *Louisiana Associated General Contractors, Inc. v. State*, 669 So.2d 1185 (La. 1996), striking down the Louisiana Minority and Women's Business Enterprise Act under the "colorblind" provision of the state's constitution, Louisiana Const. Art. I, § 3. While noting that strict scrutiny is required under the 14th amendment, the Louisiana Supreme Court held that race conscious affirmative action is *per se* invalid under the state's constitution, because "the section on its face absolutely prohibits any state law which discriminates on the basis of race." *Id.*, at 1196. According to the court, the Louisiana Equal Protection guarantee "afford[s] greater protection than its federal counterpart"—to white males in this instance—and that the Fourteenth Amendment imposes no duty on states "to employ reverse discrimination to remedy past discrimination." *Id.*, at 1199. The Louisiana court further observed that the "United States Supreme Court has never interpreted the 14th amendment to require discrimination on the basis of race for any reason whatsoever." *Id.* It concluded:

> ... [I]n *Croson*, the [U.S.] Supreme Court pointed out that states do not have a duty to engage in race preference programs. ... Thus, although a state has the authority to participate in race preference programs under the Fourteenth Amendment, that same provision does not mandate that it do so. Consequently, a state constitution which prohibits a state from enacting such programs is not in violation of the Fourteenth Amendment. *Id.*

Thus, despite legislative findings of prior or systemic discrimination against minority and women-owned businesses in state contracting, the state supreme court held that the Louisiana legislature could not voluntarily adopt remedial affirmative action programs.

16 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). As Klarman, *supra* note 11, explains:

> The *Lochner* era, especially in its waning years, witnessed a Supreme Court run amok, striking down approximately 200 regulatory statutes on no apparent ground but the Justices' own policy preferences. . . . The *Lochner* era abruptly ended in 1937 with the Court's dramatic turnabout on substantive due process and Commerce Clause issues. . . . After 1937 the Court refused to seriously consider due process or equal protection challenges to economic regulation.

17 Klarman, *supra* note 11, at 220. Klarman argues that up until the mid-1960s, the Supreme Court never held that government use of racial classifications were subject to strict scrutiny because they were presumptively invalid. Klarman maintains, instead, that only racial classifications affecting fundamental rights received heightened scrutiny. All other racial classifications were deemed presumptively *valid*, as long as they were not irrational or arbitrary. As Klarman notes, "the dominant intention of the 14th amendment's drafters . . . had been to protect blacks in the exercise of certain fundamental rights, rather than to proscribe all racial classifications." Ibid. Indeed, that interpretation of the 14th amendment was supported by the dominant 19th century view that it did not prohibit racial segregation in the schools or other public accommodations, nor did it invalidate laws against intermarriage between the races. While such laws employed racial classifications, the rights affected were not viewed as "fundamental." Klarman goes on to argue that neither *Brown v. Board of Education*, nor the Court's earlier decisions in the Japanese curfew and internment cases—*Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943) and *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944)—were premised on the rule that racial classifications were presumptively invalid. In each instance, Klarman explains, the level of scrutiny turned on the importance of the right involved. On the other hand, he contends that "the full Court first stated a presumptive rule against racial classifications in *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 272 (1964), where it struck down on equal protection grounds a state law criminalizing cohabitation by unmarried interracial couples."

In the closing decades of the 19th century, the equal protection clause "was virtually strangled in infancy by post-civil war judicial reactionism."[19] The Supreme Court refused to invoke the 14th amendment as a constitutional shield against the political compromising of minority rights.[20] In the final decade of the 20th century, the Supreme Court is once again leading the retreat from the full promise of the 14th amendment. Much like the sentiments expressed by Justice Bradley in 1883, the Court today seems to have also concluded that minorities and women must "cease to be the special favorite[s] of the law," having now attained the rank of "mere citizen."[21] With its adoption of strict scrutiny, the Court has all but declared government sponsored, race-conscious affirmative action *per se* invalid.[22]

The Court acknowledges that the playing field is not level—i.e., that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination . . . is an unfortunate reality."[23] Yet, one hundred years after *Plessy v. Ferguson*, an activist Court is again second-guessing and voiding legislatively approved policies to end pervasive and systemic discrimination against minorities and women.[24] Clearly, "[s]trict scrutiny is inappropriately applied to benign racial classifications intended to remedy our nation's deplorable history of racial discrimination."[25] Its application "under the pretext of advancing a

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18 Compare *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (upholding "separate but equal" under "rational" review) and *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 21 L.Ed. 442 (1872) (upholding the State's refusal to admit women to the practice of law under rational review), with *Croson* (strict scrutiny of racial classifications) and *United States v. Virginia, supra,* (intermediate scrutiny for gender classifications).

19 *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (Powell, J., quoting Tussman & tenBroek, *The Equal Protection of the Laws,* 37 Calif. L. Rev. 341, 381 (1949).

20 *See* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 Yale L.J. 1287, 1295 (1982):

> *The Slaughter House Cases*, to prevent the fourteenth amendment from being a comprehensive source of rights against the state, made use of the common knowledge that the [Civil War] Amendments were designed to ameliorate the condition of Blacks. This view of constitutional law and history did perceive Negroes as a special object of protection . . . [and] might have proven the starting point for articulating a special judicial role in protecting minorities, or at least in protecting the most important minority in American experience. But an observation about the purpose of a constitutional text is not . . . a theory about the role of the judiciary. . . . [T]he massive retreat from protecting Black rights between the 1870's and the 1920's—a retreat led by the Court in many instances—eliminated any chance of inferring such a role from practice. . . . [T]he explicit articulation of a special judicial role with respect to minorities and their rights awaited the constitutional reconstruction of 1937–38 [referring to *Carolene Products*' footnote 4].

21 *Civil Rights Cases*, 109 U.S. 3, 25, 3 S.Ct. 18, 27 L.Ed. 835, 844 (1883).

22 See discussion below, "How Strict is Strict?"

23 *Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

24 *See Bakke*, 438 U.S., at 402 (Marshall, J., dissenting):

> I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative action programs. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California.

25 *Aiken v. City of Memphis*, 37 F.3d 1155, 1169 (6th Cir. 1994) (Nathaniel R. Jones, Circuit Judge, dissenting). Judge Jones goes on to state:

> The Fourteenth Amendment was never intended to impose an absolute standard of colorblindness upon our law to the extent that such a standard becomes a bar to the achievement of the purposes of the amendment. . . . Review of these plans under a strict scrutiny standard routinely results in the invalidation of plans which are designed to achieve the vital goal of remedying our nation's history of discrimination. Such an application is clearly antithetical to the Fourteenth Amendment. In fact, applying strict scrutiny to the benign use of race-conscious affirmative action, which seeks to alter employment patterns shaped by past racial discrimination, comes perilously close to nullifying the amendment as it pertains to persons of color.

color-blind Constitution" perpetrates a "grave injustice."[26] Its adoption has also led to chaos in both public policy and race relations.

Study after study confirms that systemic discrimination on the basis of race and gender remains a problem in many areas of society.[27] Moreover, race and gender discrimination spans the socioeconomic spectrum. In fact, discrimination is often greatest at the top of the economic ladder, where the power, prestige, and monetary gains are greatest.[28]

Though often related, discrimination and socioeconomic disadvantage present distinct problems that require distinct solutions. Limiting affirmative action to "social and economic disadvantage," for example, would not effectively address the "glass ceiling" phenomenon. While minorities and women in corporate management suffer no economic disadvantage, too often they are still the victims of race and gender discrimination. As the U.S. Civil Rights Commission explains:

> When . . . [discriminatory] processes are at work, anti-discrimination remedies that insist on "color blindness" or "gender neutrality" are insufficient. Such efforts may control certain prejudiced conduct, but measures that take no conscious account of race, sex, or national origin often prove ineffective against processes that transform "neutrality" into discrimination. In such circumstances, the only effective remedy is affirmative action, which responds to discrimination as a self-sustaining process and dismantles it.[29]

The Supreme Court's unfortunate and ill-conceived adoption of strict scrutiny as the constitu-

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See also, Anthony Lewis, *Abroad at Home; Down the River*, N.Y. Times, July 5, 1996, at A23:

> Black Americans may be excused if they see a certain hypocrisy in the sudden zeal for equal protection on behalf of whites. But whites should worry, too. At the end of the last century the North wearied of the effort to protect blacks in the South and sold them down the river. That sorry deal has haunted the country ever since.

26 Ibid.

27 *See*, e.g., Message from Secretary of Labor and Glass Ceiling Commission chairperson Robert B. Reich on the Factfinding Report of The Glass Ceiling Commission, 51 Daily Lab. Rpt. A-1, Mar. 16, 1995:

> The term "glass ceiling" first entered America's public conversation . . . when The Wall Street Journal's "Corporate Woman' column identified a puzzling new phenomenon. There seemed to be an invisible—but impenetrable—barrier . . . preventing [women] from reaching the highest levels of the business world regardless of their accomplishments and merits. . . . The metaphor was quickly extended . . . to obstacles hindering the advancement of minority men, as well as women. . . .
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> The Glass Ceiling Act was enacted . . . as Title II of the Civil Rights Act of 1991. It established the bipartisan [21-member] Glass Ceiling Commission, with the Secretary of Labor as its chair. . . . The factfinding report that the Commission is now releasing confirms the enduring aptness of the "glass ceiling" metaphor. At the highest levels of business, there is indeed a barrier only rarely penetrated by women or persons of color. Consider: 97% of the senior managers of Fortune 1000 industrial and Fortune 500 companies are white; 95 to 97% are male. . . .
>
> The research also indicates that where there are women and minorities in high places, their compensation is lower. For example, African American men with professional degrees earn 79% of the amount earned by white males who hold the same degrees and are in the same job categories. One study found that, more than a decade after they had graduated from the Stanford University Business School, men were eight times more likely to be CEO's than woman.
>
> Nor does the evidence indicate that the glass ceiling is a temporary phenomenon. . . . [R]elatively few women and minorities [are] in the positions most likely to lead to the top[, occupying] staff positions, such as human resources, or research, or administration, rather than line positions, such as marketing, or sales, or production. . . .
>
> In short, the factfinding report tells us that the world at the top of the corporate hierarchy does not yet look anything like America. Two-thirds of our population, and 57% of the working population, is female, or minorities, or both. . . .

See also, Jared Bernstein, Economic Policy Institute, *Where's the Payoff? The Gap Between Black Academic Progress and Economic Gains* (1995), which found that the wage gap between black males and white males actually *increased* with more education.

28 This phenomenon is confirmed by the Glass Ceiling and Bernstein reports, ibid.

29 *Affirmative Action in the 1980's: Dismantling the Process of Discrimination*, A Statement of the United States Commission on Civil Rights, Clearinghouse Pub. 70 (November 1981), at 2.

tional standard for reviewing race-conscious affirmative action should be reconsidered for several reasons.

First, comprehensive remedies for historic and systemic discrimination against minorities and women are proper subjects for legislative and executive, rather than judicial resolution. In strictly reviewing policy determinations by the politically accountable branches of government, the courts have exceeded their proper constitutional role. The Supreme Court's rejection of "societal discrimination" as a basis for remedial action by government[30] simply underscores the inappropriateness of strictly scrutinizing broadly based social policies, within the context of individual lawsuits.

Second, the inconsistent application of strict scrutiny by State and Federal courts,[31] has undermined legitimate efforts to dismantling systemic discrimination in public employment, contracting, and higher education.

Third, even assuming certain constitutional limits on the use of race-conscious affirmative action, the Supreme Court's new "colorblind" jurisprudence displaces more than half a century of settled Equal Protection doctrine.

II. Strict Scrutiny of Affirmative Action: Has the Supreme Court Overstepped its Constitutional Role?

Generally, State and Federal agencies have adopted affirmative action programs in response to perceived discrimination. There is, however, widespread misunderstanding about the use of affirmative action as government policy[32]—i.e., what it is, how it operates, who should benefit, and whether it is even necessary, given laws prohibiting virtually all forms of discrimination. The U.S. Commission on Civil Rights has issued several statements explaining the concept of affirmative action.[33]

A. Affirmative Action Defined.

As the Commission said in *Affirmative Action in the 1980's: Dismantling the Process of Discrimination*:[34]

> Affirmative Action has no meaning outside the context of discrimination, the problem it was created to remedy. All too often, discussions of affirmative action first divorce this remedy from the historic and continuing problem of discrimination against minorities and women. Such discussions then debate the merits of particular measures that take race, sex, and national origin into account—such as goals and quotas—without any agreement upon or consistent reference to the discriminatory conditions that can make such remedies necessary. This statement . . . continually ties the remedy of affirmative action to the problem of discrimination with a "problem-remedy" approach. Without agreement about the forms and scope of race, sex, and national origin discrimination, agreement about appropriate remedies is difficult, if not impossible. Our starting point, therefore, is not affirmative action, but race, sex and national origin discrimination. As the title of this statement suggests, the Commission views discrimination against minorities and women as processes that will continue unless systematically dismantled.

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30 *See Adarand*, 115 S.Ct., at 2109 (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)): "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." On the other hand, Justice O'Connor wrote in *Croson* that "Congress may identify and redress the effects of society-wide discrimination," though that did not mean States and their political subdivisions were free to remedy such discrimination. 488 U.S., at 490.

31 *See* discussion below, "How Strict is Strict?"

32 "Affirmative action" enjoys no clear and widely shared definition. This contributes to the confusion and miscommunication surrounding the issue. . . ." Report to President Clinton, *Affirmative Action Review*, July 19, 1995.

33 *See*: *Briefing Paper for the U.S. Commission on Civil Rights -Legislative, Executive & Judicial Development of Affirmative Action*, prepared by Office of General Counsel, U.S. Commission on Civil Rights (March 1995); *Affirmative Action in the 1980's: Dismantling the Process of Discrimination*, A Statement of the United States Commission on Civil Rights, Clearinghouse Pub. 70 (November 1981); The United States Commission on Civil Rights, *Statement on Affirmative Action*, Clearinghouse Pub. 54 (October 1977).

34 Ibid., at 1-2.

As further explained by the Commission's Office of General Counsel:

> 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.[35]

Thus, affirmative action is used primarily—though not exclusively—as a *remedy* for identified discrimination.[36] Additionally, it addresses *systemic*, as opposed to individual instances of discrimination. The objective is twofold: eliminate the effect of prior discrimination—i.e., the underutilization of minorities and/or women—and prevent future discrimination by identifying and eliminating exclusionary practices or processes—e.g., terminating the use of "good old boy networks" as the basis of selection.

B. The Evolution of Affirmative Action as Federal Policy.

The use of affirmative action by the federal government evolved over a period of three decades. First, it was necessary to pressure the government into simply declaring a policy of "nondiscrimination" in government-related industries, and by government contractors. Capitulating to a threatened March on Washington by A. Phillip Randolph and 100,000 African-American men, President Roosevelt issued Executive Order 8802 on June 25, 1941. The Order prohibited employment discrimination by the federal government, defense related industries, and federal contractors. The policy was to be reviewed by a five-member Fair Employment Practices Committee (FEPC). However, many questioned the legitimacy of the FEPC's authority, and it was strenuously opposed in Congress. It also lacked adequate staffing, funding, and enforcement powers. As a result, the federal ban against employment discrimination in the defense industry, and by federal contractors was never effectively enforced during the 1940s and 1950s.

Recognizing that it was not enough to simply prohibit discrimination in employment, President Kennedy issued Executive Order 10925 on March 6, 1961, directing federal contractors "*take affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." A presidential Committee on Equal Employment Opportunity was established to investigate and resolve complaints. Again, however, the new Committee lacked adequate enforcement power. Moreover, the Order failed to specify the kind of "affirmative action" federal contractors were expected to take to ensure compliance. Nor were there any reporting or monitoring procedures to measure compliance.

Congress finally took action by passing title VII of the 1964 Civil Rights Act, outlawing employment discrimination on the basis of race, color, religion, sex, or national origin.[37] It also created the Equal Employment Opportunity Commission, with full enforcement powers. To secure passage of title VII, however, sponsors of the legislation had to make it clear that the law did not require "quotas." Thus, § 703(j) was added:

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35 Briefing Paper for the U.S. Commission on Civil Rights—Legislative, Executive & Judicial Development of Affirmative Action (March 1995).

36 The Supreme Court has also upheld the *nonremedial* use of affirmative action in certain context, such as the promotions of a "compelling interest" interest in diversity. *See*, e.g., *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (universities have protected 1st amendment interest in diversified student body for educational purposes); *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (diversity of police force contributes to effective law enforcement). But see, *Hopwood v. Texas*, 78 F.3d 932, *reh'g en banc denied*, 84 F.3d 720 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2580, 135 L.Ed.2d 1094 (1996), where the Fifth Circuit rejected Justice Powell's opinion in *Bakke* recognizing a "compelling interest" in educational diversity that would permit consideration of race as "a factor" in university admissions.

37 *See* 42 U.S.C. §§ 2000e.

Nothing contained in this title shall be interpreted to require any employer . . . to grant *preferential treatment* to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin . . . in the available work force. . . .[38]

The authors of the highly controversial California Civil Rights Initiative[39]—which would prohibited "preferential treatment" (i.e., affirmative action) in public employment, contracting and higher education—claim that the proposed constitutional amendment is based on § 703(j). They contend that § 703(j) simply outlaws all forms of "preferential treatment," including affirmative action. However, that interpretation of § 703(j) was flatly rejected by the U.S. Supreme Court in *United Steelworkers v. Weber*.[40]

In *Weber*, the Court held that while § 703(j) does not *require* affirmative action, neither does it *prohibit* "private, voluntary, race-conscious affirmative action efforts . . . to abolish traditional patterns of racial segregation and hierarchy."[41] Moreover, the Court continued, Congress intended title VII to operate "as a spur or catalyst to cause employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[42] As a matter of public policy, "Congress intended *voluntary* compliance to be the preferred means of achieving the objec-

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38 42 U.S.C. § 2000e-2(j). Senator Hubert H. Humphrey gave the following explanation for the inclusion of § 703(j):

> . . . [S]ubsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this expressly. . . . [Senate discussion, June 4, 1964.]

39 *See* California Senate Constitutional Amendment No. 10, introduced by Senators Kopp, Campbell and Leonard on February 17, 1995:

> Neither the State nor any of its political subdivisions or agents shall use race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education, or public contracting.

California residents will vote on the Initiative in November 1996. At least 18 other states are considering constitutional amendments or statutory provisions modeled on the California Initiative.

The initiative was first drafted by anthropology professor Glynn Custred of California State University, and former philosophy professor Tom Wood, who is now executive director of the California Association of Scholars. They say the initiative will eliminate "affirmative discrimination" and will restore title VII's original ban on "preferential treatment."

40 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979).

41 443 U.S. at 203-4. In *Weber*, the United Steelworkers and Kaiser Aluminum & Chemical Corporation entered into a collective bargaining agreement, under which 50 percent of in-plant craft-training programs would be reserved for black employees, to eliminate racial imbalance in Kaiser's historically segregated, virtually all white craftwork forces. Several white employees challenged the voluntary agreement as a violation of § 703(j).

42 Ibid.

tives of title VII"[43]—in both private and public employment.[44]

Following enactment of title VII in 1964, President Johnson took affirmative action one step further by issuing Executive Order 11246 in 1965. Not only did Executive Order 11246 prohibit employment discrimination and require government contractors to take affirmative steps to hire minorities (and later, women[45]), it also imposed the requirement to actually develop and implement written affirmative action plans, and to submit periodic "compliance" reports. Where qualified minorities and women are underrepresented in a federal contractor's work force, the contractor's affirmative action plan must include "goals and timetables" for achieving a representative work force.

Going even further, President Nixon issued Executive Order 11478 in 1969 requiring federal agencies to establish affirmative action programs for civilian employees. That same year, the Department of Labor set specific numeric targets or "quotas" for federally funded construction projects under the "Philadelphia Plan."

In the wake of *Adarand*, the Clinton administration has reaffirmed the executive branch's commitment to continued enforcement of federal affirmative action programs. Following a five month study, the administration concluded that federal affirmative action programs and requirements had been effective in remedying systemic discrimination and in creating equal opportunity for minorities and women.[46] A Presidential memorandum for Heads of Executive Departments and Agencies, dated July 19, 1995, declares in part:

> This Administration will continue to support affirmative measures that promote opportunities in employment, education, and government contracting for Americans subject to discrimination or its continuing effects. . . . [T]he Federal Government will continue to support lawful consideration of race, ethnicity, and gender under programs that are flexible, realistic, subject to reevaluation, and fair.

The memorandum goes on to state that specific programs must be eliminated or reformed if they create quotas, preferences for unqualified individuals, or reverse discrimination. In addition, programs must be eliminated if their equal opportunity purposes have been achieved. Federal agencies are directed to evaluate their affirmative action programs to ensure compliance with *Adarand*, and to reform or eliminate any program that does not meet the constitutional standard.[47]

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43 *Local No. 93, International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 515, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986).

44 *See*, e.g., Policy Statement on Affirmative Action, 29 C.F.R. § 1607.17:

> There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. . . .
>
> [V]igorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics. . . .
>
> As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the [Equal Employment Opportunity Coordinating] Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified. . . .

45 The Office of Federal Contract Compliance Programs (OFCCP) issued Revised Order No. 4 in 1972, which amended its affirmative action guidelines to include women.

46 In an address to the Nation on July 19, 1995, President Clinton cited historically bipartisan support for affirmative action, noting that affirmative action has not been the cause of middle class economic woes. He further stated that while some programs were in need of reform, the basic approach to affirmative action should be to "Mend it, don't end it." He also declared that "affirmative action has been good for America." Noting that *Adarand* had reaffirmed the need for affirmative action to end systemic discrimination, President Clinton also observed, "It is simply wrong to play politics with affirmative action and divide the country," at a time when we need to unite the country to prepare every American for global competition. See generally, Remarks by the President on Affirmative Action, July 19, 1995.

Thus, both the effectiveness and the continuing need for affirmative action to eliminate systemic discrimination against minorities and women have been established. But while the Supreme Court has upheld the constitutionality of race and gender-based affirmative action in theory, strict scrutiny has given the courts the power to veto implementation of legitimate affirmative action programs.

C. The Constitutional Bases of Race-Conscious Remedies.

A number of commentators have pointed out that the Court's "race-neutral" or "colorblind" view of the equal protection clause is plainly inconsistent with the 14th amendment's original remedial objectives.[48] Just 5 years after ratification of the 14th amendment—with its legislative history still "fresh within memory"—the Supreme Court observed that the "one pervading purpose" of the Civil War amendments was "the freedom of the slave race, [and] the . . . firm establishment of that freedom."[49] The Court went on to explain:

> We do not say that no one else but the negro can share in this protection. . . . But what we do say . . . is, that in any fair and just construction of . . . these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil *which they were designed to remedy*, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, *as far as constitutional law can accomplish it.*[50]

Providing even greater insight into the specific remedial purpose of the equal protection clause, the Court also said:

> We doubt very much whether any action of a State *not* directed by way of *discrimination against the negroes as a class*, or on account of their race, will ever be held to come within the purview of this provision.[51]

The Reconstruction-era Court in *The Slaughter House Cases* clearly contemplated "group-based" remedies under the equal protection clause, for the specific benefit of African-Americans "as a class." Also anticipating "reverse discrimination" type claims by white males, the Court indicated that such claims would *not* fall within the "purview" of the amendment's remedial protections—i.e., reverse discrimination did not specifically involve "discrimination against the negroes as a class, or on account of their race." Clearly, the Court's interpretation of the equal protection clause in *Slaughter House* was anything but "race-neutral" or "colorblind."

By contrast, the present Court has a very different view of the Equal Protection guarantee:

> [T]he Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race—a group classification long recognized as "in most circumstances irrelevant and therefore prohibited . . . . — should be subjected to detailed judicial inquiry. . . . The ideas have long been central to this Court's understanding of equal protection, and holding "benign"

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47 The Administration's review of Federal affirmative action has been ongoing. On May 23, 1996, for example, the U.S. Department of Justice published for public comment its "Proposed Reforms to Affirmative Action in Federal Procurement," which are intended "to ensure compliance with the constitutional standards established by the Supreme Court in *Adarand*. . . ." See ___ Fed. Reg. ___ (1996).

48 *See*, e.g., Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L.R. 753, 754 (1985); Patricia A. Carlson, *Adarand Constructors, Inc. v. Pena: The Lochnerization of Affirmative Action*, 27 St. Mary's L.J. 423, 447, (1996); Sameer M. Ashar & Lisa F. Opoku, *Justice O'Connor's Blind Rationalization of Affirmative Action Jurisprudence—Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995), 31 Harv. C.R.-C.L.L. Rev. 223, 240 (1996). See also Judge Jones' dissent in *Aiken*, *supra* note 25.

49 *The Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 (1873).

50 Ibid., (emphasis added).

51 Ibid., 83 U.S., at 81, 21 L.Ed., at 410 (emphasis added).

State and Federal racial classifications to different standards does not square with them. . . .[52]

But consider the classic and perhaps most familiar example of race-conscious, group-based affirmative action under the 14th amendment—i.e., the desegregation of public schools by the judicial branch itself. School desegregation is quintessentially a systemic, race-conscious, and group-based process—a process which still continues 42 years after *Brown v. Board of Education.*[53] School desegregation is not individualized relief, that is limited to specific victims of *de jure* school segregation. Rather, the constitutional command of *Brown* was to dismantle the entire *system* of racially segregated public education, district by district.

To that end, the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*[54] authorized a variety of race-conscious, affirmative measures to achieve school desegregation—including the busing of students by race, in order to attain a "racial balance" students throughout the school district, in accordance with a court-specified numeric ratio. The historic and ongoing process of school desegregation is plainly inconsistent with assertions by members of the present Court that the 14th amendment is "colorblind" and forbids the use of race-conscious, group-based affirmative action to remedy systemic discrimination[55]—propositions which the Court expressly rejected as recently as its 1980 decision in *Fullilove v. Klutznick*:[56]

> As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly "color-blind" fashion. In *Swann* . . . , we rejected this argument in considering a court-formulated school desegregation remedy. . . . In *McDaniel v. Barresi*, 402 U.S. 39 (1971), citing *Swann*, we observed: "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.' Any other approach would freeze the status quo that is the very target of all desegregation processes." And in *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971), we invalidated a State law that absolutely forbade assignment of any student on account of race because it foreclosed implementation of desegregation plans that were designed to remedy constitutional violations. We held that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." Id., at 46.[57]

Nothing under the 14th amendment restricts the use of race-conscious remedies to the judicial branch, or requires *judicial* findings of constitutional violations as a predicate for government's voluntary use of race-conscious remedies.[58] As the Court noted in *Fullilove*, the remedial *legislative* powers of Congress are much broader than those of the Court's.[59] Both the legislative and executive branches of government may undertake

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52 *Adarand*, 115 S.Ct. at 2112-2113.

53 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954). *See also*, Linda Gibson, *Judge: 37 Years of School Case Is Enough*, National L.J., Jan. 8, 1996, at A10: "Throughout the country, as many as 400 school districts still are wrangling with legal issues stemming from desegregation lawsuits first filed in the mid-'50s to late '60s, according to lawyers with the NAACP Legal Defense and Educational Fund, Inc. . . ."

While the courts have played a crucial part in the dismantling of systemic discrimination, it is also clear that litigation is an expensive and time-consuming method of achieving social change. Yet, strict scrutiny of *legislatively* adopted or approved affirmative action means more litigation, as the only sure method of establishing a constitutionally viable affirmative action program.

54 402 U.S.1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

55 *See* also Rosenfeld, *supra* note 15, 87 Mich. L. Rev., at 1755-1756.

56 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

57 Ibid., 448 U.S., at 482.

58 See *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

59 Ibid., at 483-484:

voluntary affirmative action, though strict scrutiny requires a "strong basis" in evidence for believing that discrimination has occurred and that remedial action is necessary.[60]

D. Strict Scrutiny Frustrates the Remedial Objectives of the 14th Amendment

Prior to 1938 the Supreme Court subjected all legislation to a single standard of "traditional," or rational basis review. Traditional review applied also to racial classifications under the equal protection clause.[61] However, in footnote 4 of his opinion for the Court in *United States v. Carolene Products*, Justice Stone advanced the idea of "more searching judicial inquiry" for certain kinds of legislation.[62] A presumption of constitutionality, he wrote, should no longer extend to laws falling "within a specific prohibition of the Constitution," or where "prejudice against discrete and insular minorities" tended "to curtail the operation of those political processes ordinarily . . . relied upon to protect minorities."

Footnote 4 was the genesis of the Court's modern three-tiered approach to Equal Protection analysis[63]—i.e., the use of rational, intermediate, or strict scrutiny in reviewing government action or legislation, depending on the classifications used and the nature of the individual rights affected. Racial classifications being viewed as "suspect," the highest level of scrutiny would normally apply.

But did footnote 4 contemplate "more searching judicial inquiry" for *all* uses of racial classifications, or only those which disadvantaged "discrete and insular minorities"? Given the premise upon which footnote 4 is based—i.e., the abuse of the political process to the disadvantage of minorities—would the same level of scrutiny apply to special programs adopted by the majority for the

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. . . "The power of the federal courts to restructure the operation of local and state governmental entities is not plenary. . . . [A] federal court is required to tailor the scope of the remedy to fit the nature and extent of the . . . violation." . . . Here we deal . . . not with the limited remedial powers of a federal court, . . . but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress. . . .

60 *See Croson*, 488 U.S., at 500.

61 *See*, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 550, 16 S.Ct. 1138, 41 L.Ed. 256, 260 (1896):

. . . [E]very exercise of the police power must be *reasonable*, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. . . .

So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable. . . .

62 304 U.S. at 152 note 4. See also Klarman, *supra* note 11, at 219:

. . . Justice Stone . . . found normative justification for judicial review in the failure of legislative process. The normal presumption of constitutionality to which legislation was entitled possibly was inappropriate, Justice Stone postulated, not only when specific provisions of the Bill of Rights were plainly controverted, but also in situations where the ordinary operations of majoritarian institutions were distorted by artificial constraints on full political participation.

Under this view, strict scrutiny applies only where the political process violates fundamental rights, or the rights and interests of "discrete and insular minorities." In other words, strict scrutiny is not triggered merely by the use of a racial classification.

63 *See* Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 Colum. L. Rev. 1087, 1087-1089 (1982):

Carolene Products retains its fascination solely because of Footnote 4—the most celebrated footnote in constitutional law. . . . This footnote now is recognized as a primary source of "strict scrutiny" judicial review. Indeed, many scholars think it actually commenced a new era in constitutional law.

specific *benefit* of disadvantaged racial and ethnic minorities?[64]

The Supreme Court first considered the question in *Regents of University of California v. Bakke*.[65] In *Bakke*, the Court struck down a special medical school admissions program that reserved 16 of 100 seats for minority applicants only. A key question in the case was the level of judicial scrutiny to be applied.[66] Justice Powell, in a lone opinion announcing the judgment of the Court,[67] rejected the University's argument under *Carolene Products* that white males are not a "discrete and insular minority," requiring extraordinary protection from the majoritarian political process. He responded:

> This rationale . . . has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreetness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. . . . Racial and ethnic classifications . . . are subject to stringent examination without regard to these additional characteristics. . . . Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.[68]

However, in referring to "discrete and insular minorities," Stone quite clearly had racial, ethnic, national, and religious minorities in mind.[69] As one commentator explains:

> Many constitutional sources from before 1938 speak of judicial protection of minorities. But they use the phrase . . . to refer to losing factions in political struggles or, more importantly, to broad sectional or economic interests that may be at a majoritarian political disadvantage. . . .
>
> "Discrete and insular" minorities are not simply losers in the political arena, they are perpetual losers. Indeed, to say they lose in the majoritarian political process is seriously to distort the facts: they are scapegoats in the real political struggles between other groups. Moreover, in their "insularity" such groups may be charac-

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64 The language of footnote 4 suggests there would be no need for "more searching judicial inquiry," if "discrete and insular minorities" suffer no *dis*advantage from the ordinary operation of the political process. As Justice Powell, *id.*, explained:

> . . . The footnote . . . is thought to have provided its own theoretical justification. The theory properly extracted from Footnote 4, as expressed by more than a few prominent scholars, is roughly as follows: The fundamental character of our government is democratic. Our constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress and the state legislatures should be allowed to do as they choose. But there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be trusted to protect these groups in the way it protects most of us. Consistent with these premises, the theory continues, the Supreme Court has two special missions in our scheme of government: First, to clear away impediments to participation, and ensure that all groups can engage equally in the political process; and second, to review with heightened scrutiny legislation *inimical* to discrete and insular minorities who are unable to protect themselves in the legislative process.
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> I do not embrace this theory one hundred percent; nor do I condemn it. . . .

65 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

66 *See* 438 U.S. at 287-288 (Powell, J.):

> The parties . . . disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner [the University] argues that the court below erred in applying strict scrutiny. . . . That level of review, petitioner asserts, should be reserved for classifications that disadvantage 'discrete and insular minorities.' See *United States v. Carolene Products Co.* . . . Respondent [Bakke], on the other hand, contends that the California [Supreme Court correctly rejected the notion that the degree of judicial scrutiny accorded a particular racial or ethnic classification hinges on membership in a discrete and insular minority, and duly recognized that the "rights established by the Fourteenth Amendment are personal rights." . . .

67 Justice Stevens—joined by Chief Justice Burger and Justices Stewart and Rehnquist—concurred in the judgment on statutory grounds, finding that the special admissions programs violated title VI of the 1964 Civil Rights Act, which prohibits discrimination in Federally funded programs. See 42 U.S.C. §§ 2000d. Since Justice Stevens did not reach the constitutional question, he expressed no view on the level of judicial scrutiny to be applied.

68 438 U.S. at 290-291.

69 *See* Cover, *supra* note 21, at 1298: "[B]y the 1930's, "minorities" in the footnote four sense was already an accepted term of art with a recognized technical meaning in international law."

teristically helpless, passive victims of the political process. It is, therefore, because of the discreetness and insularity of certain minorities (objects of prejudice) that we cannot trust "the operation of those political processes ordinarily to be relied upon to protect minorities." A more searching judicial scrutiny is thus superimposed upon the structural protections against "factions" relied on by the original Constitution—the diffusion of political power and checks and balances.

In effect, therefore, footnote four suggests two reasons for judicial protection of minorities. The clearest reason is contained in paragraph three: a discrete and insular minority cannot expect majoritarian politics to protect its members as it protects others. Less clearly stated is the additional argument of paragraph two that prejudice and race hatred are also levers of manipulation in the mass political arena.[70]

As a consequence, Powell's above-quoted response in *Bakke* was clearly at variance with the underlying premise of footnote 4—i.e., that unlike nonminorities, "discrete and insular minorities" are at a distinct disadvantage in the political process, and for that very reason require special protection from the Court.[71]

In other words, since minorities and nonminorities are not "similarly situated" in the political process, treating them differently under footnote 4 does not offend the equal protection clause.[72] To reject that distinction, as Justice Powell did, is to reject the very premise upon which footnote 4 is grounded.

Under that premise, race or gender-conscious affirmative action programs receive traditional or less than strict review, since they do not violate the fundamental rights of individual white males,[73] nor disadvantage them as a "discrete

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70 Ibid., at 1294-1297. By contrast, see *Bakke*, 438 U.S. at 357 (Brennan, J. concurring in part, dissenting in part):

> ... (W)hites as a class (do not) have any of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.... *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4....

71 In a Columbia Law School address several years later, Justice Powell made the following observations about footnote 4:

> ... [I]n one sense, any group that loses a legislative battle can be regarded as both "discrete" and "insular." ... But, as the cases cited make clear, these are not the types of groups that Stone had in mind.... Stone referred to discrete and insular minorities in a sentence, divided by a colon, in which he had referred earlier to racial, ethnic, and religious groups. Examining the textual evidence only, I think it would be a plausible reading that these are the only kinds of groups to which the term "discrete and insular" was intended to refer. In the normal operation of the political process, the term then would suggest that *some* racial, religious, and ethnic groups are not treated fairly and equally. Courts therefore should apply strict scrutiny to laws "directed at" these disadvantaged groups.

Although conceding its "intuitive appeal," Powell still could not accept the underlying premise of footnote 4 as constitutional doctrine. He insisted that "[i]n our uniquely heterogeneous society there are countless groups with some claim to being racial, ethnic, or religious" minorities. Over history, many of those groups had been discriminated against and had been ineffective in politics. Courts, he observed, are ill-equipped to determine when different groups become ineffective in the political process, since "these conditions do not remain static." Ibid. In a democracy, he noted, "there are inevitably both winners and losers." Thus, "[t]he fact that one group is disadvantaged by a particular piece of legislation, or action of government, ... does not prove that the process has failed to function properly." Ibid.
A former law clerk to Justice Stone, Louis Lusky, labeled Powell's construct as "another doubtful interpretation of 'discrete and insular.'" See Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 Colum. L. Rev. 1093, 1105 n.72 (1982).

72 Heightened scrutiny applies only when a racial classification *invidiously* discriminates against racial minorities, who are otherwise similarly situated with all other racial groups. See *Michael M. v Superior Court*, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981) (Justice Stewart, concurring):

> The Constitution is violated when government, state or federal, *invidiously* classifies similarly situated people on the basis of the immutable characteristics with which they were born. Thus, *detrimental* racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated. See *Fullilove v. Klutznick*, 448 U.S. 448, 522 (dissenting opinion); *McLaughlin v. Florida*, 379 U.S. 184, 198 (concurring opinion); *Brown v. Board of Ed.*, 347 U.S. 483; *Plessy v. Ferguson*, 163 U.S. 537, 552 (dissenting opinion). (Emphasis added).

and insular" minority. Consequently, "heightened" or strict scrutiny is not triggered.

Justice Powell also misapprehended the Court's role in reviewing legislation employing racial classifications, as contemplated by footnote 4. In his Columbia Law School address, Powell also charged:

> Footnote 4, as interpreted by many commentators, represented a radial departure of its own. Far from initiating a jurisprudence of judicial deference to political judgments by the legislature, footnote 4—on this view—*undertook to substitute one activist judicial mission for another* [i.e., *Lochner*ism]. . . . Where the Court before had used the substantive due process clause to protect property rights, now it should the equal protection clause . . . as a sword with which to promote the liberty interests of groups disadvantaged by political decisions.[74]

But in fact, footnote 4 calls for *less* "judicial activism" than the strict scrutiny Powell advocated. Under footnote 4, heightened review applies only to legislation that is "inimical" to the interests of discrete and insular minorities. All other government uses of racial classifications would receive at most "searching," but less than strict review.

Compare, for example, the searching, but not strict review applied by Chief Justice Burger for the Court in *Fullilove:*

> A program that employs a racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. . . .
>
> Our analysis proceeds in two steps. At the outset, we must inquire whether the objectives of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible means for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.[75]

Finding that Congress had exercised "an amalgam of its specifically delegated powers" in enacting the 10% minority owned business set-aside requirement under the 1977 Public Works Employment Act, the Court "rejected the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."[76] Furthermore, Burger explained, "In dealing with this facial challenge to the statute, *doubts must be resolved in support of the congressional judgment,*"[77] rather than presuming against as now required by *Adarand.* Burger noted that "after due consideration," Congress "perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives. . . ."[78]

Finally, Chief Justice Burger wrote, "when such a program comes under judicial review, courts must be satisfied that the legislative objec-

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73 The Supreme Court has held that there is no fundamental right to government employment. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). The Court has not recognized any fundamental right to higher education, or in the awarding of government contracts—all subjects of traditional affirmative action programs. Thus, individual white males cannot claim violation of their fundamental rights under most affirmative actions programs. Instead, they can only claim that it is the consideration of race itself that presumptively violates the equal protection clause and triggers strict scrutiny—the very propositions which are being questioned in this paper.

74 *Supra*, at 1089-1090.

75 448 U.S., at 472, 473.

76 448 U.S. at 482.

77 Ibid., at 489.

78 Ibid., at 490.

tives and projected administration give reasonable assurance that the program will function within constitutional limitations."[79] "Any preference based on racial or ethnic criteria must necessarily receive *a most searching examination* to make sure that it does not conflict with constitutional guarantees."[80]

By comparison, applying strict scrutiny to *all* racial classifications is a much broader brushstroke. Any and all legislation employing a racial classification is presumptively invalid and is subjected to the most rigorous judicial scrutiny.

Finally, under footnote 4 the Court's role in "*correcting* defects of process" within the political system is limited to providing heightened review and appropriate judicial relief to discrete and insular minorities, where warranted. The formulation of *structural* remedies to correct "defects of process" is left to the political branches of government—for example, the 1965 Voting Rights Act.

E. The Court's Adoption of Strict Scrutiny and its Presumption of Race-neutral Equality.

Since there was no majority holding, *Bakke* left unresolved the issue of whether strict or intermediate scrutiny applied to race-based affirmative action.[81] In *Croson*, however, the majority formally severed the link between footnote 4 and the special protection it afforded "discrete and insular minorities":

> If one aspect of the judiciary's role under the Equal Protection Clause is to protect "discrete and insular minorities" from majoritarian prejudice or indifference, see *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4, some maintain that these concerns are not implicated when the "white majority" places burdens upon itself. . . . In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a [political] minority . . . would seem to militate for, not against, the application of heightened judicial scrutiny in this case. See Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L.Rev. 723, 739 n.58 (1979) ("Of

79 Ibid.

80 Ibid., at 491. Burger goes on to state that "this opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in . . . *Bakke* . . . "—i.e., strict (Powell, J.) or intermediate (Brennan, J.) scrutiny. Ibid., at 492.

81 In 1980—2 years after *Bakke*—the Court applied less than strict review in upholding the 10 percent minority owned business contracting requirement under the Federal Public Works Act of 1977. See discussion of *Fullilove* in note 46; see also, *Croson*, 488 U.S., at 487 (O'Connor, J.):

> The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time "bound to approach [its] task with appropriate deference to the Congress. . . ."

However, the Court refused to apply that less stringent standard in reviewing state-sponsored affirmative action programs, the majority of which had been adopted in response to *Fullilove*. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). In deciding that the same standard should apply to federal and state programs, *Fullilove* has been overruled in *Adarand*: "Of course it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling." 115 S.Ct. at 2117. Unfortunately, the Court overruled the wrong case. A *judicially* conservative Court would have overruled *Croson*, opting instead for *Fullilove*'s deferential, but "searching" examination for both state and federal affirmative action. Only a politically conservative and "activist" Court would go the other way.

course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature.")[82]

Here, too, Justice O'Connor departs from the basis premise of footnote 4 by extending the protection of heightened scrutiny to white males as a *political* minority.[83]

In making strict scrutiny applicable to all racial classifications, regardless of purpose, the *Croson* majority rejected footnote 4's fundamental premise of historic and actual inequality in the political process, for discrete and insular minorities. Instead, the majority adopts a legal and philosophical *presumption* of "race-neutral" or "colorblind" equality.

For all its legal and philosophical assumptions, however, the *Croson* majority was no closer to knowing the actual facts about racial discrimination in Richmond's construction industry, than it was at the time it noted probable jurisdiction in the case. Most of the evidence relied on by the city council was discounted or ignored by the Court on questionable, under it retroactive application of strict scrutiny that it was then in the process of adopting. The result was dictated by the Court's mechanical application of strict scrutiny—not by a considered weighing of the evidence presented in the record, nor by appropriate deference to the legislative factfinding of the Richmond city council.

Croson involved far more than the validity of Richmond's program. Ultimately, the case has been about the ability of State and local government to formulate effective policies in addressing a problem that pre-dates the U.S. Constitution—a problem that will not disappear on the basis of legal or philosophical assumptions. The lower courts, however, have had to apply *Croson*'s "color-blind Equal Protection jurisprudence" in a wide range of remedial contexts involving employment, higher education, legislative redistricting, and public contracting. The results have been erratic and inconsistent—due in large measure to the Supreme Court's own ambivalence and incoherence in strictly scrutinizing affirmative action.

Even assuming constitutional limits on the use of race-conscious affirmative action, the Court's "colorblind" jurisprudence has only served to frustrate the central remedial objectives of the 14th amendment.

F. Crossing the Constitutional Divide

In *Lochner v New York*,[84] the Supreme Court invalidated a State statute limiting the number of hours employees could work in bakeries. The Court found the regulation to be a "meddlesome interference" with liberty of contract, as guaranteed by the due process clause of the 14th amendment. In *Liberty of Contract*,[85] Roscoe Pound wrote that in reaching the result in *Lochner*, the Court had ignored the legislative record and had made improper assumptions about "equality of rights" between employers and employees in the marketplace.[86] "Why," Pound queried, do courts insist on testing social and economic legislation against an "academic theory of equality in the face of practical conditions of inequality."[87] Legal sys-

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82 488 U.S. at 495-496. But see Klarman, *supra* note 11, 90 Mich. L. Rev., at 314: ". . . [W]hile whites possibly constituted a slight minority of Richmond's population, they enjoyed a secure majority in the state of Virginia, which could amply defend their interests by restricting, or even banning, local affirmative action plans." See also, Rosenfeld, *supra* note 14, 87 Mich. L. Rev. 1729, 1774-5, 1777:

Justice O'Connor's conclusion is erroneous, however, for two principal reasons: first, the analogy she draws is not supported by the facts; and second, more importantly, even if it were, it would be valid only at a purely abstract and superficial level. . . . [T]here is no justification for simply equating that vote with that of an overwhelmingly white legislature acting to disadvantage a group of blacks which is unmistakably in the minority.

83 Even Justice Powell recognized that footnote 4's reference to "discrete and insular minorities" did not include *political* minorities, since it is expected that there will be winners and losers in the democratic process. "The fact that one group is disadvantaged by a particular piece of legislation, or government action, . . . does not prove that the process has failed to function properly." Powell, *supra* note 62, at 1090–1091.

84 198 U.S. 45 (1905).

85 Roscoe Pound, *Liberty of Contract*, 18 Yale L. J. 454 (1909).

tems, he continued, go through periods of decay in which "scientific jurisprudence becomes mechanical jurisprudence," where concepts become "fixed," where premises are no longer examined and where principles cease to be important.[88] The law, in short, becomes a body of rules, under which "social progress (is) barred by barricades of dead precedents."[89]

Chief Justice Burger echoed those same warnings in *Fullilove*:

Petitioners have mounted a facial challenge to a program developed by the politically responsive branches of Government. . . . [A]s Mr. Justice Jackson admonished in a different context in 1941:

> The Supreme Court can maintain itself and succeed in its tasks only if the counsels of self-restraint urged most earnestly by members of the Court itself are humbly and faithfully heeded. After the forces of conservatism and liberalism, of radicalism and reaction, of emotion and of self-interest are all caught up in the legislative process and averaged and come to rest in some compromise measure . . . or some other legislative policy, a decision striking it down closes an area of compromise in which conflicts have actually, if only temporarily, been composed. Each such decision takes away from our democratic federalism another of its defenses against domestic disorder and violence. The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.

In a different context to be sure, . . . Mr. Justice Brandeis had this to say:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation.[90]

In departing from well-settled principles of judicial restraint in matters affecting social and economic policy, the *Croson* majority made certain "academic" and unsupportable assumptions about racial equality, "in the face of practical conditions of inequality." Indeed, central to the holding in *Croson* is its rejection of "societal discrimination" as a relevant basis for voluntary remedial action by the government. Justice O'Connor notes:

While there is no doubt that they sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts. . . . [A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.[91]

Yet despite that "sorry history" of discrimination, Justice O'Connor holds that it can be given no effective consideration by State or local government. In the face of history and previous congressional findings,[92] she writes:

To a large extent, the set-aside of subcontracting dollars seems to rest on the *unsupported assumption* that

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86 Ibid., at 480.

87 Ibid., at 454. Pound observed:
The court is driven to deal with the problem artificially or not at all, unless it is willing to assume that the legislature did its duty and to keep its hands off on that ground. More than anything else, ignorance of the actual situations of fact for which legislation was provided and supposed lack of legal warrant for knowing them, have been responsible for the judicial overthrowing of so much social legislation.

88 Ibid., at 462.

89 Ibid.

90 *Fullilove*, 448 U.S. at 490-491.

91 448 U.S., at 499.

92 For a summary of the congressional findings supporting the 10 percent MBE set-aside in the Public Works Employment Act of 1977, see 488 U.S., at 530-534 (Marshall, J., dissenting).

white contracts simply will not hire minority firms.... "There is no finding—and we decline to assume—that male caucasian contractors will award contracts only to other male caucasians." (Citation omitted).[93]

In short, Justice O'Connor applied an "academic" assumption of racial equality in the awarding of subcontracts, "in the face of practical conditions of inequality." A "mechanical jurisprudence" of strict scrutiny is use to invalidate legitimate government policies aimed a dismantling systemic discrimination.

"Societal discrimination" is, of course, the sum total of local discriminatory practices.[94] "The problem in Richmond was... both similar to, *and part of*, a much broader national problem."[95] Time and again the observation has been made that the elimination of race-conscious affirmative action will lead to "resegregation" of our workplaces, legislative bodies,[96] colleges and universities,[97] and in society generally[98]—a process that will no doubt accelerate in response to *Adarand*, *Shaw II*, *Bush v. Vera*, and lower court decisions such as *Hopwood*. Clearly, strict scrutiny of affirmative action exceeds the proper role of the courts in our constitutional system.

III. Strict Scrutiny of Affirmative Action

A. How Strict Is Strict?

In *Adarand Constructors v. Pena*,[99] seven members of the U.S. Supreme Court agreed that race-based affirmative action programs are constitutional, provided they satisfy the test of "strict scrutiny."[100] Writing for the Court, Justice O'Connor also declared, "[W]e wish to dispel the

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93 488 U.S., at 502.

94 As Justice Marshall observed in his dissent in *Croson*:

> ... [T]he majority downplays the fact that the city council had before it a rich trove of evidence that discrimination in the Nation's construction industry had seriously impaired the competitive position of businesses owned or controlled by members of minority groups. It is only against this backdrop of documented national discrimination, however, that the local evidence adduced by Richmond can be properly understood. The majority's refusal to recognize that Richmond has proved itself no exception to the dismaying pattern of national exclusion which Congress so painstakingly identified infects its entire analysis of this case.... So long as one views Richmond's local evidence of discrimination against the backdrop of systematic nationwide racial discrimination in this very industry, this case is readily resolved.

488 U.S., at 530, 535.

95 Rosenfeld, *supra* note 14, 87 Mich. L.Rev., at 1746.

96 *See* Linda Greenhouse, *High Court Voids Race-Based Plans for Redistricting*, N.Y. Times, June 14, 1996, at A1:

> Laughlin McDonald, director of the southern regional office of the American Civil Liberties Union, predicted the result would be the "bleaching of Congress" as well as state and local legislative bodies, as new districts drawn across the South to increase minority representation fall under legal attack.

97 *See*, e.g., Herbert W. Nickens & Jordan J. Cohen, "Policy Perspectives: *On Affirmative Action*," JAMA, Feb. 21, 1996, at 572, 573:

> ... If admissions committees were mandated to base their decisions solely on grade point averages (GPAs) and standardized test scores, analyses indicate that (with the exception of Asians) the complexion of selective higher education institutions, including medical schools, would return to that of the 1950's (Association of American Medical Colleges, unpublished staff analysis, 1995).... In our view, those who wish to see our country abandon affirmative action have given insufficient consideration to the severe damage that would occur to our social structure if our slow movement toward racial and ethnic equity were to be reversed....
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> [T]he paradigm for affirmative action in both medicine and the corporate world is diversity; the diversity paradigm incorporates justice and equity, but also recognizes that diversity is essential for quality improvement. For medicine, this view acknowledges that eradicating the underrepresentation of minorities among medical students, house staff, faculty, administrators, and researchers is essential if the medical profession is to fulfill its obligations to society; diversity is a necessary condition for medicine to provide culturally sensitive medical education, improve access to quality health care for all Americans, and address important research questions affecting all segments of our society.

98 See Rosen, *"Affirmative Action: A Solution,"* New Republic, May 8, 1995, at 20: "Color-blindness, for all its moral and political appeal, is not really a practical option. When asked point-blank, few conservatives are honestly willing to accept the widespread resegregation that would follow from a rigid ban on racial preferences."

99 ___ U.S. ___, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[101] Despite the admonition, however, *Adarand* has only intensified the debate over strict scrutiny. According to one observer:

The Supreme Court has essentially delegated the difficult responsibility of defining strict scrutiny to a nation-wide judiciary. . . . [T]he lower courts are sure to take a wide variety of approaches in applying strict scrutiny and the differences in these approaches ultimately will have to be resolved by the Supreme Court.[102]

While the lower courts have taken divergent approaches to strict scrutiny,[103] the Supreme Court has added to the confusion in its most recent decisions in *Shaw v. Hunt*[104] and *Bush v. Vera*.[105] In those two cases, the Court invalidated a total of four "majority-minority" congressional districts in North Carolina and Texas, under another formulation of "strict scrutiny."[106] Building

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100 Justice O'Connor was joined by Chief Justice Rehnquist and Justice Kennedy in Part III-D of her opinion for the Court. The four dissenting Justices—Stevens, Souter, Ginsburg and Breyer. In separate concurrences, Justice Scalia opined that government use of race-conscious remedies can never be justified under the Constitution, while Justice Thomas expressed the view that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice."

101 115 S.Ct., at 2117. But Justice O'Connor may be alone in that view. During oral argument in the North Carolina and Texas congressional redistricting cases, the attorney for the white North Carolina plaintiffs argued that once race was identified as the motivating factor, the district must be struck down under strict scrutiny. The following exchange then took place:

"So you take the position that once strict scrutiny is applied, it's fatal in fact," Justice O'Connor said. . . . "Yes," Mr. Everett replied. It was his position that no race-conscious districting could survive the hurdle of strict scrutiny. Justice O'Connor said, "I had thought we had indicated it is possible to survive strict scrutiny, but you're arguing for something else." Mr. Everett replied, "I'm descending from the theoretical to the practical."

See Linda Greenhouse, "Supreme Court Roundup: Court Hears Arguments on Race in Redistricting," *N.Y. Times*, Dec. 6, 1995, at B11. As a "practical" matter, many judges continue to regard strict scrutiny as "strict in theory, fatal in fact"—i.e., they apply it as a per se rule of invalidity.

102 Thomas J. Madden & Kevin M. Kordziel, *Strict Scrutiny and the Future of Federal Procurement Set-Aside Programs in the Wake of* Adarand*: Does "Strict in Theory" Mean "Fatal in Fact"?*, 64 Fed. Cont. Rep 6, ___ (1995). The lower courts have provided different answers to the question, how "strict" is strict scrutiny? In *Hopwood v. Texas*, 78 F.3d 932, *reh'g en banc denied*, 84 F.3d 720 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2580, 135 L.Ed.2d 1094 (1996), the Fifth Circuit appeared to ignore Justice O'Connor's admonition in *Adarand* that strict scrutiny is not "strict in theory, but fatal in fact," when it ultimately declared that any consideration of race in university admissions was per se invalid. See also *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2001, 131 L.Ed.2d 1002 (1995), in which the Fourth Circuit reaffirmed its "constitutional premise that *race is an impermissible arbiter of human fortunes*."

103 For a summary of recent court decisions on affirmative action programs, see David Jung & Cyrus Wadia, Public Law Research Institute, Hastings College of the Law, *Affirmative Action and the Courts* (Feb. 1996).

104 ___ U.S. ___, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996).

105 ___ U.S. ___, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996).

106 Justice O'Connor assumes Texas has a "compelling interest" in complying with § 2 of the 1965 Voting Rights Act, under the first prong of strict scrutiny. However, because the three majority-minority districts are "bizarrely shaped," "far from compact," and were drawn primarily on the basis of race, she concludes they are not "narrowly tailored" under the second prong of strict scrutiny. Justice O'Connor rejects the State's argument that bizarreness of shape and noncompactness are irrelevant to narrow tailoring, since they relate only to improper motive, under the first prong of strict scrutiny. 116 S.Ct., at 1961–1962. She also rejects the Federal Government's argument that because "bizarreness and noncompactness are necessary to achieve the State's compelling interest in compliance with § 2, . . . the narrowly tailoring requirement is satisfied." Ibid.

According to Justice O'Connor, "Significant deviations from traditional districting principles . . . causes constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial. . . . [I]t is part of the

on its decision last term in *Miller v. Johnson*,[107] striking down a majority-minority congressional district in Georgia, the Court in *Shaw* and *Vera* holds that while race may be "considered" as one factor among others in redistricting, it may not be considered as the "predominant" factor.[108] So how much consideration of race is *too much*? It seems that only the Court knows for sure.[109] Justice O'Connor simply reminds us that "[s]trict scrutiny remains . . . strict."[110]

The Court's ambivalence about the permissible use of race-conscious remedies has frustrated good-faith efforts by government at all levels to investigate and voluntarily rectify both historic and continuing problems of racial and gender discrimination. Many State and local agencies that want to implement voluntary plans have no clear, definitive guidance from the Court on what is required to satisfy strict scrutiny. Some have abandoned all efforts to remedy identified discrimination. Still others are considering legislative proposals to ban the use of affirmative action altogether.

B. The Fundamental Flaw in Strict Scrutiny Analysis

Supporters of affirmative action have long argued that strict scrutiny should not apply to the "benign" or remedial use of racial classifications. As Justice Marshall observed in *Croson*:

> Today, for the first time, a majority of this Court has adopted strict scrutiny as the standard of Equal Protection Clause review of race-conscious remedial measures. This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of

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constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race." Ibid. at 1962. Accordingly, bizarrely shaped, noncompact districts are not sufficiently tailored.

Justice Kennedy felt constrained to disagree with O'Connor's formulation of the "narrowly tailored" prong of strict scrutiny:

> In this respect, I disagree with the apparent suggestion in Justice O'Connor's separate concurrence that a court should conduct a second predominant-factor inquiry in deciding whether a district was narrowly tailored. . . . There is nothing in the plurality opinion or any opinion of the Court to support that proposition. The simple question is whether the race-based districting was reasonably necessary to serve a compelling interest.

Ibid., at 1972 (Kennedy, J., concurring).

107 ___ U.S. ___, 115 S.Ct. 2475, 132 L.Ed.2d 876 (1995).

108 In *Bush v. Vera*, ___ U.S. ___, 116 S.Ct. 1941, 1951-1952, 135 L.Ed.2d 248 (1996), Justice O'Connor writes:

> Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of *intentional* creation of majority-minority districts. . . . For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race. By that, we mean that race must be 'the predominant factor motivating the legislature's redistricting decision.' We thus differ from Justice Thomas, who would apparently hold that it suffices that racial considerations be a motivation for the drawing of a majority-minority district.

109 In her plurality opinion, Justice O'Connor acknowledges that "problems have arisen from the uncertainty in the law prior to and during its gradual clarification in *Shaw* I, *Miller*, and today's cases." She continues, however:

> We are aware of the difficulties faced by the States, and by the district courts, in confronting *new* constitutional precedents, and we also know that the nature of the expressive harms with which we are dealing, and the complexity of the districting process are such that bright-line rules *are not available*. But we believe that today's decisions . . . will serve to clarify the States' responsibilities. That States have traditionally guarded their sovereign districting prerogatives jealously, and we are confident that they can fulfill that requirement, leaving the courts to their customary and appropriate backstop role. (Emphasis added).

116 S.Ct., at 1964.

110 Ibid. As one Court observer notes, "Like most contested issues of social policy, the future of . . . affirmative action . . . rests on the cryptic impulses of Sandra Day O'Connor. Divining Justice O'Connor's wishes is never easy, least of all for Justice O'Connor herself." Jeffrey Rosen, *The Day the Quotas Died*, The New Republic, April 22, 1996, at 24. "[I]n her tortured opinions in the voting rights cases, O'Connor has said that government can be race-conscious, as long as its not too obvious about it." *Ibid.*

such racism.[111] . . . "Because the consideration of race is relevant to remedying the continuing effects of past discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, . . . such programs should not be subjected to conventional 'strict scrutiny'—scrutiny that is strict in theory, but fatal in fact."[112]

In his *Adarand* dissent, Justice Stevens agrees:

There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," [citation omitted], should ignore this distinction.[113]

But Justice Marshall's successor on the Court, Justice Thomas, sharply disagrees:

I write separately . . . to express my disagreement with the premise underlying Justice Steven's and Justice Ginsburg's dissent: that there is a racial paternalism exception to the principle of equal protection. I believe there is a "moral (and) constitutional equivalence" . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law. . . . [R]acial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgences. Inevitably, such programs engender attitudes of superiority or alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.[114]

For Justice Thomas, any remedial use of race-conscious remedies is morally reprehensible and a violation of the colorblind principle that "government may not make distinctions on the basis of race."[115]

Of course, the goal of affirmative action is not to "make us equal," as Justice Thomas suggests. Rather, its purpose is to remedy previously identified discrimination and to eliminate systemic barriers to equality *of opportunity*. But more importantly, and what is most striking about Justice Thomas' reasoning, is his rejection of affirmative

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111 *See also Adarand*, 115 S.Ct., at 2120 (Stevens, J., dissenting):

> The Court . . . assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority. . . . There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," . . . should ignore this distinction.

112 488 U.S., at 552.

113 115 S.Ct., at 2120.

114 Ibid., at 2119.

115 Ibid. In complete disregard of history and of the very circumstances that led to the adoption of the 14th amendment, Justice Thomas opines:

> There can be no doubt that the paternalism that appears to lie at the heart of this [affirmative action] program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").
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> Ibid.

action on social policy rather than constitutional grounds. Rarely has the Court invalidated social legislation because it is "paternalistic," or because it "engenders attitudes" of superiority, inferiority or resentment. Indeed, the Court upheld social security legislation in the late 1930's, despite such characterizations.[116]

On the other hand, Justice O'Connor is much more circumspect in her appraisal of race-conscious remedies under strict scrutiny. She agrees with Justice Powell's interpretation of the Equal Protection guarantee—i.e., it applies to all "persons" as individuals, in the same manner, and without regard to race or remedial purpose.[117] Furthermore, she believes strict scrutiny is required to ascertain whether the government's true purpose is "benign," rather than "invidious":

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. . . . [118]

Nevertheless, Justice O'Connor's construct of strict scrutiny is flawed because it fails to distinguish between the level of scrutiny appropriate for the government's intended use of a racial classification, and the level of scrutiny applicable to the *factual* basis support that intended use. In other words, different standards of review *should* apply to "benign" and to "invidious" uses of race, because the underlying judicial inquiries are fundamentally different.

The Supreme Court has recognized at least two "compelling" government interests that will justify the use of race conscious affirmative action—remedying past discrimination and (*Hopwood* notwithstanding) racial diversity to achieve other compelling governmental interests, such as educational diversity and more effective law enforcement. On the other hand, *Brown v. Board of Education* declared de jure school segregation inherently unconstitutional. In both situation, however, the initial query is whether the government has articulated some *constitutionally permissible*—i.e., legal—justification for the use of a racial classification. The Court has declared that, as a *legal* matter, remedying past discrimination and, in certain instances, racial diversity are "compelling" justifications, while no such legal justification will be recognized for the racial segregation of public schools.

Of course, "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight."[119] The stated purpose may be valid on its face, but the use of race must still be support by an adequate "factual predicate"—under strict scrutiny, a "strong basis in evidence," approaching a prima facie case of some constitutional violation.[120] But what standard of review should the Court apply to the government's conclusion that such a strong basis

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116 *See*, e.g., *Helvering v. Davis*, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307 (1937):
> . . . A system of old age pensions has special dangers of its own. . . . The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. . . . Whether wisdom or unwisdom resides in the scheme of benefits [under the Act], it is not for us to say. . . . Our concern here, as often, is with power, not with wisdom. . . .

117 *See Croson*, 488 U.S., at 494:
> . . . [O]ur interpretation of § 1 [of the Fourteenth Amendment] stems from our agreement with the view expressed by Justice Powell in *Bakke* that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke*, 438 U.S., at 289-290.

> But clearly this "colorblind" or "race-neutral" view of the 14th amendment is a rejection of the principal remedial purpose behind its drafting and ratification in the first place, as discussed in *The Slaughter House Cases*, *supra*.

118 *Adarand*, 115 S.Ct., at 2112, quoting *Croson*, 488 U.S., at 493 (plurality opinion of O'Connor, J.).

119 *Croson*, 488 U.S., at 500.

120 Ibid.

in evidence exists? Therein lies the defect in O'Connor's model of strict scrutiny.

As Justice O'Connor noted in *Croson*, "[t]he factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary."[121] However, she states, when a legislative body employs a racial classification, both its proffered legal and factual justifications must be strictly scrutinized. The question is why? If the government finds that discrimination exists, and if it has a compelling interest in remedying that discrimination, why should those findings be more "suspect" than any other legislative findings by the government? Either the evidence supports the government's conclusion, or it doesn't.

Under strict scrutiny, however, the majority of affirmative action programs invalidated by the courts have been struck down under a form of strict, de novo review. Combined with a presumption invalidity, the courts have had considerable leeway in striking down affirmative action programs on the basis of hypotheticals or factual assumptions, often having no basis in the record. Accordingly, courts can and often do disagree with the findings of the governmental actor, and simply substitute their own conclusions.

Most often, the issue is not whether the intended use of a racial classification—e.g., remedying discrimination—is legitimate, but whether the court agrees that discrimination exists in the first place, and whether the remedy fits the violation. These are fairly typical questions of fact most civil rights actions. Yet the findings of the trial judge can be overturned only if they are "clearly erroneous." Why that same deferential standard is not applied to legislative findings supporting the use of race-conscious remedies has yet to be explained.

IV. Conclusion

In adopting strict scrutiny as the constitutional standard of review for government-adopted affirmative action, the Supreme Court has taken onto itself ultimate responsibility and accountability for the success or failure of ending systemic discrimination in this country. It is that very kind of public policy control which the Court has studiously avoided throughout most of its history. And yet, an activist majority on the present Court appears determined to oversee race relations in this country with, little more than a judicial declaration that government must be "colorblind," even though the rest of the nation is not.

In retrospect, it is clear that *Croson* needs to be revisited. The Supreme Court should reconsider Chief Justice Burger's predicate in *Fullilove*: "As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."[122]

Note: This paper also appears in the *Michigan Journal of Race & Law*, December 1996.

121 Ibid.

122 448 U.S., at 482.

What Affirmative Action Requires

By Emily Hoffman

Definition of Affirmative Action

In order to have a reasoned discussion of affirmative action, let us begin by trying to define what affirmative action *is,* and what affirmative action *is not.*

Affirmative action is the name for a set of procedures that apply to firms and organizations that have contracts with a value of $50,000 or more from the Federal Government. The main legal requirement of affirmative action is that such employers must take positive action to integrate their labor force for those groups covered by Title VII of the Civil Rights Act of 1964. The intent of affirmative action is to eliminate discrimination by race, religious affiliation, age, and gender in such areas as employment, awarding of government contracts, and admission to public higher educational institutions. The object of affirmative action is for all groups of our society to be represented in the work force proportionately to their numbers in the pool of qualified applicants.

Affirmative action is not merely "not discriminating." Not discriminating is treating job applicants and current employees equally, without regard to their race, color, gender, national origin, or religion. Affirmative action requires going "the extra mile" beyond merely not discriminating. Affirmative action requires taking positive steps to create equality of opportunity for all qualified persons without regard to race, color, gender, national origin, or religion. In practice, the emphasis of affirmative action has been on eliminating discrimination by race or gender.

In higher education, examples of positive steps are public advertisement of job openings and contacting professional societies to request names of qualified female and minority persons, who are then directly contacted and invited to apply for the open position(s). In my own area of academic economists, about 20 percent of those persons with Ph.D.s in economics are female, so about 20 percent female faculty members would be considered as proportionality in an academic economics department.

Legal Basis of Affirmative Action: The Executive Orders

The concept that contractors to the Federal Government should not discriminate in employment was given legal effect by Executive Order 8802,[1] that President Franklin Roosevelt issued in 1941. The order prohibited discrimination by race in the hiring of workers by government contractors, who were engaged in the great expansion of industries for World War II. Although the term "affirmative action" was contained in this executive order, there were no specific procedures for implementation.

This concept of nondiscrimination in the labor market was extended in 1961 by Executive Order 10925,[2] which forbids government contractors from discrimination in employment by race, creed, or color. More recently, Executive Order 11246,[3] issued in 1965, not only required Federal contracts to have clauses prohibiting employment discrimination by race, color, religion, or national origin, but also set up an enforcement mechanism to actually oversee the implementation of affirmative action. Executive Order 11246 was amended by Executive Order 11375[4] in 1967, which added sex to the list of characteristics for which discrimination was prohibited. Therefore, "affirmative action" is the popular name for Executive Orders 11246 and 11375.

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1 Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943).

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

3 Exec. Order No. 11,246, 3 C.F.R. 339 (1964–65), *reprinted in* 42 U.S.C. § 2000e note (1988).

4 Exec. Order No. 11,375, 3 C.F.R. 684 (1966–1970).

Enforcement of Affirmative Action

The Office of Federal Contract Compliance Programs (OFCCP) was established in 1966 to enforce the affirmative action aspects of these executive orders. Affirmative action requires that government contractors submit an annual report, which compares the composition of the employer's work force by gender and race for each occupation with the composition of the total (local or national, depending on the occupation) available labor force. The OFCCP oversees compliance with affirmative action by monitoring the employer's hiring practices, including setting goals and timetables for the integration of the work force.

It should be noted that OFCCP is distinct from the Equal Employment Opportunity Commission (EEOC), which was established to enforce title VII of the Civil Rights Act of 1964, popularly known as "title VII."[5] Title VII applies to all employers who have at least 15 employees. It outlaws labor market discrimination by race, color, national origin, religion, and sex in such aspects of employment as hiring, pay, promotion and training. Additionally, some of the States have laws that are similar in intent to title VII, outlawing workplace discrimination by intrastate employers, and enforcement agencies similar to the EEOC.

Legal Status of Affirmative Action

While it is a value judgment that discrimination is morally wrong and ethically unfair, it is in fact illegal to discriminate in the workplace. Under the aegis of title VII and the various executive orders, cases have been decided by the U.S. Supreme Court, which upheld the principle of nondiscrimination. In addition, the Court has decided cases concerning affirmative action which have delineated some of the methods and procedures by which affirmative action can be implemented. It is beyond the scope of this paper to list and analyze the Court decisions affecting the legal status of affirmative action.

President William Clinton ordered a review of affirmative action, which resulted in the conclusion that affirmative action was of value. In a July 1995 speech, President Clinton declared that affirmative action was still needed, and he articulated four standards of fairness: no quotas; no discrimination (including reverse discrimination); no preference to unqualified persons; and ending affirmative action programs once they have succeeded in eliminating discrimination in the covered labor markets.

Criticisms of Affirmative Action

Affirmative action is a very controversial policy, having both ardent supporters and implacable foes. The most vocal claim of the critics is that affirmative action constitutes "reverse discrimination," particularly against white males. I will try to refute this allegation in a following section.

Opponents of affirmative action also claim that it is government interference in the free working of the labor market. To these critics, nothing is more sacrosanct than the unfettered operation of "the free market." Yet, they ignore the fact that almost all modern industrialized countries "interfere" in the labor market in ways which society generally approves of, such as banning or restricting child labor, and regulating workplace safety and working conditions.

Some critics doubt the effectiveness of affirmative action. Jonathan Leonard[6] compared gender and racial composition of the work forces of firms which were subject to the requirements of affirmative action with the work forces of firms without Federal government contracts. He found that the implementation of affirmative action resulted in the employment of proportionately more women and minorities than in the noncontractor firms. Leonard found that affirmative action was most effective in increasing the representation of black males, than for black females, and least effective for white females. Note that this should be regarded as progress towards proportionate

5 42 U.S.C. §§ 2000e–2000e-17 (1988 & Supp. 1994).

6 Jonathon Leonard, "The Federal Anti-Bias Effort." In *Essays on the Economics of Discrimination*, Emily P. Hoffman, ed., W.E. Upjohn Institute for Employment Research, Kalamazoo, MI, (1991).

representation, rather than as reverse discrimination against white males.

Affirmative Action and "Apparent Discrimination"

As noted above, the subject of greatest controversy concerning affirmative action is whether or not the implementation of affirmative action results in discrimination against white males. I was fortunate in studying with an eminent labor economist, Professor Ronald Oaxaca, who noted that under affirmative action, white males were for the first time having to compete for good jobs; prior to affirmative action white males had a distinct advantage in getting the most desirable jobs. The reason for this favoritism was quite straightforward; typically, the person with the authority to hire or promote was a white male. Understandably, since the familiar seems "safer" than the unfamiliar, those white males in charge of employment decisions preferred to hire other white males.

It should be carefully noted, most particularly in the case of white males, that there is a real, distinct difference between the loss of the advantage of being discriminated for and of actually being discriminated against (which would be real "reverse discrimination"), notwithstanding the emotional reaction that they are one and the same.

The Application of Affirmative Action to the "Real World"

The implementation of affirmative action in the higher education labor market might be considered to serve as an example of nondiscriminatory hiring for other labor markets. In academic hiring, the *most qualified* person is supposed to be offered the job. There are both objective and subjective criteria used to determine who is the most qualified, but they should be applied *equally* to all the applicants. If it should happen that a male candidate and a female candidate (for instance) are judged to be *equally* the most qualified, the female candidate probably would be hired, *if* the ratio of male to female faculty in *that* department is much greater than the ratio of male to female faculty in that field nationwide.

As an example of the application of affirmative action to a nonacademic labor market, consider the method of police department promotions. In what appears to be a reasonable and fair system, the promotion procedure in many large police departments is that police personnel applying for a promotion take an examination to see if they are qualified for that promotion. In general, those who receive the highest scores (above a predefined minimum level) are the ones promoted.

However, some police departments have decided that blacks can be considered as sufficiently qualified for promotion even if they score lower than some whites. As a result, those departments are able to promote greater numbers of blacks than would be otherwise possible. For example, suppose whites need a score of 80 to be considered qualified for promotion, while blacks need a score of only 70. Understandably, this results in resentment by those whites who received a score (say 75) which was *above* the black minimum, but *below* the white minimum, and who therefore were not promoted, even though blacks with lower scores were promoted. It is a very difficult value judgement to decide if this procedure is right or wrong. In any case, it should be considered as a short term expedient, not a permanent solution.

A Justification of Affirmative Action

However, before deciding that affirmative action is a unique aberration in our society's otherwise "level playing field," let us consider some cases of unequal treatment which our society does seem to find justified, or at least condones. For example, veteran's preference is an instance where we have decided that there is good reason for making an exception from strictly equal test-score criteria in appointments to civil service positions. Veteran's preference consists of awarding "extra" points to examination scores based on a person's status as a veteran. While it is generally seen in quite a different emotional context, veteran's preference is mathematically equivalent to allowing black police promotion applicants to meet a lower criterion than white police promotion applicants.

In a different area, some students are admitted to college based partly on their athletic ability, or their status as a child of an alumnus, and not strictly according to high school grades and college admission test scores. Here again our society departs from strictly merit-based decisions. Yet, while there is relatively little public complaint

about these procedures, there tends to be a public hue and cry when lower passing scores are required of minority persons. Why does our society approve of nonequal policies in the case of veterans, athletes, and children of alumni, but not in the case of minorities?

Apparent Correlations in the "Real World"

The question of *why* blacks on average have lower scores than whites on many "standardized" paper-and-pencil type examinations needs to be addressed, rather than tip-toed around, especially by the U.S. Commission on Civil Rights. There is a contention that these written tests, which are often used for "determining suitability" for job hiring or advancement, or college admission are "culturally biased" to favor whites, to the detriment of blacks in particular.

I personally think that what is often labelled "cultural bias" is much more a bias against the poor, particularly the children of female-headed households, who generally are the poorest families. There is a growing body of evidence that household income level is more important than race in determining whether or not children do well or poorly in school. Disparities in achievement that *appear* to be correlated with race are probably actually correlated with household income, which *is* correlated with race. I think that this is a case of confusing the cause and the effect, or "putting the cart before the horse."

In my opinion, poor/low income/disadvantaged people need to be the *most* protected group under affirmative action. The poor typically have a lesser quantity and quality of education, are in poorer health, and come to the labor market with less work skills as compared to the nonpoor. It seems patently unfair that a black person who has had the good fortune to be raised in a relatively high-income intact family, and who has had the opportunity to attend good schools should receive special consideration due to race, while a white male, raised in a poverty-stricken household, who attended lower-quality schools, receives no special consideration.

Conclusions Concerning Affirmative Action

Properly applied, affirmative action does *not* require, and *need not* result in discrimination against white males. Indeed, affirmative action *has* operated successfully—and therefore affirmative action should be continued until the inequities of labor market discrimination have been eradicated.

Unfortunately, affirmative action is but a "band-aid," *not* a cure for the problem of illegal discrimination. We have had affirmative action without legal implementation since World War II, and with government enforcement since the 1960s, but we have not yet succeeded in providing equal employment opportunities to all members of our society.

But our society, our country, is changing. The laws of our great nation require that *all* citizens be treated equally—without regard to gender, race, religion, or any other discriminatory characteristic. Yet, we all must admit that a law, however noble in intent, may require *active* governmental policies to bring the intentions contained in the words of the law to actuality in society. Affirmative action is just that policy in respect to bringing a truly level playing field to the workplace.

Affirmation Action Versus Markets as a Remedy for Discrimination

By John Lunn

Affirmative action means different things to different people. Some perceive affirmative action as quotas and programs where race alone determines outcomes, while others perceive affirmative action as programs that provide equal opportunities for all members of American society. In this paper, affirmative action refers to programs that go beyond outlawing discrimination, and that require more positive actions on the part of employers or government agencies.[1] Increased utilization of minority workers or minority owned firms are mandated by legislative or judicial requirements. The facts of past and current discrimination provide the justification for affirmative action programs.

Economic analysis tends to be forward-looking rather than backward-looking. This is seen in the treatment of costs as opportunity costs rather than as the historical prices one has paid for something. While past discrimination is an important issue, the economic approach focuses more on the future effects of proposed remedies in judging their efficacy. If affirmative action programs could ensure that we achieved a society in which all members face equal opportunities to pursue whatever employment, business, or personal plans they wish, then I would endorse wholeheartedly these programs. However, I fear that they will not achieve this goal. In fact, I fear that it is likely that affirmative action programs and laws, as actually implemented in society, will delay the achievement of this goal.

Markets and Discrimination

It is easy to see that discrimination harms the person discriminated against. What is less obvious is that discrimination also costs the one who discriminates. Gary Becker coined the term, "taste for discrimination," and described the phenomenon as someone who acts, ". . . *as if* he were willing to forfeit income in order to avoid certain transactions. . . ."[2]

The economic analysis of discrimination relies on Becker's insight that the taste for discrimination is exhibited as a willingness to forfeit income to avoid transactions that involve members of the minority group. For example, suppose a firm wants to hire 50 workers and faces a pool of 100 workers who are all equally qualified. The 100 workers consist of 20 blacks and 80 whites, and 40 of the whites will work for $10 an hour and the other 40 whites will work for $20 an hour. All the black workers will work for $10 an hour. The employer who wants to discriminate and hires 50 workers has to pay a wage of $20 an hour. (As long as the workers have the same productivity, once the employer offers a wage of $20 to attract the workers with the higher wage demands, he has to pay $20 to the other workers too.) If the employer decided not to discriminate, he could hire 40 white workers and 10 black workers for $10 an hour. In this case, the cost of discrimination to the employer is $500 an hour. The employer may choose to discriminate and pay the extra costs, but he must bear a cost for his actions.

To continue the example, suppose a rival wants to hire 20 workers too. If the first firm hired all white workers, the second employer faces a pool of 30 whites with a reservation wage of $20 and 20 blacks with a reservation wage of $10. She also would prefer a white work force due to a taste for discrimination, but she is not willing to pay as much as the first employer to indulge her taste. It is likely she will hire the 20 blacks at a lower wage and have lower costs of production than the first firm. Certainly she will enhance her competitive position relative to the first firm by hiring the black workers.

The example illustrates several features of the economist's model of employment and discrimina-

1 Affirmative action programs initiated by private firms are not considered in this paper.

2 Gary S. Becker, *The Economics of Discrimination* (2nd ed., 1971), p. 16.

tion. First, discrimination costs employers who discriminate. Second, competitive pressure reduces the likelihood that discriminating employers can survive in a market where some employers are willing to hire without discrimination. Third, the taste for discrimination is likely to vary across the population. Consequently, market forces will encourage those with a reduced taste for discrimination to hire workers from the disadvantaged group. The model can be modified to account for productivity differences among workers. In this case, wages would differ according to differences in productivity in a situation without discrimination, and competitive firms that discriminated would still experience lower profits than firms that did not discriminate.

Similar analysis can be applied to discrimination against firms owned by minorities or women. Once again, firms, or consumers who discriminate against a firm because of the race of the owner will bear a cost—either in terms of higher prices or higher search costs. The latter would occur when a customer found a low-cost minority-owned firm but decided to keep looking for a white-owned firm instead. Further, just as employers are interested in productive and low-cost subcontractors, competitive pressure tends to weaken discrimination against minority-owned firms. For example, if existing prime contractors discriminate against minority subcontractors by selecting white subcontractors who are charging higher prices, than savvy entrepreneurs can enter the market, use the cheaper minority subcontractors, and capture business from the contractors who practice discrimination.

The existence of uncertainty and imperfect information also affects the market outcome. It is not possible to know the productivity of a worker by observing the worker in an interview, or to know whether a firm will fulfill its contractual obligations satisfactorily by walking into the reception area. People often engage in some search activity in order to learn about prices and which suppliers are most reliable. People economize on these search costs. Repeat buying is one way customers reduce search costs—once a reliable supplier is found they continue to use that supplier. It is not worthwhile to engage in additional search costs once the identity of a reasonably priced supplier is found. Of course, this type of activity will make it more difficult for new suppliers to break into a market.

This brief review of economic analysis of discrimination suggests that market forces tend to attenuate the economic effects of racial prejudice. This is not to suggest that discrimination does not exist in competitive markets, but to note that economic agents are forced to bear the costs of their discriminatory actions in the marketplace. Competition encourages economic agents to economize, and one way to economize is to cease costly discrimination.

Some may think that this discussion is strictly theoretical, and that actual markets do not behave in this fashion. But, there is a growing literature documenting the effects or market forces in the post-Reconstruction South. Jennifer Roback has shown that labor laws developed in southern States in the Jim Crow era were passed because the political majority did not like the outcome of market forces.[3] In particular, competitive pressure in labor markets did not generate economic exploitation of blacks, so legal resources were used. Roback concluded, " . . . the evidence indicates that the law, not the market, was the chief oppressor of blacks in the Jim Crow period."[4] Roback also found that segregation of streetcars was fought by the streetcar companies.[5] Robert Higgs found that competitive pressure in southern labor markets tended to equalize payments

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3 Jennifer Roback, "Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?," *University of Chicago Law Review*, 51 (1984), p. 1161.

4 Ibid., p. 1192.

5 Jennifer Roback, "The Political Economy of Segregation: The Case of Segregated Streetcars," *Journal of Economic History*, 46 (1986), pp. 893–917.

for equal work.[6] Substantial evidence also exists that shows economic progress by blacks prior to the passage of the Civil Rights Act of 1964. Both economic theory and considerable empirical evidence support the idea that competitive pressure attenuates the effects of discrimination.

What Does Nondiscrimination Look Like?

For affirmative action to be successful it is necessary to have some idea what a nondiscriminatory equilibrium would look like. The assumption, sometimes states and sometimes not, that underlies much of the affirmative action enforcement is that each group would participate in every occupation or industry proportionately to the group's representation in the overall population absent discrimination. If 20 percent of the population is black, then 20 percent of the lawyers, doctors, accountants, police, and so on should be expected to be black. When this is not the case, it is presumed the disparity is due to current discrimination or to the effects of past discrimination. Given this assumption, affirmative action programs are needed until equal representation exists in all occupations and industries.

If the assumption is wrong, then affirmative action programs may be striving for the impossible. Cultural and religious differences across groups impact the types of businesses and occupations people enter. The United States is a nation of immigrants, but the immigrants were not randomly selected from the populations of their homelands. They usually brought the specialized skills associated with the regions of the country from which they came.

Business formation rates vary widely by racial and ethnic groups, and discrimination cannot explain the variation in these rates. A study performed by the Minority Business Development Agency with the U.S. Department of Commerce calculated business participation rates of the Nation's largest ancestry groups.[7] The business participation rate (BPR) is defined as the number of self-employed persons per 1000 population of a group. The national average was 48.9 for 1980. The ancestry groups with the lowest BPRs included those one often thinks of as facing discrimination—Puerto Ricans, Subsaharan Africans, and Mexicans, for example. However, other groups that have faced discrimination have rates substantially above the national average—Japanese, Chinese, and Koreans for example. Cubans are substantially above many other Hispanic groups, and above the regional average for the South. The highest rates are not those from England, Germany, or other countries in western Europe, but those from eastern Europe—Russians and Rumanians. These differences suggest that a world without discrimination would not yield equal representation in every occupation or in business formation rates. Other historical events shape today's economic world, and we cannot presume that equal representation is the norm to strive after.

It is important to distinguish between stocks and flows when evaluating the operation of markets. The makeup of an industry at a point in time is a stock concept while the rates of entry into the industry and exit from the industry are flow concepts. Suppose we are examining utilization of minority-owned firms in the construction industry. Further, suppose there were no minority-owned firms in the industry at a point in time due to discrimination, and then the formal barriers faced by minority-owned firms are removed due to passage of civil rights legislation. Finally, suppose that each year minority-owned firms make up a proportion of entrants equivalent to what would be expected in a world of no discrimination. It will take years before the proportion of firms in the industry (the stock concept) composed of minority-owned firms is equal to the proportion of entrants that are minority-owned firms.

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6 Robert Higgs, "Firm-Specific Evidence of Racial Wage Differentials and Workforce Segregation," *American Economic Review*, 67 (1977), pp. 236–45.

7 *See* Frank A. Fratoe and Ronald L. Meeks, *Business Participation Rates of the 50 Largest U.S. Ancestry Groups: Preliminary Report* (1985).

This is illustrated with a simple example. There are 100 firms in the industry, and a firm that enters exists for 10 years. Initially (year 0), there are no minority-owned businesses, but beginning in year 1, 20 percent of the new entrants are minority-owned businesses. Given the exit rate of 10 percent, it would take 10 years before the percent of the minority-owned businesses in the industry equalled 20 percent. This example could be complicated by allowing firms to exist longer or by having rates determined by probalistic method. The period of time it would take for minority-owned businesses to make up the "correct" proportion of the industry would take longer, but the main point of the example would be the same.

This example shows that if one wants to determine whether discrimination currently exists in a market, one should look at entry rates rather than the proportion of firms that are owned by minorities. If somehow one knew that 20 percent of the firms would be owned by minorities absent any discrimination, it does not imply that failure to achieve 20 percent minority representation is a sign that a discrimination persists. Entry rates provide more information about the current and recent conditions of the market than disparity in the existing stock of firms. Even without current discriminatory behavior it could take years before the new long-run equilibrium would be achieved.

Proponents of affirmative action programs likely would argue differently, though. They would argue that the market process will take too long, and affirmative action programs are needed to accelerate the process. Further, many would argue that past discrimination still has effects in that minorities face educational and financial constraints that make it unlikely that the entry rates are free from the effects or discrimination. Again, affirmative-action programs are judged necessary to offset these advantages. I believe these arguments fail for several reasons—some of which are economic and others legal.

Costs of Affirmative Action

The costs of accelerating the movement toward the new long-run equilibrium may be very high. In the example used above, the costs of immediately having minority-owned firms make up 20 percent of the industry would be enormous. Existing firms would have to expand artificially. In the absence of growing demand, the latter would be ineffectual. Developing business skills and experience takes time. Minority entrepreneurs would not exist in sufficient numbers. An affirmative action program that required the use of minority-owned firms beyond the existing firms' capabilities would lead to an acceleration of entry by minority entrepreneurs, but many of these entrepreneurs would likely fail once the government program was over.

The capacity of new firms always will be relatively small, and their inexperience implies that they are not qualified for many activities that established firms are qualified for. To push too fast could have two negative consequences. First, minority-owned firms that lack experience or capabilities to perform certain tasks but are still given the tasks, may face many difficulties, leading suppliers, customers, and other firms to conclude that minority-owned firms are, in general, incapable of doing the work. This would negatively affect future prospects of minority-owned firms.

Second, many firms fail because of over expansion and capital-flow difficulties when moving from very small scale to larger scale production. The likelihood of such failures among minority-owned firms is greater if the government attempts to accelerate the rate of entry and the rates of growth of these firms. Affirmative action programs can increase minority participation in the short run, but there are reasons to believe that they will have little impact on the long run unless the programs continue indefinitely. Stephen Coate and Glenn Loury offer another reason to think affirmative action programs may not lead to a better long-run solution. They note that discrimination reduces the incentive to invest in skills that relate to employment or business opportunities that are blockaded. But, affirmative action programs that provide preferential treatment of the groups that formerly faced discrimination may also discourage the incentive to invest in those skills. Coate and Loury show that patronization of the favored group may reduce the incentive to acquire the necessary skills for the tasks under consideration. Without the acquisition of

the skills, the favored group will not be able to compete on an equal basis in open markets.[8]

Loury extends the analysis in another paper. He shows that, even when minority and majority groups have equal abilities on average, requiring equal representation in positions that require the development of certain skills may distort incentives so that the minorities fail to make the necessary investments. Asymmetric information in labor markets makes it difficult for enforcement agencies to develop policies that fail to have the unintended consequences of underinvestment by the members of the group receiving preferential treatment. Second, Loury advocates a policy of gradualism rather that radical intervention when trying to correct for disparities that are the result of past discrimination.[9]

There are also legal arguments against using affirmative-action programs to accelerate the expansion of minority-owned firms. The correlation between those who faced actual discrimination and those who benefit from the program is very low. Such programs benefit firms already in business and people who are thinking about entering the market. Those who have already entered the market successfully did not face the discrimination others faced in the past. Those harmed by the old practices are not the firms currently in business. But it is these new firms that receive the benefits. Similarly, the people who bear the cost of the remedy are unlikely to have been the actual people who excluded the minority firms in the past. As Justice Stevens noted in the *Croson* decision, "Ironically, minority firms that have perished, are most likely to benefit from an ordinance of this kind.[10]

Perceptions

There is a difference between the perception of discrimination and the existence of discrimination. Professor Huey Perry of Southern University in Baton Rouge, Louisiana and I did a predicate study for the State of Louisiana after the *Croson* decision.[11] We included a survey to determine the perceptions of respondents in the construction industry concerning the fairness of the State's contracting system. Those surveyed were asked, for instance, to evaluate the statement, "Companies owned primarily by blacks are discriminated against when competing for construction work on State public works in road, bridge, port, airport, transit, and highway construction in Louisiana." Respondents could say that they strongly agreed, agree, were neutral, disagreed, or strongly disagreed with the statement. Similar statements were included for women-owned firms, firms owned by French-Acadians, and firms owned by other minorities (Asians, Hispanics, and Native Americans). Each targeted group had a larger percentage that agreed or strongly agreed that their group faced discrimination than agreed or strongly agreed that any other group faced discrimination.

We failed to ask a similar question for firms owned by white males. I am confident that had we asked the question, a larger percentage of white males faced discrimination than would have agreed that firms owned by any other group faced discrimination. We received numerous written statements from white respondents about reverse discrimination. Obviously, all the groups cannot be correct. It is also obvious that a serious gap exists between reality and perceptions, at least for some of the groups.

An exaggerated sense of unfairness can occur under both discrimination and affirmative action. Suppose 10 whites and 10 blacks apply for the same job. If the employer discriminates against blacks and hires a white worker, the nine white

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8 Stephen Coate and Glenn C. Loury, "Will Affirmative-Action Policies Eliminate Negative Stereotypes?," *American Economic Review*, 83 (1993), pp. 1220–1240.

9 Glenn C. Loury, "Conceptual Problems in the Enforcement of Anti-Discrimination Laws," working paper (1995).

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

11 John Lunn and Huey L. Perry, "An Analysis of Disparity and Possible Discrimination in the Louisiana Construction Industry and State Procurement System and Its Impact on Minority- and Women-owned Firms Relative to the Public Works Arena," *Final Report for the Governor's Task Force on Disparity in State Procurement* (April 1990).

applicants who did not get the job cannot blame their failure on discrimination. All 10 of the black applicants can believe it was due to discrimination; but, in reality, only one did not get the job due to discrimination. Nine of the black applicants would not have obtained the job absent discrimination. Similarly, if a black applicant is hired because of affirmative action programs, all 10 of the white applicants can believe they lost the job due to racial preferences, when this is true for only one of the applicants. I fear that continued reliance on programs that focus on race, ethnicity and gender exacerbates the gap between reality and perceptions, and make it more difficult to achieve a society that provides equal opportunity for all.

Affirmative Action as Interest Group Politics

Economists regard regulation and other public policies as the outcome of competition among interest groups for favors from elected officials. The motivation for at least some of the affirmative action programs in place today is due to interest group politics rather than principled concern for social justice. This is nothing new, since the Jim Crow era in the American South also is consistent with the hypothesis that government regulation often aids politically influential interest groups. Disenfranchised blacks in the South were unable to influence the political processes, which was then used by whites to discriminate against blacks when the market process failed to do so.

Blacks are no longer disenfranchised, and in many communities make up an important block of voters. The same is true for numerous other groups. The stated goal of most affirmative action programs is to provide a remedy for discrimination against minorities. Examination of hearings undertaken by the government bodies provides evidence that interest group politics often are at work. In Louisiana, for example, the legislation that provided for the predicate study concerning the State's construction contracting required the inclusion of French-Acadians as a minority group. In Dade County, Florida, an affirmative action program for black-owned firms was expanded in the early 1990s to include women and Hispanics, groups which controlled the county and city governments and ran many of the largest construction firms in the area. Statistical evidence from the area shows that Hispanic-owned firms receive more awards from the local government than would be expected on their numbers and size.[12]

Beneficiaries of affirmative action programs often are the larger and better situated minority- or women-owned firms. For example, a recent study for the city of Richmond found that the bulk of city construction business went to four large minority-owned firms.[13] In a study of preferential programs in several countries, Thomas Sowell concluded that the programs benefitted members of the protected group at the upper end of the economic ladder, and harmed those at the lower end.[14] Unfortunately, those at the lower end of the economic ladder often have less impact on public policy than those at the upper end.

Conclusions

Competitive markets tend to reward entrepreneurs who provide goods and services that people want, and do so at relatively low cost. Markets tend to reward workers who are productive. Nonmarket means of rewarding producers or workers are more likely to base rewards on personal characteristics. In some situations, many think that this is good. Perhaps markets reward people of great moral character less than a nonmarket system would. However, nonmarket systems also permit people to indulge in their taste for discrimination without having to bear the cost of their actions. Market forces attenuate the economic

12 John Lunn, Todd P. Steen, and Tom Bonnema, "Predicate Studies and Regression Analyses: A Look at Dade County," working paper (1996). Regression analysis shows women-owned firms are receiving the contracts expected given their numbers and size.

13 National Economic Research Associates, Inc., "Availability and Utilization of Minority Business Enterprises at the City of Richmond, Virginia, Richmond School Board, and Richmond Redevelopment and Housing Authority," July 18, 1991, p. 75.

14 Thomas Sowell, *Preferential Policies: An International Perspective* (New York: W. Morrow, 1990).

effects of racial prejudice by making those who discriminate bear a cost for their behavior. Competition tends to drive out higher-cost producers, which would include businesses that discriminate.

Affirmative action programs can create the appearance of greater equality of opportunity by artificially increasing utilization of the protected groups. If these programs discourage people from investing in the formation of the skills needed to run businesses successfully, or increase the probability of poor performance on the part of minority-owned firms, then these programs will fail to achieve the goal of equal opportunity for all. The unintended negative consequences of affirmative action programs may result in more harm than good. I believe that open, competitive markets offer the best hope of achieving a society which provides equal economic opportunities for all.

Beyond Black and White: Asian Americans and Affirmative Action

By Gail M. Nomura

In the current public debate and scrutiny of affirmative action, there is much divisive rhetoric playing on the fears, prejudice, and misunderstandings of Americans. Affirmative action has been blamed for many of the ills facing our nation and society. Accurate information is needed in any sound attempt to understand and evaluate this complex issue. This paper presents historical information on Asian Americans. Although Asian Americans are often not included in affirmative action programs designed to overcome the continuing effects of discrimination and promote equal opportunity for historically underrepresented/disadvantaged groups, this paper challenges us to consider the implications of over a century of legislative, economic, and social exclusion, restriction, and discrimination of Asian Americans in assessing whether Asian Americans fit the category of historically underrepresented/disadvantaged. This paper contend that the history of Asian Americans in the United/States compels us to move beyond the black and white paradigm for United States race relations in discussing affirmative action.

The group we call Asian American is not a unified, homogeneous grouping. The ethnic peoples called Asian Americans include Chinese, Filipino, Japanese, Korean, South Asian (e.g., Asian Indian, Pakistani, Bangladeshi, and Sri Lankan), and Southeast Asian (e.g., Vietnamese, Lao, Hmong, Cambodian, Thai, Indonesian, Malaysian, and Singaporean). The complexity of this term "Asian American" can be further illustrated. Note the many ethnicities within the large subcategory of Southeast Asian American, or even different groups within the seemingly homogeneous subcategory such as Japanese American, where Okinawan Americans comprise a distinct grouping.

To the above Asian American grouping we might also add Pacific Islanders (e.g., Native Hawaiian, Samoan, Chamoru, Fijian, Tongan, and Tahitian) to create a grouping called Asian/Pacific American (APA) or Asian/Pacific Islander (API). The U.S. Census Bureau lists Asian and Pacific Islanders together and many political coalitions have been formed by these groups, who share some common agendas and histories.

All of these peoples possess distinct histories, languages, cultures, religions, and conflicts among and between themselves. Moreover, there are deep generational and class differences within this grouping in part due to restrictive immigration laws which in the earlier part of the century stunted the growth of Asian American communities. Recent changes in immigration laws have dramatically changed the demographics of the Asian American community with the majority now having immigrated in the post civil rights era and a significant percentage of new immigrants being of the professional class rather than the earlier period when the majority were of the working class. Despite these and many more differences, these groups share a common history in the United States of exclusion and discrimination.

Exclusion is a central theme in the history of Asian Americans. Asian Americans settled and became part of the United States despite efforts of some groups to exclude them on the basic threat they were not "American." Though Asian immigrants provided much of the labor for building the American West in the 19th and early 20th centuries especially for mining, transportation, and agriculture, they were eventually excluded from immigration and naturalization rights on the basis of an assumption that they could never become American and thus posed a threat to American society. In the process of excluding Asians, a definition of American was constructed, an exclusive definition rather than an inclusive one. What was left unexamined were the assumptions that guided the screening criteria of what was "American" and what was not.

Some scholars have noted that Asians became the accepted target of nativist-racist antagonism which served to unify the religiously and ethnically diverse white population in the American West. An American ethnicity could be achieved by European immigrants through the mantra of asserting that they were not Asian. Asians became the necessary "Other" in defining who was an american. The idea of assimilability was utilized.

Asians were inassimilable. Europeans were assimilable. In the process white ethnicity was affirmed. In arguing for the inassimilability of Asians, exclusionists were aiming to define a racist foundation for the United States.

The treatment of Chinese immigrants in the 19th century set the pattern for late Asian immigrants. Chinese were portrayed as biologically inferior and incapable of assimilating to democratic self-government. They were claimed to be naturally inclined to "Oriental despotism" and so a threat to the very foundation of American democratic society. In many Western States Chinese immigrants were denied voting rights, barred from testifying in court cases involving whites, and forced to pay special fees and taxes. But anti-Asian exclusion acts were not limited to state action. On the Federal level, immigration exclusion acts were the most damaging of these legal constraints.

The Chinese Exclusion Act of 1882 was the first in a series of exclusion acts passed by the U.S. Congress that stunted the growth of Asian groups in America and distorted their population composition creating, in the case of the Chinese, an aging "bachelor" society. Passed in the midst of an economic recession in which Chinese became the scapegoat for many on the West Coast, the Chinese Exclusion Act set a dangerous precedent which would have far-reaching effects for subsequent Asian immigrants. There were two major provisions of the act. The first suspended the immigration of Chinese laborers, skilled, unskilled, and those engaged in mining, for 10 years. The second provision denied the right of naturalization to Chinese. The Chinese Exclusion Act was extended twice with additional restrictions in 1892 and 1902 and in 1904 was extended without time limit.

Since very few Chinese women had come before 1880 and Chinese laborers were not able to send for wives after 1882, there was little hope for having a settled family life in America after the Chinese Exclusion Act. By 1990 Chinese males outnumbered Chinese females 26 to 1. In effect the Chinese Exclusion Act prevented family formation in the Chinese community condemning the Chinese in America to becoming an aging bachelor society. Since no new Chinese laborers were allowed in after 1882, the population decreased dramatically with each census from 1890 to 1920. Further, the anti-Chinese movement intensified after the passage of the Chinese Exclusion Act. The Chinese Exclusion Act seemed to legitimize the assumption that Chinese were not fit to become part of American society. Chinese became an easy scapegoat for white frustrations.

The Chinese Exclusion Act set a precedent for the exclusion of all Asian immigrants. In 1907–08 under pressure by the United States, and hoping to halt anti-Japanese sentiment in the United States, the Japanese Government agreed to prohibit the emigration of Japanese laborers to the United States. The Japanese Government, however, continued to allow wives, children, and parents of Japanese in the United States to emigrate. The Japanese community continued to grow as Japanese sent for their wives in the years after 1908, and a generation of American-born Japanese American citizens, nisei, resulted. Exclusionists found fault with the Japanese Government's desire to allow the formation of families in the Japanese American community. The Japanese Government believed that a healthy, stable, family-oriented Japanese American community committed to permanent settlement in America would eliminate anti-Japanese sentiment in the United States. But to exclusionists the coming of Japanese wives meant an increase in the population of the hated Japanese. Even more abhorrent to exclusionists was the resulting birth of a generation with U.S. citizenship since exclusionists could never accept the possibility of a person of Japanese ancestry being American. For exclusionists, race was the key ingredient in determining who could be an American. Exclusionists called for the revoking of citizenship from the nisei on the grounds that they were being raised by aliens ineligible for citizenship.

Further immigration restrictions were imposed against Asians by the Immigration Act of 1917 which created an Asiatic barred zone from which no immigrants from India, Siam, Indo-China, parts of Siberia, Afghanistan, Arabia, and the island of Java, Sumatra, Ceylon, Borneo, New Guinea, and Celebes could come. Then in 1924 Congress passed a major comprehensive immigration law which prohibited the immigration of "aliens ineligible to citizenship." The only "aliens ineligible to citizenship" were Asian. After 1925 no Asian immigration was permitted. This im-

migration law closed the doors to the United States to all Asian immigration except Filipinos.

The racist nature of exclusion of Asian immigrants is unmistakable when one looks at the treatment of Filipinos. Since the Philippine Islands were an American possession after the Spanish-American War in 1898, Filipinos were U.S. nationals possessing the right to migrate to any part of the United States. Since they were not aliens, the 1924 immigration act that prohibited the immigration of "aliens ineligible to citizenship" did not apply to them. Therefore, when exclusionary immigration laws had cut off the supply of Asian labor from China, Japan, and India, Filipinos could step in to fill the labor needs of the United States. Filipinos became an important and visible component in the West Coast migrant labor force in agriculture and in the canneries. But, since exclusionists did not recognize their U.S. national status, they were considered by exclusionists to be foreigners robbing them of economic opportunities. Filipinos were often physically assaulted by exclusionists. Filipinos were U.S. nationals, but, to exclusionists, Filipinos were all too often just another kind of Asian to be excluded.

Exclusionists believed the 1924 immigration act which excluded all Asian immigration should have applied to Filipinos but that Filipinos had escaped exclusion due to the technicality that they were not aliens. This technicality was remedied in 1934. Congress passed the Tydings-McDuffie Act of 1934 which made the Philippines a commonwealth and promised full independence 10 years later. Since Filipinos would become aliens in 10 years the act limited Filipino migration to the U.S. to a quota of 50 a year. The Tydings-McDuffie Act was, in effect, a Filipino exclusion act. As a result, there was little growth of the Filipino population from 1934 to 1946.

The exclusion acts created aging bachelor societies in the Chinese and Filipino communities. Because immigration exclusion laws prevented them from sending for wives and children and anti-miscegenation laws prevented intermarriage with whites, there was little normal family life in the Chinese and Filipino communities. Japanese, on the other hand, experienced steady growth in population since their government was politically strong enough to prevent the passage of total exclusion until 1924. There was enough time to establish a healthy second generation in America though the numbers of Japanese were of course severely limited by restrictive immigration policies. In contrast to the Chinese and Filipinos, the Japanese had a more normal family life and developed a growing American-born citizen generation.

It is striking to note that if Asian immigration had not been restricted the present population of Asian Americans would be considerably larger particularly in the western United States where in the mid-19th century Chinese composed 9–28 percent of the population in many States. Of course, it was the intent of Federal legislation to make sure that Asians would not compose a significant percentage of the U.S. population. In a sense, Federal legislation ensured that Asian Americans would be permanently underrepresented in the United States.

The 1924 immigration law used the category "aliens ineligible to citizenship" to exclude Asians. The exclusion of Asians from the right to become a naturalized American is the key feature that distinguishes the Asian immigrant experience from that of other immigrants to America. In 1790 Congress had originally set a racial condition for naturalization by restricting the right of naturalization to an alien who was a "free white person," but after the Civil War in 1870 Congress extended the right of naturalization to former slaves by making "aliens of African nativity and persons of African Descent" also eligible. Naturalization laws did not specifically deny naturalization to Asian immigrants, but the 1882 Chinese Exclusion Act denied Chinese naturalization rights. This act did not specify any other Asian group.

The question remained whether Asians could be classified within the definition of free white. Some lower Federal courts had issued naturalization papers to some Japanese, for the 1910 census indicates that there were 420 naturalized Japanese. But the U.S. Attorney General ordered Federal courts in 1906 to stop issuing naturalization papers to Japanese. Japanese took their case to the U.S. Supreme Court in the test case of Takao Ozawa, a Japanese immigrant who met all of the nonracial requirements for naturalization. Ozawa argued in a legal brief for the U.S. Supreme Court that "In name, General Benedict Arnold was an American, but at hear he was a traitor,. In name, I am not an American, but at

heart I am a true American." In November of 1922 the U.S. Supreme Court heard Ozawa's cased but ruled that Ozawa did not have the right of naturalization since he was of the Mongolian race and therefore was not judged to be either a free white person or and African by birth or descent. The Court had affirmed a racial prerequisite for naturalization.

It is interesting to note how the Court handled the question of naturalization rights of South Asians who by the racial classifications of that time were considered to be Aryan. Between 1914 and 1923 some 70 South Asians had become U.S. citizens based on the criterion that they were "high caste Hindus of Aryan race" and were thus Caucasian and entitled to be considered "white persons" eligible for citizenship. Although in the 1922 Ozawa decision the court had based its ruling on the racial definition that white person meant Caucasian, in 1923 in the Bhagat Singh Thind decision, the U.S. Supreme Court further refined its exclusionary definition for naturalization now relying on the "understanding of the common man" rather than on a basis of racial classification. The Court argued that Congress never meant to include South Asians in the definition of white persons since in 1790 Congress associated the term white persons with immigrants from northern and western Europe and in 1870 Congress assumed it meant Europeans. The Court further reasoned that in denying South Asians immigration privileges in 1917 Congress was opposing their naturalization, too. The Court concluded that neither the public nor Congress ever intended that South Asians be granted naturalization rights.

Thus the U.S. Supreme Court affirmed the legality of the useful category of "alien ineligible to citizenship." In making Asians ineligible to citizenship, the Ozawa and Thind decisions greatly facilitated the total exclusion of all Asian immigration. Congress utilized this category of "alien ineligible to citizenship" to prohibit all Asian immigration in 1924. The denial of their naturalization rights led to the political weakness of the Asian immigrant communities in the prewar period. Asian immigrants were permanently disenfranchised in America. No politician sought their political support nor cared for their needs. In fact politicians found it popular among their voters to call for further restrictions against Asians. The permanent status of Asian immigrants as "aliens ineligible to citizenship" also served as the basis for further discriminatory laws such as the anti-alien land laws passed in various /West Coast States which greatly restricted their economic opportunity by prohibiting the ownership, leasing, renting, and sharecropping of land by "aliens ineligible to citizenship." Furthermore, despite the fact that Filipinos were U.S. nationals and not aliens, anti-alien land laws were generally interpreted to apply to Filipinos. Filipinos were considered to be "noncitizens" who were not eligible for citizenship. Filipinos thus were prevented from setting up farms of their own and condemned to migrant labor status.

Exclusion from naturalization condemned Asian immigrants to the permanent status of being forever foreign in the United States. While Asian immigrants were systematically denied every avenue of legally becoming American they were faulted for being foreign. Exclusionist forces perceived Asian immigrants as being incapable of being American. In the eyes of exclusionists, somehow the highly touted melting pot of America could never be hot enough to melt Asian immigrants into the pot of America. A case in point is the editorial statement of Bellingham's *The Reveille* after the September 1907 Bellingham anti-Hindu riot in Washington State. On September 6, 1907, *The Reveille* stated:

> From every standpoint it is most undesirable that these Asians should be permitted to remain in the United States. They are repulsive in appearance and disgusting in their mannersnTheir actions and customs are so different from ours that there can never be tolerance of them. They contribute nothing to the growth and upbuilding of the city as the result of their labors.

The immigrants were not ignorant of the impossible position in which they were placed by the illogic of the exclusionists who denied them naturalization, socially discriminated against them, economically restricted them, and yet demanded that Asians assimilate or be excluded. As one Japanese immigrant history states, "such is like tying someone's feet, ordering him to run, then finally clubbing him to death for not being able to run."

With the outbreak of World War II on December 7, 1941, Japanese immigrants who had been

denied the right of naturalization, became enemy aliens. After the outbreak of war with Japan they were viewed with great suspicion. They and their citizen children were subject to a myriad of restrictions and on February 19, 1942, with the issuing of Executive Order 9066 by President Franklin D. Roosevelt, more than 110,000 Japanese Americans were all forcibly rounded up, removed from their homes on the West Coast and interned in inland concentration camps located in California, Idaho, Wyoming, Utah, Colorado, Arizona, and Arkansas. Two-thirds of those interned were U.S. citizens. The exclusionists' ultimate goal of physical removal had been achieved. Though the United States was at war with Germany and Italy, German Americans and Italian Americans were not rounded up and interned en masse. Clearly the difference in treatment was based on race.

The internment of Japanese Americans in World War II marked the culmination of a century of a racist policy of discrimination and exclusion of Asians. Always considered foreign because of their race even the American-born, second generation Japanese American, the nisei, were interned in inland concentration camps during the war along with the immigrant, first generation, the issei. Japanese Americans were never charged with a crime. There are no documented cases of sabotage attributed to Japanese Americans. Moreover, Japanese Americans fought with distinction in the U.S. armed forces in World War II in both the European and Pacific theaters. The 100th battalion and the 442nd Regimental Combat Team were the most decorated units of their size in American military history. Furthermore, government documents uncovered in 1981 through the Freedom of Information Act revealed that the initial recommendations for mass internment of Japanese Americans were based on racial considerations and that in later cases argued before the U.S. Supreme Court the government knowingly suppressed, altered and destroyed evidence proving that there existed no military necessity for the removal of Japanese Americans from the West Coast. On the basis of this uncovered evidence of government duplicity, the lower courts finally overturned the convictions of the World War II test cases of Korematsu, Yasui, and Hirabayashi in the mid-1980s and, due to the vigorous educational campaign by the Japanese American redress movement, the legislative and executive branches of the U.S. government moved to correct this injustice. In 1988 Congress passed, and the President signed legislation to apologize and pay monetary compensation to redress the relocation and internment of Japanese Americans during World War II.

The exclusion era slowly came to an end starting in the midst of World War II. The United States began to change its racist exclusionary policies in response to pressures by the Chinese Nationalist Government to repeal the Chinese Exclusion Act and in response to Japan's wartime propaganda that pointed out the hypocrisy of America's claims to be fighting for liberty and democracy for Asians abroad while discriminating against Asians in America. After all, Chinese, Filipinos, and South Asians were allies in arms in Asia. As Filipino American activist Trinidad A. Rojo argued, "From the standpoint of biology, color line, history, anthropology, logic, justice, fairness, and world's democracy, your naturalization law is consistently inconsistent toward us. It is a record against you rather than against us." In December of 1943 Congress repealed the Chinese Exclusion Act establishing a token quota of 105 per year for China and granting naturalization rights to Chinese already residing in the United States. Despite the great symbolic elimination of total Chinese exclusion, this new law was intricately designed to maintain the almost total exclusion of Chinese immigration. Not only was the inadequate quota of 105 for all of china ridiculous, even insulting, especially in comparison to the quota of 67,721 for whites from Great Britain, but there were other restrictions attached that further limited even this low quota of Chinese immigration. Later in 1946 Filipinos and South Asians were granted naturalization rights and immigrants from India were granted a quota of 100.

In 1952 Congress passed the Immigration and Nationality Act which eliminated race as a bar to immigration and naturalization. Known as the McCarran-Walter Act of 1952, this law ended the total exclusion of Asian immigration to the United States by giving every country a quota and made all races eligible for naturalization. However, this act still perpetuated a discriminatory barrier to Asian immigration by giving only a token quota to Asian countries. China had a quota of 105. Japan

had a quota of 185 and most Asian countries had a maximum quota of 100.

It was only after the passage of the 1965 Immigration and Naturalization Act that Asian countries were given quotas equal to other countries of the world. This ending of immigration exclusion and restriction has greatly changed the demographics of the Asian American community. Half of all documented immigrants coming to the United States are now Asian. Asian Americans are the fastest growing group in the United States due to this immigration with their population doubling with each census since 1970. A high percentage of the immigrants from Asia are close relatives of U.S. Citizens and of the educated, professional, and business classes since immigration laws give preference to these categories. Because of the long years of exclusion and immigration restriction there is a tremendous backlog of Asian applicants for immigration. To these growing numbers of post-1965 immigrants must be added the immigrants from Southeast Asia who have entered the United States as refugees since the fall of Saigon in 1975. Many of these Vietnamese, Lao, Hmong, and Cambodians have found it very difficult to quickly adapt to life in the United States. There is a high rate of poverty among these groups.

Though the post-1965 Asian immigrants entered the United States in the post-civil rights era they have inherited the legacy of anti-Asian exclusionary history and anti-immigrant bias. Whether they are the rich, highly educated professional living in the most elite areas of their community or the poor refugee living in the inner city, these new immigrants often are the targets of racially motivated physical violence, hate, and discrimination. Emblematic of this anti-Asian sentiment is the 1982 killing of Vincent Chin in Detroit.

Asian Americans know that racism and sexism are alive and well and affect their daily lives. They support affirmative measures to eradicate discrimination. Yet many have mixed views on the interpretation and implementation of affirmative action which have had a perceived negative impact on them. They see upper limit quotas being imposed on them in higher education and their exclusion from affirmative action programs despite the effects of past and present anti-Asian/anti-immigrant discrimination which limits their mobility. Entry level admission may be easier now but the ever present glass ceiling prevents true structural changes at the upper levels of power. Furthermore, they see themselves used in anti-affirmative action rhetoric as examples of a "model minority" (not model American) which has succeeded without any affirmative action to rectify past discrimination yet see that their income and status does not match their educational level as compared to whites.

Despite the confusing rhetoric surrounding affirmative action, it seems clear that affirmative action is needed even more today to promote equal opportunity and justice for all.

III. Community Perspectives Regarding Affirmative Action

Affirmative Action: An American Tradition

By Donna R. Milhouse

I. Introduction

As attacks on affirmative action continue to mount, and calls for its dismantlement permeate, it is important to reflect on the historical use of preferences in this country to exclude African Americans and women from opportunities. This position paper explores the important benefits of affirmative action programs as vehicles of inclusion, and attempts to dispel the myth that such programs are stigmatizing rather than a blueprint for creation of opportunities. Since much of the affirmative action debate appears to be racially focused, particularly as it relates to African Americans, this discussion chiefly revolves around the racial implications of affording preferences.

II. Position

A. Historical Use of Preferences to Exclude

It is undisputed that for centuries, white males enjoyed preferential treatment in all aspects of economic, social, educational, and political life in America, to the detriment and exclusion of African Americans and women. Despite promulgation of laws prohibiting discrimination, it persists. The pervasive effects of past legalized and institutional discrimination against African americans and women likewise continue to be entrenched and contaminate our society.

Affirmative action as a remedial measure to address past and continuing racial discrimination, entails making a conscious effort to include African Americans as full participants in society, particularly with respect to opportunities in education and employment. The need today for legally sanctioned affirmative action programs which focus on achieving diversity, emanates from actions that were affirmatively taken to legally and systematically exclude African Americans from the sphere of influence in virtually all aspects of American life.

This affirmative exclusion began with the enslavement of African Americans in this country centuries ago. Official and concerted acts of isolation continued with the United States Supreme Court's pronouncement in the historical *Dred Scott v. Sandford*[1] decision in 1857, that declared that African descendants, even if emancipated, were not "citizens" entitled to enjoy the protections and rights guaranteed by the Constitution.

Although the 13th amendment to the United States Constitution marked the official end of the enslavement in 1865, and the 14th amendment was ratified in 1868 to provide equal protection under the laws for African Americans, the judiciary continued to take affirmative steps to deprive equality of opportunity and to protect the preferences that only white men enjoyed. Indeed, 1996 marks the 100-year anniversary of the *Plessy v. Ferguson*[2] decision in which the United States Supreme Court sanctioned the separate but equal doctrine.

Thus, for another 58 years, the legal segregation of African Americans from mainstream society continued until the pivotal 1954 Supreme Court decision of *Brown v. Board of Education.*[3]

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1 60 U.S. 393 (1857).

2 163 U.S. 537 (1896).

3 347 U.S. 483 (1954).

Even with the enactment of the Federal Civil Rights Act of 1964,[4] which specifically prohibited racial discrimination in employment and other areas, preferences for white males persisted in practice. It simply was and is not enough to pronounce, after centuries of systematic racial oppression, that the playing field is level and expect the scales to miraculously balance. In fact, there is no parity on the playing field. Outlawing discrimination certainly did not eliminate discriminatory treatment of African Americans. It is precisely because it is very difficult for those who have embraced notions of racial superiority and entitlement to automatically dispel these strategically cultivated and deeply tooted views, that conscious efforts to include African Americans in all educational and employment circles is necessary. Casual indifference merely perpetuates the status quo. Inclusion requires creativity, sincerity, effort, and most importantly, a legal mandate. In fact, endorsement of affirmative action programs, at least by a government which actively sanctioned and perpetuated racial inequities, is crucial and necessary if this Nation is to continue to strive to fulfill the intent and spirit of the 14th amendment's equal protection clause. It is critical to ensuring racial parity on employment, educational, and other economic fronts.

B. Narrow Remedy

Given the vigor with which opponents of affirmative action attack such programs, the perception could easily be that these programs are widesweeping, all encompassing tools designed to strip white males of any civil protections under the law. In reality, the institution of affirmative action plans are only required under certain relatively narrow circumstances, and are generally confined to public employers and private employers who receive government funding and grants, or those who enter into certain contractual arrangements with governmental entities. Thus, many employers are not subject to any affirmative action obligation whatsoever.

In addition, even when employing its most liberal interpretation of affirmative action programs, courts have been careful to craft standards that ensure that the rights of white applicants are not unnecessarily impinged. Thus, in the seminal case of *United Steelworkers of America v. Weber*,[5] the United States Supreme Court determined that in order for a voluntary affirmative action plan to be permissible, it must be (1) developed for the purpose of eradicating a racial imbalance that was created by historically segregated job classifications, (2) temporary in nature so as to achieve a racially balanced work force as opposed to maintaining one, and (3) carefully tailored to prevent white employees from being completely eliminated from consideration or "unnecessarily trammel" their rights (e.g., through discharge or demotion).

Moreover, where the Supreme Court was once inclined to uphold Federal affirmative action programs that were substantially related to satisfying an important governmental purpose (e.g., promoting diversity in certain industries), the Court is embracing a far more rigid test for establishing the validity of these programs.Thus, in the recent case of *Adarand Constructors, Inc. v. Pena*,[6] the Court adopted a strict scrutiny test to strike down a Federal Department of Transportation 10 percent set-aside plan for disadvantaged contracting firms. The Court found that discrimination used to exclude African Americans and women, and racial preferences designed to provide racial and gender parity in areas from which African Americans have been traditionally excluded, both must be examined under strict scrutiny confines. The strict scrutiny test requires that the program be narrowly tailored to serve a compelling governmental interest. Strict scrutiny suggests that only in the most egregious and outrageous circumstances of intentional discrimination, will affirmative action programs survive microscopic, constitutional evaluation, and be upheld.

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4 Pub. L. No. 88–352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a et seq. (1988 & Supp 1994)).

5 443 U.S. 193 (1979).

6 115 S. Ct. 2097 (1995).

This most recent pronouncement by the United States Supreme Court is indicative of a retreat from the goals of encouraging race and gender conscious affirmative measures to ensure the inclusion of people of color and women in mainstream society as active and productive citizens. The *Adarand* Court's most conservative view is also suggestive of its willingness to ignore the inherent differences between racial preferences that traditionally have been use to promote racial superiority, and racial preferences which are tools for inclusion of African Americans who historically and continually are disenfranchised. As Justice Stevens in his dissenting opinion in *Adarand* explained:

> There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception to the Government's constitutional obligation to "govern impartially," should ignore this distinction.[7]

C. Michigan Review

Unfortunately, just as Federal judicial pronouncements appear to signal a reluctance to continue affirmative action efforts in employment and other areas, the Michigan legislature is likewise entertaining significant scalebacks to affirmative action programs. At least three measures are currently pending in the Michigan House of Representatives, which, if enacted, would signal a significant retreat from the goals of racial parity and inclusion. Joint House Resolution L proposes an amendment to the Michigan Constitution specifically prohibiting public employers and institutions of higher education from granting preferential treatment to individuals on the basis of race, religion, sex, color, ethnicity, or national origin, in the connection with employment, education, or public contracting.

Substitute House Bill 4972 seeks to impose a host of prerequisites which must be satisfied by public employers before the adoption and implementation of affirmative action plans can be accomplished. These conditions include approval of the plan by the Michigan Civil Rights Commission. The bill would effectively overrule the Michigan Supreme Court's opinion in *Victorson v. Department of Treasury*[8] in which Justice Conrad Mallett, writing for the majority, concluded that an affirmative action plan which was implemented but not approved by the Civil rights Commission was not automatically void, and did not constitute illegal discrimination as a matter of law. Substitute House Bill 4972 would automatically invalidate such unapproved plans, and make it much more difficult procedurally and substantively to acquire approval.

Finally, House Bill 4054 would amend the State's Elliott-Larsen civil rights act to preclude all employers and educational institutions from using different scores for determining minimum testing results required for job qualification and school admission on the basis of race, sex, religion, color, or national origin.

These are unfortunate legislative attempts to dismantle and virtually outlaw what little affirmative action is allowed, and represent a failure to address the importance of achieving diversity in our places of work and study. These attempts also ignore the continuing racial imbalance which exists, not because African Americans lack merit, but because barriers to full inclusion of African Americans in employment and higher education remain. A retreat from affirmative action mandates for public employers will surely sound the death knell for any voluntary programs by private employers.

D. Necessity of Affirmative Measures of Inclusion

Programs which seek to encourage conscious efforts to include qualified and talented African Americans in employment and higher learning institutions are necessary, because, without

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7 115 S. Ct. at 2120 (citation omitted).

8 439 Mich 131 (1992).

them, racial imbalances would continue to persist. History has demonstrated that legal prodding is required to compel the dominant culture to relinquish some of the power and entitlement to which they have become so very much accustomed. Indeed, many in power attempt to justify continued racial dominance by attributing racial imbalances to lack of qualifications and merit among the general African American population. This attitude generally emerges from feelings of racial superiority which have been carefully and systematically ingrained.

Sentiments of dominance and entitlement surface particularly in the form of resentment when African Americans appear to receive even a meager crumb of the American pie. There is no public outcry when other white Americans receive preferential treatment in employment and education because of connections, economic or social status, familial ties, or other reasons unrelated to merit. Moreover, the simple truth is that merit has not always ruled in connection with selections in employment and education. So many other factors have traditionally played a role. It is no less than curious that preferences that are extended to African Americans ignite such a furor and spawn public debate over merit. Lack of opportunity simply cannot be equated with lack of ability. The challenge is to redefine merit so that more meaningful considerations—which increase the diversity of the applicant pool—are made, as opposed to adopting notions of merit and qualifications which perpetuate the status quo.

Furthermore, the argument that affirmative action programs somehow stigmatize African Americans, who will be viewed as advancing because of race instead of merit, again appears to arise from accepted notions of white dominance and superiority. It assumes that black people who are admitted into colleges and universities and hired and promoted into jobs traditionally reserved for whites, are not qualified or equipped to take advantage of the opportunity. It also presumes that without affirmative action, white people would be more inclined to be accepting and respectful of African Americans as deserving participants in the work place and study halls.

The obvious truth of the matter is that long before affirmative measures for inclusion were instituted, white America viewed African Americans as unqualified and undeserving of any measure of success, control, or privileges this society had to offer. It would seem far more stigmatizing to be devoid of any prospects for opportunity for educational and economic advancement and relegated to a racially subordinate status, than to be offered an opportunity which had been historically denied. One way to overcome preconceived notions based on race is to increase interaction with those of other races in the very place where inclusion has been traditionally denied.

Finally, use of principles of reverse discrimination and the equal protection clause to stifle efforts at diversity and inclusion, turns civil rights protections on its head. Clearly, laws against discrimination and the constitutional mandates for equal protection under the 14th amendment, were not advanced in response to any discrimination being suffered by white men. To now make the equal protection clause and civil rights laws incongruous with assuring equal opportunity through proactive approaches to inclusion of historically disenfranchised groups is counterproductive and does nothing more than perpetuate the status quo of white male dominance. Indeed, as United Stats Supreme Court Justice Harry Blackmun reflected and observed in his dissenting opinion in *Bakke*:

> I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. and in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.[9]

Justice Blackmun's observations capture the very essence of what must be accomplished in

9 Board of Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978).

order to affect remedial change and move closer to a racially balance society.

III. Conclusion

The history of inclusion in this country has been far from exemplary and indeed shameful. The sooner all members of our society become welcomed and productive participants, the less divisive this country will become. Achieving real and meaningful diversity in all segments of academic, economic, and social life requires dispelling long-held notions of superiority, and can only be accomplished through concerted and deliberate efforts. Attempts to retreat from action which affirmatively seeks to remove obstacles to inclusion and creates genuine opportunities for groups which traditionally and continually face opposition, must be resisted. We simply cannot afford to ignore the realities of the past, the challenges of the present, and the promise of the future with respect to race and gender issues in America.

Note: The views expressed in this paper are those of the author and do not necessarily represent the views of AAA Michigan.

The World Your Children Will Inherit

By Jeannie Jackson

I want this paper to discuss something that is fairly new to us. Lately we have been saturated with "cultural diversity" or similar terms. What does it mean for the future? How will this impact affirmative action?

I will explore some concerns of Americans and some demographics on the changes that we will be experiencing in the United States. We have already heard about the statistics on the disparities in earnings between blacks and whites, and that black men who hold professional degrees and top management positions earn 79 percent of what white men earn; that blacks, even though they represent 12.8 percent of the American work force only hold 2 percent of top level and management jobs; and that females still earn less than males for the same work performed.

But here are some other issues—concerns of Americans about the changing demographics of our society as we know it now, and some immigration concerns. What are the concerns facing us, as Americans, and our children? We, as adults, especially those who have been through the riots and peace marches, have seen a progression in employment for minorities and women, and we all have our opinions about where we stand and where we are going. But we also are mindful of a different future for our children. We hear regularly about the influx of illegal aliens. I hear those concerns in the media, in training sessions, and in discussions with my colleagues. Here are some of their concerns:[1]

* overpopulation
* threatened environment
* growth of illegal immigration
* seeming lack of government control
* crime and disease
* burdens on schools
* burdens on welfare rolls
* language barriers

With the projection of the immigrant tide into the United States, the U. S. population continues to rise to a projection of 392 million people by the middle of the next century. The already sluggish American economy and persistent unemployment makes us feel that aliens are a threat to our jobs. No wonder the latest wave of immigrants has been so controversial, the net cost of immigrants could reach into the billions.

A poll conducted by *Time* reported that three-fourths of those polled felt that the Nation's current policy has gotten out of hand, and the government should limit immigration more strictly. In many cases, this new wave of immigrants, appear to be poorer and have fewer job skills to bring with them than previous immigrants. It is felt that new laws are needed to head off a bitter struggle between these new immigrants and disadvantaged segments of the United States population for increasingly scarce low-skill, low-wage jobs. So, Americans have expressed, in larger percentages, that they want stricter governance over immigrants.

Other factors that have contributed to the disillusionment of Americans with the influx of immigrants are such factors as: the bombing of the World Trade Center; the reneging on a campaign promise by President William Clinton disallowing entry to Haitian boat people; the hostile public reaction to the President's first two choices for Attorney General, when it is learned that they have hired illegal immigrants as household help. These and other events have made many Americans feel that their country is under siege, and that the Nation has lost control of its borders.

The fact remains that when times are tough, as they are now with high unemployment and economic uncertainties, Americans' oppositions rise when newcomers arrive. This is in opposition to when times are good, then we are more tolerant.

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1 *From* "The New Face of America," *Time Magazine*, special issue, Fall 1993.

But let us now examine the other side of this coin. We who call ourselves Americans—but whose ancestors were immigrants (except for the Native American)—are here in America. Are we ready to shut the door and say, "I have mine, that's enough, don't let those "immigrants" in?" How easily we can forget where we came from. Those privileges that our ancestors sought and received by coming to America, are we now wanting to close those doors to others who seek those same freedoms and privileges?

Is there a brighter side to this picture? Of course! Different is not always negative. Other cultures have brought us a wealth of knowledge in many areas, such as, music, literature, art, cooking, dance, fashion, and on and on. Many talented people have brought us this knowledge and have influenced us to see the world in a different way. We used to be a melting pot, with "outsiders" assimilating to the country of their migration.

Now separate cultures are forming, and we are appreciating them for who they are and not trying to change their cultures into ours. The best analogy that I have heard regarding this multitude of distinct cultures is one that says: "A salad is delightful when it has a blend of different ingredients that complement each other, but if one were to put them in a blender and mix everything together it would probably taste terrible."

What does this mean for our children? Everything we know now will be obsolete in just 2–3 years from now, that is how fast technology is moving. By the middle of next century, for the most part, their will not be a majority! What does this mean for affirmative action and equal opportunity? We cannot disqualify people on the basis of race or gender, we cannot afford to.

Waves of immigrants from Asia, Latin America and Africa, added to an already growing minority population, are radically reshaping the face and buying habits of the "typical" American consumer.[2] Ethnic-minority shoppers, predominantly African Americans, Hispanics, and Asians, spent $600 billion on everything from toothpaste to shoes to cars last year, up 18 percent since 1990. By the year 2000, minorities may account for 30 percent of the economy. Major corporations like Pepsico, K Mart, and J.C. Penny are going all out to win over free-spending ethnic consumers, recruiting minority marketing experts who speak each group's language and know their customs. Mass marketing worked when America was a cultural melting pot, but now a different message is needed to suit the taste of each group.

There is also an enormous amount of change going on at our college campuses. *Time* magazine reported:

> A generation or two ago, it demanded validation of America's cultural maturity on college campuses. Today it demands diversity. The 1991 Health anthology of American literature, widely used in colleges, begins with Indian chants and Spanish voyager poems, rather than Pilgrim ruminations. Next year's update adds more Native American oral narratives. Multiculturalism came about because a lot of people are ignorant about people of color, and of other ethnic origins. These groups feel like they are marginalized. It's more than validation for certain groups. It's validation for the whole of society rather than just some part of it.[3]

This is what is in store for us in the future, and for our children. This will be a much different world than we can ever imagine.

How does this impact affirmative action? I feel there will be a time where we will not have the same kinds of race issues and need goals in order to bring minorities into the workplace, because people of color will be predominant and employers will be seeking anyone with the skills needed to do the job. But we are not there yet.

The people, for the most part, that have the jobs are still the white majority. If we do not continue to have affirmative action laws, we will go back in time to people choosing people who look like themselves. In fact it will be worse than before, because of the negative feelings of equal

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2 Ibid., "It's a Mass Market No More."

3 Ibid., *see* "The Politics of Separation."

employment opportunity and affirmative action that the white majority has because of a lack of understanding of these concepts. This will mean an even more difficult time for our children, having to compete not only in a society that is more race conscious than ever, but also having to compete with the influx of new immigrants coming in from other countries.

Affirmative action is good business practice and helps everyone, not just minorities and women, because it focuses on auditing our work forces to make sure we are treating everyone equally. Businesses need to support affirmative action for these reasons, as well as because it is the law.

The Detroit Medical Center, a large employer with over 16,000 employees, has taken the position that with or without affirmative action laws, they will support equal opportunity. A quote from testimony given before the Michigan House of Representatives, Committee on Judiciary and Civil Rights states:

> The Detroit Medical Center (DMC) is committed to the goal of expanding opportunity for all Michigan's citizens in education, employment, and the economy in general, through affirmative measures. There will be no retreat from that commitment.[4]

In conclusion, affirmative action works as stated in a recent report from the Congressional Black Caucus Foundation:

> All total the decade of the 1970's resulted in minority employment rising by 20 percent in firms subject to affirmative action requirements, almost twice the increase among noncontractors. The employment of women by covered contractors rose 15 percent, but only 2 percent elsewhere. When the Reagan-Bush years virtually eliminated the threat of sanctions, the contract compliance program ceased to have any general demonstrable positive effect on minority or white female employment. Between 1980 and 1984, for example, both black male and female employment actually grew much more slowly among firms covered by affirmative action than among noncontractors.[5]

As Justice Blackmun put it: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."[6]

Affirmative action—it is necessary, it works, and it benefits America. It is recommended that the U.S. Commission on Civil Rights formally and publicly support continuation of the Executive Order 11246, as amended.

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4 David J. Campbell, president and CEO, Detroit Medical Center, testimony to the Michigan House of Representatives Committee on Judiciary and Civil Rights.

5 Congressional Black Congress Foundation, *The Attack on Affirmative Action.*

6 Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978).

Affirmative Action and the Rule of Law

By Robert L. Willis, Jr.

It is difficult to discuss something called affirmative action when there is no consensus on what it means. My understanding of the term is a remedial tool to eradicate the present effect of past acts of racism. Those acts of racism were violative of the equal protection clause of the 14th amendment to the United States Constitution.

Affirmative action is a phrase and methodology that was initiated during the administration of President John F. Kennedy and continued with some enthusiasm through the administration of President Richard M. Nixon. Until recently, it was supported by liberals and conservatives, Democrats and Republicans. It is, however, soon to be relegated to history. This simple, yet effective way of measuring and redressing the effect of past and present discrimination, at least in the workplace and in academia, will not likely survive this U.S. Supreme Court's scrutiny.

America's long legacy of racism has proven to be immune to every cure, device, proclamation, effort, program, and law devised by government. An illustration of such is America's history in support of racism as exemplified by apartheid "whites only" laws that were passed to ensure a separate and unequal America.

Affirmative action will be destroyed in spite of the expressed language found in the equal protection clause of the 14th amendment to the United States Constitution. That language states that all people, regardless of race will have the equal protection of the law. It is ironic that it is the present Supreme Court's interpretation of the 14th amendment that is serving to invalidate a tool that allows equal protection for all Americans. A brief look at the evolution of various Supreme Court decisions is an important place to begin this analysis.

As affirmative action programs were first implemented by employers—based either upon their desire to do the right thing or based upon pressure from the Federal Government—the test was simple. The company looked at its work force, counted the number of minorities in each job area, and demanded that the proportion of minorities in the job area equal the proportion of qualified minorities available.[1] The use of a "count" initiated a use of goals, and it proved to be an effective way of getting people of color to work in places that had up to that point in time refused to let them into the front door.

The use of quotas existed until 1978 with the case of *Regents of the University of California Medical School v. Bakke*.[2] In *Bakke*, the United States Supreme Court took a look at the admission plan initiated by the University and ruled that it was too broad. Although the Court held in *Bakke* that affirmative action plans were legitimate, it imposed a strict scrutiny standard in 1978 that did away with quotas and ensured that any future affirmative action plan or program implemented would serve only to overcome the present effect of past discrimination.

In an employment environment, the recognition that past discrimination drives the implementation of an affirmative action plan now seems lost. Politicians have recognized that by expressing indignation over quotas, they had a ready made method of ensuring their reelection. The Supreme Court has followed and "discovered" a new rationale in finding almost all of the plans that it has reviewed, to date, unconstitutional. It seems as though the Court is waiting for an employment case that it could use to end affirmative action altogether.

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1 *See generally*, U.S. Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* (1971), and *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* (1981).

2 438 U.S. 265 (1978).

Some time after the decision in *City of Richmond v. J.A. Croson Co.*,[3] Senator Jesse Helms (R, NC) ran a campaign against a black challenger for his office, Harvey Gant, mayor of Charlotte. The Senator's campaign played upon the fears of the white constituency. Other politicians learned from that method, and have parlayed such fears and misinformation into consideration for the highest office in the land. At the same time the U.S. Supreme Court started reading the 14th amendment to the U.S. Constitution in a way that assured that the Court would never find language in the U.S. Constitution to redress racism.

In the summer of 1995 the U.S. Supreme Court decided the matter of *Adarand Constructors, Inc. v. Pena.*[4] *Adarand* was a matter that had to do with a set-aside provision for contractors with the Federal Government. Prior to *Adarand*, the Federal Government was committed to the effort of ensuring equal access to contracting opportunities to all Americans. In spite of this commitment, Americans of color were nearly kept out of the Federal contracting process. Statistics show that out of the billions of dollars contracted out yearly, only 6 percent went to women- and minority-owned companies. It has been estimated that Americans of color received between 1.5 to 2 percent of those contracts, and the bulk of those were small service type contracts. The *Adarand* decision assures that even these contracts will be awarded to the majority population.

The rationale for *Adarand* was the Supreme Court's narrow reading of the 14th amendment to the U.S. Constitution, applying it's new interpretation to the Federal Government. It opined that the United States government must comply with the "strict scrutiny" rationale the Court had imposed upon the States in the *Croson* decision. The Court stated that in order to sustain an affirmative action plan, that plan must be so narrowly tailored that it would overcome the effect of an identifiable act of discrimination. This is an impossible task. The 1.5 to 2 percent contract business presently "enjoyed" by businessmen of color with the Federal Government may now shrink to near zero.

The latest assault on affirmative action by the Federal courts is found in the 5th United States Circuit Court of Appeals decision in *Hopwood v. University of Texas Law School.*[5] By way of background, the University of Texas Law School is a law school whose admission policies were subject to legal challenges in the late 1960s and early 1970s. Those legal challenges charged that the admission policies then in place discriminated against people of color to the point of total exclusion of all minority applicants. In response to court challenges, the university developed a law school for black applicants. That school was placed in the basement of the State's capitol and, at times, there were as few as one student in a class. The "professors" in this law school consisted of legislators with law degrees, judges, visiting professors, etc.

In subsequent court challenges, the court determined that this system was separate and unequal, did not provide for a quality legal education for minority students, and ordered the program changed. An admission policy that considered race in its application process was put in place, and this allowed for the admission of students of color. It was developed by the university in conjunction with court orders and proved to be effective and legal—until 1996.

In 1996 the Federal court of appeals ruled that the University of Texas' admission policy was inconsistent with the language in the 14th amendment to the Constitution and ruled it invalid. One of the principal arguments offered by the university was that a 2-tier admission policy assured that there would be diversity in the university setting and in the practice of law in the State. The school further argued that by taking this action, it assured a future generation of judges, legislatures, and attorneys as diverse as the population of the State.

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3 488 U.S. 469 (1989).

4 115 S. Ct. 2097 (1995).

5 78 F. 3d 932 (5th Cir. 1996).

One of the hallmarks of affirmative action was that a program, in order to pass Constitutional review, had to serve a compelling governmental interest. In *Bakke* the Court stated that assuring diversity in the university setting and the medical profession was a compelling government interest. *Hopwood* overrules this provision. If diversity is not a compelling government interest, it will be difficult to find any "interest" compelling for the current Court's scrutiny.

In *Hopwood* the 5th circuit also opined that the University of Texas had failed to demonstrate the past discrimination that its admissions policy was redressing. Again, unless somehow documented, the courts will not see a discriminatory act. When people discriminate, they tend not to leave a business card at the scene, so acts of discrimination are oftentimes undocumented.

The immediate effect of the *Hopwood* decision is that at least three States immediately ended their practice of admitting students into their State colleges and universities if that admission policy considered race in its process.

The activity of the courts and the rhetoric of the politicians have not gone unnoticed by people of color. The word "quota" has been thrown around, and people of color know that it has not been allowed in any affirmative action plan since 1978. People of color have heard of complaints of unqualified minorities being placed in jobs that qualified whites were unable to get. They know that the placement of unqualified applicants in employment, no matter what their race, is not a requirement of any affirmative action plan. They have heard that their children take up all of the scholarship money while deserving white children do without. Yet it is evident that any male born black in America has a much greater likelihood of going to prison than to college.

No one seems to complain about the cost, both monetary and societal, of locking up a large percent of America's black population. *Adarand* makes it a violation of the Constitution for black contractors to make a living doing business with the Federal Government in that 1.5 to 2 percent of such contracts went to Americans of color. Obviously litigation offered in opposition to this piece of the "contract" pie is offered to ensure that no piece of the pie will be available to Americans of color.

People of color are watching, lamenting their defeats, and licking their wounds. They are not, however, passive. They note that those who are most adamant in their attempts to erode rights and privileges gained by people of color during the civil rights movement offer no solution. Such opponents say that the dilemma facing people of color are a result of the minority community's own weaknesses. It is a problem of the minority community, so go home and fix the problem alone; and when that is done America will not discriminate against them. Where is the historical reference for this position?

Americans of color are not seeking civil rights, affirmative action, voting districts, welfare, or prisons; nor have they ever. These are tools that were designed to reduce the sting of racism. Rather, people of color want to be free from both historic and the current disease of racism. They want their sons and daughters to live with hope and without the specter of racism playing a role in their lives daily.

Today's children of color will have less opportunity than their parents have had. Without the current protection of law, a large number of minorities would not be where they are today. Those who are the most outspoken advocates of the reversal of civil rights protection are those who seem to identify with the notion of black inferiority and white superiority. It appears from where most people of color are sitting that those in the forefront of the movement to overturn civil rights laws are drawn from the groups that count as their members the most racist in the country.

People of color are not unmindful of the events that are occurring. Their response is to begin the process of withdrawing from the larger society. Children of color used to be taught in their communities that they could work within the system; this is no longer taught. Communities of color are being built that are economically and politically removed from the larger society. These communities are returning to a society which only associates with members of its own group for its own protection, growth, and development.

The radio talk shows—both black and white—are replete with discussions of why "they" are evil; why "they" have all the advantages; why "we" should live where "we" live and "they" should remain where "they" are.

It is ironic that people of color have depended upon and respected the rule of law. They have based their life's courses on the respect of the law and the courts interpretation of them and on the hope for justice. Minorities recognize that the United States Constitution was written during a time when this country profited off the worst form of slavery in history. In spite of that, people of color believed that if there was "equal protection under the laws" they would share in it too. Recent court rulings and the use of affirmative action as a wedge tool to gain political office, however, say very clearly and very loudly that people of color cannot depend upon this country's rule of law.

It is ironic that while this country moves rapidly to the right, it is groups on the right that are breaking away. Groups like the Freedman's and the Michigan Militia and various tax protesting groups are denying the rule of law and going in their own direction. People of color, while hoping for the rule of law, see themselves being pushed out of its protection.

It is difficult to envision what this country will be like when the extreme right breaks away and those who are now considered minorities are rejected. Will this be a country with both groups unable to respect its laws? What happens when collectively these minorities become the majority?

It is clear that America has no solution to the problem of racism. What it is offering today is the withdrawal of the tools needed to address the disease of racism. It offers instead unrealistic scenarios and 30-second sound bites.

Because the problem of racism is not being addressed fairly and openly by either the courts, political institutions, or "leaders," it is festering in a new and more virulent way. Churches are being bombed, polarizing communities and schools at an ever increasing rate and becoming less tolerant every day. The disease of racism remains; the cure has been destroyed.

Ironically, it is government that will be called upon to pick up any pieces. If the polarization increases, the police, the military, or the national guard may be called upon to keep us apart or to quell disturbances.

If the country moves in a direction where the right declares that the rule of law no longer applies to blacks, the dream of a racist free America becomes unrealistic. Then only the middle will have a claim on America's promise. Those in the middle would be left to try to quell the pending crisis. No matter what the intent, government will be there to try to pick up any pieces. Those remaining may become the minority.

My concern is that this country is beginning to spin out of control. The combination of hostile forces on the right and the specter of dashed hopes and aspirations of people of color seem to be energizing a true and permanent split of people that we may never recover from. That split threatens what makes this a country.

It is now time to repudiate the current decisions of the Supreme Court for the protection of all. It is time that the rhetoric that is associated with the right be examined for what it is. It is time that we renew our commitment to equality and to the promise of "one nation" before it is too late.

Affirmative Action: What Is It? A Layperson's Perspective

By Patricia Lauderdale Bell and John T. Blackwell

Objective

This position paper will attempt to demonstrate that the term affirmative action is misunderstood and is often considered just another form of discrimination. The authors hold that if the layperson is exposed to what affirmative action is, the myths surrounding affirmative action would be debunked.

Introduction

The controversy surrounding affirmative action and the accompanying rhetoric that has come to envelop that subject have engendered a clear need for increased precision in thinking and talking about affirmative action programs. Rhetoric to the contrary notwithstanding, AFFIRMATIVE ACTION does NOT—repeat does NOT—equal quotas. An Affirmative Action Plan may include quotas, but NEED NOT do so.[1]

Affirmative action is a "commitment to achieving the intent of equal opportunity legislation through a detailed set of objectives and plans designed to achieve prompt and full utilization of minorities, women, handicapped persons and Vietnam era veterans at all levels and in all areas of the workforce."[2]

Some Major Antidiscrimination Measures and Policies

Following is a brief history of the major antidiscrimination measures and policies:

1. The 13th amendment—This amendment (sometimes called the Dred Scott Amendment) enacted in 1865 prohibits slavery in the United States. It reads in full:

> Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction.

2. The 14th amendment—This amendment declares the negro to be a citizen of the United States, and contains the privileges or immunities clause, which reads:

> No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States.

3. The 15th amendment declares that "the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color or previous condition of servitude." Negro males having, by the 14th amendment, been declared to be citizens of the United States were thus made voters in every State of the Union.

4. The Civil Rights Act of 1866[3] (also known as Section 1981) guarantees all persons the same rights to make and enforce contracts that "white citizens" enjoy. Race is covered—and possibly national origin—but sex and religion are not. "The Federal government had acted against discrimination shortly after the Civil War; the Civil Rights Acts of 1866 and 1871 initially appeared to prohibit a wide range of discrimination, possibly including employment discrimination. These statutes were so narrowly construed by the Supreme Court in the Civil Rights cases of 1883,[4] however, they were essentially nullified. These cases made it appear impossible to do much about discrimination in the private labor market on the

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1 *See* Ronald J. Fiscus, *The Constitutional Logic of Affirmative Action*, Durham: Duke University Press, 1992, pp. ix–x.

2 Pamela Conrad and Robert Maddux, *Guide to Affirmative Action-A Primer for Supervisors and Managers*, (California: Crisp Publications, 1988), p. 67.

3 Apr. 9, 1866, Ch. 31, 14 Stat. 27.

4 109 U.S. 3.

basis of the 13th and 14th amendments to the Constitution."[5] However, usage of these amendments were resurrected in the Supreme Court's *Jones v. Mayer*[6] 1968 decision as a remedy for private discrimination in certain aspects of employment before the 1940s.[7]

The 13th, 14th, and 15th amendments were ratified by the States on December 6, 1865, July 9, 1868, and March 30, 1870 respectively. Collectively they are known as the reconstruction amendments and were written specifically to protect the legal rights of former slaves. The Civil Rights Act of 1875 was titled, "An Act to protect all citizens in their civil and legal rights." This act prohibited discrimination in the private sector by the owners of all hotels, restaurants, theaters, railroads and steamships which served the public.

5. The Veterans Preference Act of 1944[8]—This act provides substantial benefits to those who served in the armed forces. Some of those who served did so almost 35 years ago and are still obtaining the benefits on the basis of that service. This provision is one of the few that has never been overruled. Few women and few blacks (male or female) are receiving veterans' preference benefits, largely because the majority of those who served were white and male.[9]

6. The Equal Pay Act of 1963[10]—This legislation requires that all employers subject to the Fair Labor Standard Act (the minimum wage law) provide equal pay for men and women performing work substantially similar in skill, effort, responsibility, and working conditions unless wage differentials are due to bona fide systems of seniority, merit, output or some business factor other than sex.

7. The Civil Rights Act of 1964[11]—The objectives of the Civil Rights Act of 1964 were to provide equal opportunity for all races, religions, sexes, and nationalities. This law covers all educational institutions, public and private sector, State and local governments, public and private agencies, joint labor/management committees for apprenticeship, and training. Title VII of the Civil Rights Act of 1964 prohibits discrimination including sex discrimination—in terms and conditions of employment. Although the discrimination that legislators wished to go on record against was racial, the act when passed included the protected classes of color, religion, national origin, and—as an afterthought—sex. As the law was amended, its compliance agency, the Equal Employment Opportunity Commission (EEOC) was established. The EEOC has broad and important powers.

Since sex discrimination was a violation of the new law except when a bona fide occupational qualification existed, most jobs (and careers) had to be opened to both sexes or rather to qualified applicants regardless of sex. Compliance with the Civil Rights Act of 1964 thus requires shifts in practices and attitudes, for title VII prohibits discrimination in terms and condition of employment under a wide range of circumstances.

Under the 1972 amendment to the act the definition of employer was expanded to include State and local governments and their political subdivisions. The minimum number of employees was lowered from 25 or more to 15, thus bringing many more employers under the jurisdiction of the civil rights act. Two additional types of employees have been added to groups protected

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5 Maureen Harrison and Steve Gilbert, eds., *Civil Rights Decisions of the United States Supreme Court, The 19th Century*, (California: Excellent Books, 1994), p. 114.

6 392 U.S. 409.

7 Paul Burstein, *Discrimination, Jobs, and Politics*, Chicago: University of Chicago Press, 1985, p. 114.

8 June 27, 1944, Ch. 287, 58 Stat. 387.

9 Emily B. Kirby, *Yes You Can: The Working Woman's Guide To Her Legal Rights, Fair Employment, and Equal Pay*, New Jersey: Prentice-Hall, 1984, pp. 245–46.

10 Pub. L. No. 88–38, 77 Stat. 56.

11 Pub. L. No. 88–352, 78 Stat. 241.

under the law: (1) employees of educational institutions whose work involved educational activities (teachers and nonprofessional staff members), (2) law firms organized as partnerships are considered employers under title VII. An amendment in 1974 gave EEOC the power to enforce title VII through court action. In 1980 sexual harassment guidelines were added to title VII.

8. Executive Order 11246[12]—On September 24, 1965, President Johnson issued Executive Order 11246. This order required Federal contractors to take affirmative action to recruit, hire, and promote more minorities. Two years later, in 1967, in Executive Order 11375, President Johnson added women to the groups covered by previous antidiscrimination orders.

9. Age Discrimination Act of 1967[13]—This act made it unlawful to discriminate against persons between the ages of 40–65. However, the act did not apply to either Federal or State government employees. The 1974 amendment brought them into scope. In 1978 the maximum age was again extended to age 70. In 1986, the act was again amended, it prohibits discriminating against a person in any area of employment due to age. Some apprenticeship programs, retirement, and/or benefit systems are excepted from these prohibitions.

10. The Philadelphia Plan—In 1971, President Richard Nixon unveiled the "Philadelphia Plan," a model for bringing minorities into segregated trades. The Nixon plan issued as the Office of Federal Contract Compliance (OFCC) revised Order #4, strengthened the two Johnson orders by requiring annual affirmative action plans from major contractors and including hiring goals and timetables. The Nixon administration ordered what Congress had not: numerical goals and enforcement.

11. The Vocational Rehabilitation Act of 1973[14]—This act requires affirmative action to employ and promote qualified handicapped persons and prohibits discrimination. Handicapped individuals are defined as persons who have a record of physical or mental impairment, history of alcoholism, asthma, diabetes, epilepsy and other diseases. The amended definition reflected Congress concern with protecting the handicapped against discrimination stemming not only from simple prejudice but from archaic attitudes and laws and from the fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps. Under this Act, employers with Federal Government contracts ($ 50,000 or more) or subcontractor ($2,500 or more) are subject to the requirements for affirmative action plan and enforcement procedures.

12. The Vietnam Era Veterans Act of 1974[15]—This legislation requires affirmative action to employ and advance Vietnam Era Veterans. Affected employers are those with contracts or subcontracts of $10,000 or more.

13. The 1978 Pregnancy Discrimination Act requires employers to treat women affected by pregnancy, childbirth, or related medical conditions the same as any other employee who is unable to work. During this same year the uniform guidelines on employee selection were established. These guidelines are used by EEOC and the Department of Labor to provide a consistent set of rules for the use of tests and other selection criteria. The guidelines are also applied by the government to enforce such laws as Title VII and Executive Order 11246.

14. The Americans With Disabilities Act of 1990[16]—Title I of this act went into effect in July 1992 and prohibits discrimination in employment against persons with disabilities. A person with

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12 Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65).

13 Pub. L. No. 90–202, 81 Stat. 602.

14 Pub. L. No. 93–112, 87 Stat. 394.

15 Pub. L. No. 93–508, 88 stat. 1818.

16 Pub. L. No. 101–336, 104 Stat. 327.

disability is one who has "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment, or (C) [been] regarded as having such an impairment. Major life activities include walking, breathing, seeing, hearing, talking, working, etc. Some conditions were specifically excluded from coverage, such as drug addiction and 'homosexuality,' bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, sexual behavior disorders, compulsive gambling, kleptomania, [and] pyromania."[17]

15. The 1991 Civil Right Act[18]—This act is designed "to reverse (the) discrimination of WARDS COVE and return the law to 1971..."[19] *Wards Cove Packing Co., Inc. v. Atonio* involved the issue of statistical disparity. The issue arose because of the difference in treatment of cannery and noncannery workers employed at the defendant's remote Alaskan site during the summer months. The majority of the cannery workers, members of Local 37 of the Longshoremen's Union, were Filipinos and Alaskan natives. The more skilled non cannery workers were predominantly white and had been hired the previous winter at the company's offices in Washington and Oregon. In *Wards Cove Packing Co. v. Atonio* the Court held that a disparate impact violation of title VII was not shown simply by a high percentage of nonwhite workers in one type of job within a company and a low percentage of them in another type, and holding that to win a disparate impact claim, the plaintiffs must show a connection between a particular employment practice of the employers and the disparate impact.

Fears

Ever since this country was established we have had to deal with the difference between the promises of liberty, equality, justice, and fair opportunity for all, and the practice of prejudice and discrimination.

In spite of the undesirable consequences of discrimination, it exists, and although discrimination will never ever be completely eliminated steps can be taken to reduce it. Affirmative action in the workplace is about democracy in action! The relative incomes of nonwhites and women is rising more rapidly now than they were before title VII was adopted, however, most research shows their gains remain relatively modest. Many nonwhites and women indeed are dissatisfied with the present rates of progress and want ever stronger measures taken to ensure equality in the workplace.

This is just what opponents of affirmative action fear. They claim that the courts, administrative agencies, some corporations, and some unions have been taking measures against discrimination that are so strong they amount to REVERSE DISCRIMINATION, giving preference to women and nonwhites even when they are less qualified than their white male competitors.

If the perception of unfairness to white males could be changed, affirmative action would stand on firmer ground, both theoretically and practically. The concept of REVERSE DISCRIMINATION seems to arise only when the programs are perceived as benefitting African Americans. "Afrophobia" helps deflect attention from the real meaning of affirmative action. Placing these programs in a black-white context distorts a program that includes a significant percentage of white beneficiaries.

Consider the 1944 Veterans Preference Act. More white males have and continue to benefit from this program than women and blacks (male or female). On the other hand consider 40 acres and a mule that should have been allocated to former slaves when they were emancipated. This affirmative action program would have served as an antidote to racism while seeking to bring the formerly excluded into the economic mainstream.

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17 Ibid.

18 Pub. L. No. 102–166, 105 Stat. 1071.

19 Gerald Horne, *Reversing Discrimination: The Case for Affirmative Action* (New York: International Publishers, 1992), p. 105.

Since this program was targeted at former slaves, it could not have been seen as reverse discrimination against those who were not beneficiaries.

One of the most thorny nonlegal issues is about behavioral change. Research shows that laws can change behavior and hopefully one result of behavioral change is attitudinal change. People are accustomed to thinking that laws cannot change attitudes. But changing behaviors can change attitudes. Changes in behavior are likely to produce new and different experiences that themselves lead to attitude change. To some extent you CAN legislate morality by changing people's behavior first. Rev. Martin Luther King Jr. says it so well: "It may be true that morality cannot be legislated, but behavior can be regulated. It may be true that law cannot make a man love me, but it can keep him from lynching me, and I think that's pretty important." Life is breathed into a judicial decision by the persistent exercise of legal rights until they become usual and ordinary in human experience.

In conclusion, in 1964 President Lyndon Johnson gave a speech at Howard University in which he explained why this country needed affirmative action.... "You do not take a person who for years has been hobbled by chains and liberate him,bring him up to the starting line of a race and then say, 'you are free to compete with all the others' and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity; all our citizens must have the ability to walk through those gates."[20]

"Do American political institutions enhance the government's capacity to respond to the public, or do they weaken it? As it turns out, today's EEO laws may be described as the product of a meeting between old ideas about laws with new opinions about equality, a meeting organized by social protest and brought to fruition any political leadership."[21]

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20 Melvin I. Urofsky, *A Conflict of Rights: The Supreme Court and Affirmative Action* (New York: Charles Scribner's & Sons, 1991), p. 17.

21 Paul Burstein, *Discrimination, Jobs, and Politics*, pp. 10–11.

IV. Community Organization Positions on Affirmative Action

The Role of Affirmative Action in Promoting Intergroup Relations

By Horacio Vargas

I. Summary of Affirmative Action

Affirmative action, which simply takes race and sex into account, is in some cases a legal remedy applied to a specific case of discriminatory exclusion, and in others a compensatory opportunity that an institution or employer provides voluntarily and temporarily to members of groups disadvantaged by discrimination.

When a court orders an affirmative action plan as a legal remedy, it usually does so only after proof that persistent discrimination has resulted in total or near total exclusion of racial minorities or women, and only after other methods of achieving equality have failed.

In cases where discrimination has been found to be extreme, the only reasonable way of remedying it is to set numerical goals that can reasonably be met within a prescribed period of time. Such goals, in effect, estimate the circumstance that would most likely prevail were there no discrimination. Seeking to discredit affirmative action, some critics insist on equating these remedial goals with "quotas." That equation is utterly false. The truth is that such goals are flexible, temporary, and are remedial instruments of inclusion, while quotas are fixed, intended to be permanent and were used historically to exclude members of some ethnic groups from jobs and education.

When used as a compensatory opportunity, affirmative action provides broad opportunities to racial minorities and women to make up for disadvantages they have long suffered because of discrimination. Universities and employers are asked to make an extra effort to seek out applicants whom they would not likely find through traditional methods of recruitment. Compensatory affirmative action sometimes means that a qualified candidate from a disadvantaged group is chosen instead of a candidate who is white and/or male.

Affirmative action policies and guidelines have resulted in greatly expanding opportunities for racial minorities and women. People who would otherwise not have had the chance to acquire skills and build productive lives have gained increased access to employment, higher education, and housing.

Federal support for civil rights eroded sharply in the 1980s with the advent of the administrations of Presidents Ronald Reagan and George Bush, who both vetoed major civil rights bills, discouraged vigorous enforcement of existing civil rights laws, and eliminated various programs and services created during the 1960s for minorities and poor people. At the same time, the Supreme Court moved to reverse the gains of the previous two decades.

Affirmative action is under the greatest attack of its short history. From Congress to the Courts to the States to Republicans on the presidential nomination campaign trail, opponents of affirmative action have declared their intent to eliminate "racial preference." This issue has been overblown to the point that the white male has become the victim of 30 years of affirmative action.

Affirmative action continues to be needed because evidence of racial discrimination and prejudice continues to be pervasive.

New Detroit, Inc. agrees that affirmative action is a proactive response to discrimination and that affirmative action has been successful in giving women and minorities an equal opportunity in employment, education, housing, and voting. New Detroit also agrees that the issue of affirmative action is being used to create divisiveness among people. During the primaries, several presidential candidates were using this issue as part of their campaign rhetoric. This issue also has the propensity to create divisiveness among the advocates of affirmative action.

II. Excerpts from Testimony Presented to the House Judiciary and Civil Rights Committee of the Michigan House of Representatives

In his testimony,[1] Mr. Charlie J. Williams stated his disappointment that some legislative members were trying to end affirmative action in Michigan and were also attempting to amend the Elliott-Larsen Civil Rights Act which prohibited preferential treatment for individuals in employment, housing, health, and other critical areas which affect our daily lives.

Williams indicated that the New Detroit Board of Trustees had taken action on May 4, 1995 to a renewed commitment to affirmative action goals. The resolution voted on was identical to one approved by the New Detroit board in November of 1988. Williams stated that the board's action was very gratifying to him and to others who adhered to the ideals of diversity and equality in America, particularly in light of the current economic climate of downsizing and cutbacks in the workplace. Williams felt that the action taken by the New Detroit board, which is comprised of members of the corporate community, sent a strong message that affirmative action is a valid and just remedy, and should remain on the political and legal landscape. He further stated:

It appears as if some Americans want to return to a time in the not too distant past when the majority of job opportunities were primarily funneled through a network of friends and relatives. For example, vacancies in the Detroit Fire Department were reserved for the *relatives* of fire fighters. Until Mayor Coleman A. Young initiated his affirmative action campaign in the Fire Department (and in the Police Department) where there were virtually no African-Americans, other people of color, or women in their ranks.

Neither a level playing field or a color-blind society exists today. Historically, despite the equal or better qualifications of women and minorities, white males tend to promote people like themselves—other white males. For example, the Labor Department's Glass Ceiling Commission recently found that although white males constitute only 29 percent of the work force, they hold about 95 percent of the senior management positions (vice-president and above), and that in Fortune 2000 industrial and service companies, only 5 percent of the senior managers are women, and virtually all of them are white.[2]

On April 3, 1995, the *Detroit Free Press* reported that after 30 years of affirmative action, white men are in the overwhelming majority in the employment and management ranks of the construction, manufacturing, transportation/utilities, retailing, and service sectors. In that article, statistics from the Equal Employment Opportunity Commission compared metropolitan Detroit to national labor force data. For these five sectors, at the management levels, between 51 percent and 83 percent of those jobs were held by white men in metropolitan Detroit, while at the national level, the proportion of white males ranged from 49 percent to 86 percent.

Two Census Bureau reports on the economic status of African Americans, *The Black Population in the U.S. (March 1993 and 1994)* and the *Characteristics of the Black Population*, tell us that:

- For all jobs at all levels, blacks earn significantly less than their white counterparts, i. e., among college-educated workers, a similar proportion of African American (28 percent) and white men (30 percent) were employed in executive, administrative, and managerial jobs in 1993. However, the median wages of these African-American men ($46,980) was only 86 percent of their white counterparts ($54,680).
- The median income of African American families was not significantly different in 1969 than it was in 1993 — approximately $21,550. For this same 24-year period, white median family income in 1993 ($39,310) was 9 percent higher than in 1969.

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1 Testimony made on July 12, 1995, by former New Detroit president, Charlie J. Williams.

2 Ibid.

When we look at data closer to home, from the March 1993 Census equal opportunity report, the economic consequences of ethnic polarization and discrimination are striking at the *individual level.*

- While the total unemployment figure for the Detroit region stood at 8.7 percent, for whites it was only 6.05 percent.
- The unemployment figure for African Americans was well over three times as high—20.63 percent. The Native American unemployment figure was 13.76 percent, and for Hispanics, 12.57 percent.
- Overall, people of color had an unemployment rate that was almost twice the Detroit regional average of 15.56 percent.

In the face of this evidence, it is difficult to substantiate the claim that African Americans and other minorities are enjoying unfair advantages at the expense of others. Moreover, such a position is morally indefensible in light of the fact that racism and discrimination persist in this country even after three decades of affirmative action as national policy.

The statutory mandate of the Equal Employment Opportunity Commission (EEOC) is to enforce the Federal laws that insure an equal opportunity for all, without regard to race, religion, ethnicity, gender, age, or disability. These laws are based on the 14th amendment of the Constitution, as well as Title VII and other EEO laws. Briefly stated, these laws maintain that all Americans have a right to *equal protection* under the law.

People of color in this region (and in this country, for that matter), since we numbered only a few thousand in the year 1800, until our ranks swelled to over 1 million people in 1990, are concerned about the twin issues of fair representation and equity. We want the same opportunities that are enjoyed by the majority population—to live, work, and play where we desire. Of course this has direct implications on the current debate about the relevancy of ethnic and cultural diversity, equity, and equality—is it fair to the majority population?

Let's examine EEOC complaints of reverse discrimination, from FY 1987 through FY 1994. As a percentage of total receipts, white males filing discrimination charges based on race have averaged approximately 1.7 percent of all charges received by that agency during this 8-year period.

Many of the opponents of affirmative action argue that such programs fly in the face of a merit-based system of admission and advancement. But how do we determine real merit? Is it a system based solely on test scores? How do other factors, such as special talents and abilities, and demonstrated intelligence fit into the equation?

Preferential treatment is a fact of life in this country, from star athletes, to the sons and daughters of alumnae who are admitted to colleges and universities over others with superior test scores. It is strange that there is no public outcry about this widespread type of preferential treatment.

Affirmative action helps to widen the labor pool of talent in both the private and public sectors to include people of color and women. More often than not, it has had the positive effect of bringing about diversity in the workplace, slowly inching us closer to the twin ideals of equity and equality. I believe that without affirmative action, even fewer people of color or women would have been considered for the jobs, contracts, or positions they currently enjoy. Current affirmative action programs are making only modest strides, at best: minority businesses received only 3.5 percent of total Federal contract dollars, according to a 1993 Small Business Administration annual report.

We need to spend more time and energy pointing up the benefits of diversity in our schools, in our neighborhoods, and most of all, in our places of work. Ethnic and cultural diversity grants everyone the opportunity to protect as well as to exercise their own self-interests. In other words, people of a different gender and hue are able to reconcile their own interests with the goals and aspirations of others, and hopefully, reach a compromise."

III. New Detroit's Actions

On May 4, 1995, the New Detroit Board of Trustees reaffirmed its commitment to the affirmative action Goals originally identified and adopted on November 1988. The resolution re-emphasized its commitment to leadership in establishing the atmosphere and framework for effective affirmative action programs for business, industry, government, education, labor, and

nonprofit groups in the Detroit Metropolitan area. In 1988, New Detroit published a document highlighting informative descriptions of successful affirmative action for these organizations. In this publication two characteristics were associated with particularly successful affirmative action programs, specifically:

1. A clear and definite demonstration by top leadership of an on going commitment to affirmative action communicated by personal statements and direct involvement in their organization's effort, and
2. A clear and definite indication to managers at all levels that fulfillment of affirmative action goals is a critical part of evaluating their performance for purposes of promotions and improved compensation.

New Detroit felt it was essential for local, State, and Federal government units to provide significant examples of their full commitment, thus undergirding efforts in the community at large and among employers, employees, and those who prepare people for work, and those involved in hiring, promotion, and training decisions. New Detroit also urged attention to specific affirmative action techniques proscribed and followed:

1. Maintenance of a high priority commitment to affirmative action at the highest levels of an organization, including governing boards and top management officials, with their commitment being clearly communicated to all levels of the institution, and
2. Establishment of a definite system of accountability that equates achievement of affirmative action goals with the achievement of any other organizational objectives.

New Detroit also urged all organizations in the Detroit metropolitan area to strengthen their affirmative action programs and urged all levels of government, in addition to setting admirable examples, also to provide support and encouragement for affirmative action through reasonable clear and effective guidelines and compliance regulations that reflect the particular needs of different industries, individuals, organizations, and areas of the country.

On March 7, 1996, New Detroit's board again reaffirmed its commitment to affirmative action. In the resolution approved by the Board, New Detroit recognized that the country had benefitted from the principles of affirmative action, both socially and economically, because of public and private programs which have taken race and sex into account in hiring and promotion decisions. New Detroit also stated that it must remain committed to the equality of educational and employment opportunities, recognizing that these are crucial to the development of positive self-esteem, a stable family environment, and good citizenship.

As part of the action that New Detroit committed itself to included:

1. To form a broad based coalition of appropriate groups and individuals to support and promote affirmative action programs;
2. To take a leadership role in providing the necessary advocacy to support affirmative action; and
3. To offer its support and assistance to civil and human rights organizations, locally and nationally, by hosting a conference or dialogue in 1996 for the purpose of formulating an advocacy strategy to support and enhance affirmative action.

IV. Conclusion

In conclusion, New Detroit, Inc. offers its assistance to the Michigan Advisory Committee to the U.S. Commission on Civil Rights and to the U.S. Commission on Civil Rights and other organizations both locally and nationally in supporting and advocating the principles of affirmative action through lawful consideration of race, ethnicity, and gender under programs that are flexible, realistic, and fair.

Affirmative Purchasing in Government Contracting as Effective Affirmative Action

By Ronald E. Hall

I want to focus attention on the part of affirmative action called "affirmative purchasing," which seeks to include minority businesses in the economic mainstream of this State and country through contract set-asides.

The Michigan Minority Business Development Council (MMBDC)[1] was established in 1978 by the "Big Three" and other major corporations as the primary advocate for minority business development. MMBDC is a Michigan nonprofit public benefit corporation and today lists as its membership well over 300 major corporations and their divisions. Through our offices in Detroit, Grand Rapids, and Flint the MMBDC works with and is a resource for corporate America identifying qualified and qualifiable minority-owned businesses for the provision of goods and services. MMBDC is entirely funded by the private sector.

Although MMBDC will remain private sector oriented and funded, we stand behind affirmative active purchasing in the public sector because we firmly believe that it is a valuable tool that helps give equal opportunity to minority individuals and minority businesses. Minority suppliers are also minority employers, and they hire an uncommonly high proportion of minorities. The more jobs minorities have the better the quality of life in minority communities, which also creates a better quality of life in minority communities, which in turn creates a better quality of life for all of America.

Today we draw your attention to the area of public policy and affirmative purchasing in government contracts because we seek a level playing field for our members and other minority businesses, and because the development of minority businesses provides a multiplier for growth in our communities. Minority businesses hire minority people, bring tax dollars into our neighborhoods, and serve as beacons of pride and hope for people of color.

History

Some review of the experience of minority businesses in our State may be helpful. While we have always had a small number of minority businesses in this State, it has been extremely difficult to expand to a level in which businesses become a major player in the State's economy. In 1974 the effort to involve State government in the process of promoting the orderly growth and development of minority businesses began. After initial discussion, public hearings on opportunities for minority businesses were held, a report was issued and a series of executive directives and orders put a program in place.

At the time of the hearings, the figure for State contract dollars going to minority businesses was 0.0007 percent. During the 1976–1980 period, a program which encouraged State agencies to use minority businesses was established and nurtured.

In 1980 the Michigan legislature passed P.A. 428 of 1980 which created goals of 7 percent for minority businesses in contracts and 5 percent for women-owned businesses. Throughout the 1980s this program continued to grow, until the goals were reached by most State agencies by 1988. I emphasize that this program was based on the concept of goals and was never a set-aside program. By 1987 a total of 15.7 percent of all dollars in State contracts was spent with minority and women businesses.

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1 The Michigan Minority Business Development Council was established in 1978 by the major corporations in the Detroit area to advocate for minority business development. The MMBDC is composed of almost 700 minority enterprise members and 334 corporate members.

At the time of implementation the Michigan Roadbuilders Association and 36 contractors and contractor organizations challenged Public Act 428 as an unconstitutional denial of equal protection. After the U.S. Federal District Court upheld the law, the Sixth Circuit Court of Appeals ruled that the law was unconstitutional. The U.S. Supreme Court denied appeal on this decision in 1989 leaving the appeals court decision in effect. The State of Michigan got out of the business of procurement contracts for minority businesses when the Supreme Court ruled in the *Roadbuilders* case.

Current Status

The present situation for minority business in obtaining government contracts from the State of Michigan is abysmal. There is no requirement for State agencies to try and include minority businesses in the procurement process. The procurement council which functioned for Public Act 428 is still authorized by Executive Order 1994-16, but the council seldom meets and there is no reporting on how well affirmative purchasing is doing. No public knowledge of the council's planning or review of agency participation exits. Few minority businesses get State contracts today and the message to minorities essentially is, "You're on your own."

Replacement legislation for Public Act 428 was introduced by the original sponsor, State Representative Morris Hood, Jr., of Detroit. During a series of hearings conducted on this bill by Representative Hood, several facts emerged:

1. After P.A. 428 was ruled unconstitutional, no requirement for minority contracting by State agencies was in place.
2. As a result of no mandated goals, the use of minority subcontractors dropped precipitously. In 1990 the State-wide percentage had dropped to 4 percent. Yet with mandated goals such as those used by the Michigan Department of Transportation, a constant 15 percent minority subcontractor utilization was constant at a rate of 15 percent through the years of 428 up to today.
3. Minority contractors frequently are required to hire white male sales representatives to obtain loans and to compete for business with white businesses. Testimony related instances in which businesses declined to do business with minority people as owners, but would engage in business when white male salespersons made contacts with the same owners.
4. An Asian American owned business was burned down in one small town after being established. This reflects part of an alarming trend toward increased violence toward minority businesses in this State.

During the past year, we have witnessed legislative consideration of three bills which would limit "preference" toward minorities and women. Some of the proposed language was modeled after similar legislation in California. Harsh criticism has been directed toward the use of "set-asides" in any form, whether State or Federal.

At present, State agencies, and the Michigan Department of Transportation in particular, receive Federal funds which have set-aside requirements for "disadvantaged" businesses. Even though the U.S. Supreme Court has upheld the use of Federal funds for set-asides, State legislators have attempted to legislate them out of existence even when Federal funds and mandates authorized them.

Limitation on "affirmative purchasing" is a problem not only for blacks, browns, yellows, reds, or whites. It is a problem for Michigan and for all of America. There is an article that explains the economic impact of labor underutilization. It means that we as consumers end up paying more for goods and services, our work force is less competitive and we are more likely to lose jobs to more overseas firms. It means that unemployment rates are higher, which increases crime rates and the number of welfare recipients, which results in higher taxes. It means that millions of Americans are not adding all that they could to the economy and therefore not spending as much as they might on new homes, automobiles, computers, and other goods in industries that generate jobs, income, tax revenues, and consumer spending.

With that said, I continue to wonder why we all cannot see that affirmative action purchasing is not about "quotas" or "set-asides," it is about leveling the playing field. Affirmative purchasing is

a competitiveness, productivity, and fairness issue—not a preference issue.

Recommendations

First, the State should develop a process for monitoring State funds which are spent with minority business. It is simply not known at this point what these numbers are. Perhaps Federal standards could include the reporting requirement.

Second, race neutral programs should be authorized with the use of Federal funds, even if specific goals are not set.

Detroit Branch NAACP Statement on Affirmative Action

By Joann N. Watson

"It would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."[1]

"If you look at it in a broad sense," said David Neely, assistant dean of the John Marshall Law School in Chicago. "The legal definition of affirmative action is a remedy for an illegal act—discrimination."[2]

One little-noticed fact in the current debate: many of the principles underlying affirmative action, including the use of quotas, have been accepted in spheres outside the volatile world of race and sex relations without a peep from conservatives.

Take, for example, the concept of compensation for past injustices. There is a Federal Government payment of $1.2 billion to the families of Japanese-Americans who spent World War II in internment. The payment to the Japanese also affirmed the notion of sons paying for the sins of the fathers. Nearly one-third of those who paid taxes last year, and therefore contributed to the reparation payments, were born after World War II. They could not have supported the Federal Government's policy of putting Japanese Americans in prison camps.

And what of quotas? In 1986, the Reagan administration negotiated a trade agreement with Japan under which the country set a goal of American manufacturers gaining 20 percent of Japan's market in computer chips. The policy, though highly contentious, is still in force. Yet conservatives, who are often backers of free trade, who say purchasing decisions should be made solely on quality and merit, have generally not criticized the deal as a manipulation of the market.[3]

So far, as businesses are concerned, affirmative action is not just a moral matter, it's good business. White males already make up a minority of the work force, and 85 percent of new recruits between now and the year 2000 will be women, or nonwhite men. So firms with a good track record of producing non-white managers and managing people from different backgrounds will enjoy a growing advantage in recruiting and motivating workers. They may also be more attuned to an increasingly diverse population of customers. Equally, firms that continue to favor white men will find themselves fishing in a shrinking pool of prospective employees.[4]

The bottomline—white men, while constituting about 29 percent of the work force, hold about 95 of every 100 senior management positions, defined as vice president and above.

White women have poured into the work force, taking nearly 40 percent of all jobs nationwide, compared with 30 percent three decades ago.

This information is from a report by the Glass Ceiling Commission, titled, "Good Business: Making Full Use of the Nation's Human Capital." It used 1990 census data and the results of surveys by consulting firms to sketch the corporate landscape for women and minorities, and to identify the barriers to their advancement—principally the fears and prejudices of white male executives on the lower rungs of the corporate ladder.

The report cited various studies suggesting that the glass ceiling exists because of the

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1 Regents of the University of California v. Bakke, 438 U.S. 265, 406-7 (J. Blackmum dissenting).

2 *Poverty & Race*, vol. 4, no. 3, May/June 1995.

3 Excerpt from "Washington Talk," *New York Times*, Mar. 10, 1995.

4 *The Economist*, Mar. 11, 1995.

perception of many white males that as a group they are losing—losing the corporate game, losing control, and losing opportunity. The report said that many middle- and upper-level white male managers view the inclusion of minorities and women in management as a direct threat to their own chances for advancement.

Those male managers, the report implied, actually stand no better odds of reaching the top today than they did 30 years ago. But if there has always been competition, the face of it has changed. White men, the report said, have circled the wagons against challengers whom they view not in terms of their merit but in terms of their color and sex.[5]

In hearings across the country, commission members have heard hundreds of top- and middle-level managers, male and female, testify that white men were stymieing the progress of women and minorities. Those who do break through are often shunted to the anterooms of the executive suite--into dead-end staff jobs, like directors of personnel and public relations.

According to the *New York Times*/CBS poll, most Americans object to blacks being given preferences in jobs and college admission, but did not mind the advantages being given to white women. The public also believes, like the politicians, that blacks dominate the fruits of the present affirmative action.

But, "White women have been the biggest beneficiaries," asserts Dr. Mary Berry, chairman of the U.S. Commission of Civil Rights, attempting to calm down opponents who base their evaluations on emotion rather than fact.[6]

"Black women certainly haven't kept pace with the white women and neither have black men," argues Attorney Barbara Arnwine, the executive director of the Lawyers Conference for Civil Rights Under Law. "In the mid-60's, white women were less than 5 percent in the law schools. Now they're 45 percent."

The critics of affirmative action claim that their goal is a truly colorblind society that offers equal opportunity to all.

But, the challenges to affirmative action are not being carried out in a vacuum. They are part of an overall attempt to roll back the rights of America's disenfranchised: people of color, women and the poor.

In this context, the challenges to affirmative action cannot be regarded as well-intentioned, if misguided efforts to achieve a colorblind society. They are an integral part of a much broader effort to take back the limited political and economic power that people of color and women have achieved in recent decades. Unless we want to see the clock turned back, we must make the defense of affirmative action and civil rights a top priority![7]

Quite frankly, America's failure to safeguard and protect the rights of all people; while allowing those most vulnerable to be scapegoated and villainized has laid the foundation and fueled the fires of hatred now exploding across black churches in the South, and white supremacist movements across America.

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5 The *New York Times*—National, Mar. 16, 1995.

6 *Jet Magazine*, 1995.

7 *Civil Liberties Newsletter*, Summer, 1995.

Affirmative Action and the Asian/Pacific American Community

By Ann E.Y. Malayang

I. Introduction

This position paper focuses on affirmative action and the Asian Pacific American community. The paper is not an exhaustive discussion of the issue, but is an overview from a perspective of one Asian Pacific American. The hope of the paper is to educate those in power to include the voices of all people of color in the discussion of civil rights issues here in the United States.

The first part will present a brief history of Asian Pacific Americans here in the United States and the laws excluding the people of Asian Pacific descent. Next, the model minority myth will be discussed. The last part will address how the history of Asian Pacific Americans and the model minority myth combined continue to perpetuate the antiimmigrant sentiment against Asian Pacific Americans and how this myth is being used to dismantle affirmative action programs.

II. Historical Perspective of Asian Pacific Americans

The dominant and current paradigm in traditional civil rights issues focus on the relationship between African Americans and whites. There is virtually no discussion as to the discrimination Asian Pacific Americans faced throughout their history here in the United States. Today's anti-immigrant sentiment is really a continuation of what Asian Pacific Americans have already seen and currently experience. The voices of Asian Pacific Americans have not been heard in the discussion of civil rights issues. The voices of all minorities cannot be lumped into one category and a general conclusion drawn from one group's experience. This is an unrealistic view of current race relations. An overview of the history of Asian Pacific Americans is needed in order to recognize how differently situated Asian Pacific Americans are to other disempowered groups here in the United States.

Asian Pacific Americans have a long and rich history here in the United States.[1] The first recorded Asian in this continent was in 489 A.D., in the year of Yung Yuan during the Ch'i Dynasty. A priest from China named Hui Shen came and worked with the Native American Indians for about 40 years before returning to China. In the 1600s, Chinese and Filipinos landed in Mexico on the ships of the Manila galleon. The first recorded settlement of Filipino Americans was in New Orleans in 1763. These Filipinos escaped from Spanish galleons by jumping ship. In 1781, Pueblo de Nuestra Señora Reina de Los Angeles (now known as Los Angeles), was founded. One of the 46 founders was Antonio Miranda, a Filipino. The first recorded arrival of an Asian Indian in the United States was in 1790.

The first Asians to arrive in large numbers were the Chinese laborers after 1848 when gold was discovered in California.[2] The Chinese began to arrive in 1849 as a source of cheap labor and indentured servants in California and all over the United States. During the Reconstruction Era, southern plantation owners imported Chinese laborers. The northern industrialists used Chinese laborers as strikebreakers because they worked for less money than those in the unions. When the Central Pacific Railway completed its part of the railroad in 1869 at Promontory Point, Utah, its work force included 12,000 Chinese—90 percent of its work force. The Chinese also worked in mines, fisheries, farms, orchards, canneries, garment industries, and other manufacturing industries.

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1 *Asian Pacific American Experience in the United States, A Brief Chronological History: 498-1991*, Leadership Education for Asian Pacifics (LEAP), Los Angeles, CA.

2 Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. Third World L.J. 225, 230 (Summer 1995).

Various laws were passed specifically targeting the Chinese. In 1854, the California Supreme Court ruled that Chinese immigrants were not allowed to testify against a white person.[3] As the Nation entered into an economic downturn in the 1870s, the Chinese became the scapegoats and a movement to exclude the Chinese began. The Naturalization Act of 1870 excluded the Chinese from citizenship and prohibited entry of the wives of the laborers. In 1882, the Chinese Exclusion Act was passed prohibiting Chinese laborers from entry into the United States and courts from issuing citizenships. The United States Supreme Court eventually upheld the law as constitutional in 1889 and 1893.[4] The Chinese Exclusion Act was intended to last for 10 years but was extended on a number of occasions.

During the first half of the 20th century, beginning in 1910, the Chinese immigrants were detained on Angel Island in San Francisco Bay before entering the United States for processing.[5] Children were separated from their parents, husband from their wives, and brothers from their sisters. Detainees were interrogated intensively. Some immigrants were detained on the island for as long as 2 years. Many suicides took place.

As to other Asians,[6] in 1883, the Japanese began replacing the Chinese as a source of cheap labor after the Chinese Exclusion Act was passed. A gentlemen's agreement was entered into in 1907 between Japan and the United States restricting Japanese immigration of laborers. In 1910, administrative measures were used to restrict the influx of Asian Indians into California. Also, in 1910, the United States Supreme Court extended the 1870 Naturalization Act to exclude other Asians from obtaining citizenship. Various alien land laws were enacted beginning in 1913 in California, prohibiting Asians from purchasing land, especially targeting the Japanese Americans. At that time, Japanese Americans and other aliens only controlled 2.1 percent of California's farms.

In 1922, the United States Supreme Court upheld the Naturalization Act of 1879 which meant that Asians were ineligible for citizenship.[7] The 1924 Immigration Act declared that no one ineligible for citizenship may immigrate to the United States. Except for Filipinos who were subjects of the United States at that time, the 1924 Immigration Act ended Asian immigration. During the Great Depression, competition for jobs between minority farm workers and whites intensified. Numerous violence against Asians occurred during this period, especially in the West Coast.[8] In 1934, the Tydings-McDuffy Act declared the Philippines independent in 10 years. The act restricted immigration of Filipinos to 50 per year.

Japan attacked Pearl Harbor in 1941. Executive Order 9066 was signed in 1942 rounding up more than 120,000 Japanese (75,000 were Japanese Americans) and incarcerating them in internment camps. The order "evacuated" the "enemy" to internment camps. The negative perception that the Japanese is the "enemy" continues today. Despite the perception that the Japanese were the "enemies," Japanese American men were allowed to fight in the military and served in Europe. In 1944, the 442nd Regimental Combat Team, made up of second generation Japanese Americans, became the most decorated unit during World War II.

The Magnuson Act in 1943 finally repealed the Chinese Exclusion Act of 1882. When World War

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3 People v. Hall, 4 Cal. 399 (1854). Defendant, George Hall, a white person, was charged with murdering Ling Sing, a Chinese. The jury heard the testimony of three Chinese and one Caucasian and found defendant guilty of the murder. The California Supreme Court reversed the conviction holding that the testimonies of the Chinese were improperly admitted.

4 Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698, 734 (1893).

5 Chang, Robert S., *Toward an Asian American Legal Scholarship: Critical Race Theory post-Structuralism, and Narrative Space*, 1 Asian L.J. 1, 17 (May, 1994).

6 *See, supra* note 1.

7 Ozawa v. United States, 260 U.S. 178 (1922).

8 *See, supra* note 1.

II ended in 1945, the War Brides Act was enacted removing racial restrictions for Japanese war brides and other Asian brides. The Luce-Celler bill in 1946 conferred naturalization and small immigration quotas to Asian Indians and Filipinos. The McCaran-Walter Act in 1952 granted naturalization and small immigration quota to Japanese. During the Korean War in 1950 to 1963, the immigration of Koreans to the United States rose.

In 1965, amendments were made to the Immigration and Nationality Act which abolished national origins as the basis for allocating immigration quotas. Although not targeted for Asians, the 1965 amendments opened up immigration from Asian countries. The most significant increase in the Asian Pacific American community resulted from the 1965 amendments. The amendments emphasized family reunification. Today, 80 to 90 percent of the immigration from most Asian Pacific nations enter in the United States under the family categories.[9]

As a result of the 1965 amendments, Asian Pacific Americans are now the fastest growing minority group in the United States today.[10] Although the Asian Pacific American population only comprised 2.9 percent of the total population in the United States, between 1980 and 1990, the increase in size was over 95 percent. In the 1980s, whites, who made up 80.3 percent of the population in 1990 only increased by 6 percent. African Americans in 1990 made up 12.1 percent of the population and saw an increase of 13.2 percent between 1980 and 1990. Hispanics made up 9 percent of the total population in 1990, grew 53 percent during the 1980s. The Bureau of the Census does *not* project the Asian Pacific American population into the next century, however, other studies project that by the year 2020, the Asian Pacific American population will be between 17.0 million to 20.2 million. This would be an increase from 1990 of 145 percent to 177 percent.

The 1990 reforms of the Immigration and Nationality Act did not reduce the number of visas available to family immigrants. Today, almost half of all legal immigrants are from the Asian and Pacific Island nations. Recent bills in Congress propose to limit family reunification numbers and severely restrict access to public benefits not only for illegal immigrants but also legal immigrants.[11] It appears that the country is now returning to its exclusionary attitudes of the late 1800s.

III. Model Minority Myth

Despite the history of discrimination of, exclusion of and violence against Asian Pacific Americans, the dominant culture's portrayal of the Asian Pacific Americans as the "model minority" is an assumption about current social reality.[12] The model minority label and the portrayal that Asian Pacific Americans are successful allows and is a justification for the public, government officials, and the judiciary to ignore and exclude the Asian Pacific Americans in the discussion of civil rights issues. It might seem that the model minority label is a compliment. In reality, it is used as a tool of oppression in two ways: 1) to deny the existence of present-day discrimination against Asian Pacific Americans and 2) legitimizes the oppression of other racial minorities and poor whites.[13] There are many problems in the Asian Pacific American community which are not addressed because of the model minority myth which renders these problems invisible.

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9 Bill Ong Hing, *Making and Remaking Asian Pacific America: Immigration Policy, The State of Asian Pacific America, Policy Issues to the Year 2020*, LEAP, 1993.

10 Paul Ong and Suzanne J. Hee, *The Growth of the Asian Pacific American Population: Twenty Million in 2020, The State of Asian Pacific America, Policy Issues to the Year 2020*, LEAP Asian Pacific American Public Policy Institute and UCLA Asian American Studies Center (1993).

11 S. 1664, 104th Cong. 2d Sess. (1995); S. 1665, 104th cong. 2d Ses. (1995); H.R. 2002, 104th Cong. 2d Sess. (1995).

12 *See, supra* note 5, p. 7.

13 *See, supra* note 5, p. 7.

Several critiques of the model minority image will now be addressed.[14] One critique is that it ignores the history of Asian Pacific Americans here in the United States. Prior to 1965, immigration from Asian and Pacific Island nations were strictly limited and Asian Pacific Americans were not allowed to become citizens. Various statistics show that 35.9 percent foreign born Asians in the United States completed 4 years of college, compared to 16.2 percent of native-born citizens. This statistic establishes that Asian Pacific Americans are more educated than native-born citizens as a result of immigration policies and not as a result of opportunities provided to them here in the United States. Asians and Pacific Islanders with education are allowed to enter the United States. The individual successes of Asian Pacific Americans here in the United States should validate American ideals of meritocracy and individual achievement. However, the perceived individual success of Asian Pacific Americans is used against them in affirmative action discussions and to oppress other minorities.

Another critique is that the model minority myth ignores African American history. African American history includes chattel slavery, Jim Crowism, and institutional racism that still continues today. Asian Pacific Americans are caught between the racism of the white majority and the anger of the African American and Latino minorities and poor whites. Other racial minorities and poor whites are blamed for not being successful like Asian Pacific Americans. This was illustrated in the 1992 riots in Los Angeles after the Rodney King verdict. The focus in the aftermath of the riots was the racism faced by the African American community. Once again, the Asian Pacific Americans, specifically the Korean Americans, were caught in between and served as convenient scapegoats. During the public debate, no discussion was focused on the great personal and business losses faced by the Korean Americans in the 1992 riots. The Korean Americans were treated as invisible in the discussion of discrimination during the 1992 riots.

A third critique is that the model minority label does not take into account the "glass ceiling" effect Asian Pacific Americans experience despite educational attainment. White Americans with the same educational background have a higher income than Asian Pacific Americans.[15] Asian Pacific Americans are viewed with technical skills but without people skills. A recent study of the 1990 census in southeastern Michigan,[16] once again gives a false view of the success of Asian Pacific Americans in the region. The unpublished SEMCOG data[17] shows that Asian Pacific Americans with a bachelors degree earned $4,500.00 less than whites. In all the other educational categories (e.g., some college, high school degree, etc.), Asian Pacific Americans had the *lowest* median income in southeast Michigan.

The fourth critique of the model minority myth is that the household income used in the statistics does not acknowledge the fact that there are more household members in an Asian Pacific American family who contribute to the overall household income.[18] The published Community Foundation/SEMCOG study of southeast Michigan showed the common model minority myth that Asian Pacific American households are successful because they enjoy an income level of $43,000, 23 percent higher than any other household. However, the study did not note that 38 percent of all households earn less than $29,999 and about one-fourth are in poverty. When the numbers are broken down to individual incomes, in four out of the five educational categories, Asian Pacific

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14 *See, supra*, note 2, p. 7.

15 *See, supra* note 2.

16 The Community Foundation for Southeastern Michigan, *Patterns of Diversity and Change in Southeast Michigan*, Southeast Michigan Council of Governments (SEMCOG).

17 Jeff Jenks, *The Minority Success Myth in Southeastern Michigan, Justice Update*, Asian American Center for Justice, Vol. IX, Issue 7 (Summer/Fall 1994).

18 *See, supra note* 2.

Americans have the *lowest* median income in the region. These statistics certainly belie the model minority myth of financial success attributed to the Asian Pacific Americans.

A fifth critique is that the model minority myth does not address the different patterns among Asian ethnic groups. The model minority myth enforces the insult that "they all look alike," therefore, they are all successful. In the Laotian community, the poverty rate at 67.2 percent.[19] In the Hmong Community, the poverty rate is at 65.5 percent. The Cambodians have a 46.9 percent poverty rate and the Vietnamese poverty rate is at 33.5 percent. These poverty rates are compared to a national poverty rate is at 9.6 percent. As can be seen from the poverty rates in various Asian Pacific American communities, the model minority label cannot be justified.

Finally, the model minority myth ignores the fact that Asian Pacific Americans do not suffer from discrimination. The myth is that because "they" are all well-off or have the ability to overcome discrimination, Asian Pacific Americans, are, therefore, not discriminated against. The model minority myth assumes that the Asian Pacific Americans competed unfairly to become too well off.[20] The model minority myth is perpetuated in the college admission process. Non-Asian Pacific Americans believe that Asian Pacific Americans should be subjected to maximum quotas in college admissions because they have done too well and represent unfair competition.[21]

IV. Antiimmigrant Sentiments and Affirmative Action

As indicated previously, in addition to Proposition 187 in California, there are current legislative proposals to reduce the level of immigration and to deprive not only illegal immigrants of benefits but also legal immigrants. Despite antidiscrimination statutes and case law that allegedly prohibit discrimination based on ones race, the Asian Pacific Americans and others have not benefited from these laws in the immigration area. Race is not taken as a factor in the immigration debate because it has been characterized as "foreign" policy rather than "domestic" policy.[22]

The immigration discussion is looked at separately from traditional civil rights analysis. A long line of Supreme Court cases have made clear that Congress can discriminate based on race in immigration issues. This attitude by the judiciary and Congress perpetuates discrimination against those who are considered "foreign," such as Asian Pacific Americans, even though the "immigration" issues are in reality "domestic" policies pertaining to federally funded benefits.

Anti-Asian sentiment has also been seen in violent attacks against Asian Pacific Americans. The reason for the existence of the Asian American Citizens for Justice was the beating death of Vincent Chin in 1982. Vincent Chin was killed by two autoworkers, Ronald Ebens and Michael Nitz. These autoworkers blamed Vincent Chin, a Chinese American, for the woes of the auto industry. They did not serve a single day in jail for killing Vincent Chin. Judge Kaufman, the sentencing judge, stated that these were not the type of men to be punished severely because they were respectable citizens. There are numerous instances of violence against Asian Pacific Americans in our history.

A more recent incident occurred in Grand Rapids, Michigan. Michael Lawrence Hallman, a 19-year old white male and former high school football hero, was given a very light sentence for killing Thanh Mai, a Hmong resident. The sentencing judge, Dennis Lieber, did not find race as a factor in the killing despite witnesses indicating that the defendant called the victim a "gook." A witness testified at trial that Mr. Mai was sitting alone at table in a dance club when the defendant confronted him for looking at the defendant's friend in a "funny" way. Mr. Mai stood to walk

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19 U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, at 59 (1992).

20 *See, note* 2.

21 Wu, Frank H., "Changing America: Three Arguments About Asian Americans and the Law," 45 *Am. U. L.R.* 811 (Feb. 1996).

22 *See, supra*, note 21.

away when defendant knocked him flat with a single punch to the head. Mr. Mai suffered a 7-inch skull fracture and brain damage that eventually claimed his life.

These two violent and deadly incidents demonstrate that the judiciary and the public's attitudes toward Asian Pacific Americans are that their lives are not as important as those of white Americans. Asian Pacific Americans' lives are devalued because they look like "foreigners."

In the college setting, Asian Pacific Americans are perceived to be beneficiaries of special considerations under affirmative action programs. However, they are almost always excluded from race-based college admission plans, scholarships and loan programs.[23] An example is the University of Michigan. Asian Pacific Americans are not included in the admission and student aid criteria. Asian Pacific Americans are ignored.

Again, in the employment setting, the myth is that because the educational levels are high, unemployment is rare in the Asian Pacific American community.[24]

A further analysis[25] of the discussion does not show that Asian Pacific Americans are often ignored in affirmative action programs in white collar occupations where they hold lower level positions. Asian Pacific Americans in managerial and professional positions are often ignored by affirmative action and receive lower pay for their educational attainment and occupational or job titles. In the high paying precision production, craft, and repair occupations, Asian Pacific Americans are also ignored in affirmative action programs planning.

Current affirmative action programs are used as a basis to pit one minority group against another—Asian Pacific Americans against African Americans. The idea is that one group can only succeed by the failure of another.[26] Asian Pacific Americans are urged to view affirmative action programs only for African Americans and as a limit to their upward mobility. African Americans are encouraged to see Asian Pacific Americans as foreigners and as a group that is taking away what should be theirs.

The argument against affirmative action programs is that there should be color-blindness in our society. This argument is only used by groups when they perceive that other subordinate groups are gaining grounds on them. The model minority myth has been used by whites to argue for affirmative action in favor of whites—that Asian Pacific Americans are proportionately over-represented.[27] If the proportionate representation theory were to be used in an affirmative action plan, it must be applied consistently which means that African Americans would benefit more than whites. Opponents of affirmative action have defined "majority" as meaning "white." "Minority," therefore, meant "black." To treat affirmative action to benefit all minorities does not solve the debate and does not resolve the tensions among racial minority groups. The demands of some whites for affirmative action for whites could be seen a sign of their dissatisfaction over perceived inequalities in our society. The "majority" and "minority" labels will not be useful in the near future, given the projections that the current "minorities," taken as a whole, will shift to become the "majority."

V. Conclusion

In the context of affirmative action programs, it should first be acknowledged that our society is made up of a diverse racial peoples. All should have a voice in the discussion. Affirmative action should not be considered as the end but merely as a means—to achieve racial justice. Perhaps affirmative action programs could have a minimum quota without having maximum quotas.

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23 *See, supra*, note 2.

24 *See, supra*, note 16.

25 *See, supra*, note 17.

26 *See, supra*, note 1.

27 *See, supra*, note 1.

The current paradigm in race relations of black and white must be shifted to include all races. Asian Pacific Americans should not be treated as an invisible minority. Inclusiveness must be a priority in the discussions of affirmative action programs. The existing paradigm must also be shifted between the current dominant white majority to each of the subordinate minority groups—white-African Americans, white-Asian Pacific Americans, white-Latinos, etc. The dynamics between and amongst the subordinate minority groups must also change. The paradigm of assimilation must also be shifted. Conforming to anglo beliefs is not the only and correct model in order for peoples to succeed in our society. The paradigm must be shifted to cultural pluralism which will be the social reality by the year 2020. Cultural diversity must be looked at as a strength and not as divisive. Ethnicity and language should also not be looked at as an impediment but as an enrichment and an asset to our society. We must look at past laws in order to avoid making the same mistakes in the future. The participation of everyone in shaping the public policy agenda must be desired and is needed.

Affirmative Action and Government Spending: Cutting the *Real* Waste

By Ronald L. Griffin

The mission of the Detroit Urban League is to assist African Americans and other people of need to reach their full human potential. The Detroit Urban League implements its mission through eight key programmatic areas: Social Responsibility, Education, Employment Services, Seniors In Community Service, Health and Substance Abuse, WIC, Child Care Food Programs, and Advocacy.

The Beginnings of Affirmative Action

In 1965, President Lyndon B. Johnson issued Executive Order 11246 that required Federal contractors to undertake affirmative action to increase the number of minorities they employ. Subsequently, in 1969, the Department of Labor uncovered widespread racial discrimination in the U.S. construction department. This resulted in President Richard M. Nixon implementing a system of "goals and timetables" designed to evaluate Federal construction companies according to affirmative action regulations.

Affirmative action was extended to persons with disabilities and Vietnam veterans under the presidency of Gerald R. Ford. Jimmy Carter created the Office of Federal Contract Compliance Program (OFCCP) in 1978 to ensure compliance with affirmative action policies.

Under the Bush administration the Federal Glass Commission was created to identify barriers to progress for women and minorities in private industry. *Significant gains have been made in the national effort to end discrimination and give all Americans the opportunity to compete fairly.*

However, many factions in recent years have proposed cutting affirmative action programs citing that they have out lived their usefulness and are a financial burden on American businesses. Even when black men, black women and white women secure administrative, or managerial positions they still earn substantially less than do white men. Affirmative actions policies were needed 30 years ago and are still needed today. *In a global market place, diversity is a necessity. Business can ill afford to discount anyone who may possess the skills and training needed in today's complex arena.* The real "waste" is with inappropriate spending on questionable government initiatives, not on policies which assist in leveling the "national playing field."

Examples of Waste in Government Spending

Over a 27-month period, former White House Chief of Staff John Sununu used military aircraft for 77 trips to a host of venues. These trips cost taxpayers $600,000.00. $14,000 dollars alone was spent to fly Sununu to his dentist in Boston twice.

One billion dollars is spent annually on our Export Enhancement Program which subsidizes large export, (not farmers) firms while depressing commodity prices.

Fact. More than $1.5 million in Federal money was spent for a national pig research facility in Iowa.

Fact. More than $1 million in Federal money was spent for a green plant-stress lab at Texas Tech University in Lubbock.

Fact. In Tacoma Washington, a city which only has 57 sunny days per year, a covered walkway was built to view Mt. Ranier using $2 million worth of taxpayers' money. The cost per viewing day is over $35,000.

Citizens Against Government Waste reported in 1993 that 34 cents of every individual tax dollar remitted to Uncle Sam is wasted on bureaucratic bloat, mismanagement, and redundant programs. This amounted to a loss of over $170 billion dollars. This amounts to $2,108 of the average middle-income family's taxes. This wasted tax money could supply 6 month's of groceries, pay two house payments, or cover most of the health insurance for the average family. If the issue is fraud and waste and the instances can be documented, then eliminate the cause of the fraud through tighter contracts and compliance procedures.

Affirmative Action Does Not Mean Quotas

Quotas are illegal. But there have been so many instances of pronounced biased practices that courts have had to exercise their power under the Civil Rights Act of 1964 to impose a

range of solutions, including hiring goals and timetables. These timetables estimate the number of women and minorities who would be hired if there were no discrimination.

In 1972, a group of African Americans challenged the Alabama Department of Public Safety's longstanding practice of excluding blacks from *all* positions. In the 37 years of the department's existence, not one black person had ever been hired.

As a result of a Federal court issued affirmative action order, the department had to hire one black trooper for each white trooper hired until blacks constituted approximately 25 percent of the force. The Supreme court upheld a lower court ruling observing that:

> Qualified white candidates simply have to compete with qualified black candidates. To be sure, should the District Court's promotion requirement be applied, black applicants would receive some advantage. This situation is only temporary and subject to amelioration by action of the Department itself . . . [1]

Are Employers and Colleges Forced To Hire and Admit Unqualified People?

No. Affirmative action guidelines require employers to make a conscientious effort to find and train qualified people, based on job-related standards. Educational institutions are encouraged to enhance recruitment practices to filter in women and other minorities who can reasonably be expected to handle the rigors of an academic program.

Some Feel That Affirmative Action Is Reverse Discrimination

If the compelling business reason for removing affirmative action is "reverse discrimination" then let us examine who is affected or hampered when 95 percent to 97 percent of senior managers at Fortune 1500 companies, university presidents, tenured professors, chiefs of police, and school superintendents are white males.

Conscientious recruitment of women and other minorities is a way for institutions to break their habit of white male favoritism, and a way of changing over to nondiscriminatory practices. Is something being lost when we change these practices?

Yes. Favoritism long enjoyed by white males as members of the highest caste system that discriminates on the basis of color and sex. Most courts have found that in instances where white males claimed reverse discrimination that they were actually "disappointed" job applicants who were less qualified for the job than the chosen female or minority applicant.

Affirmative Action Policies Are Still Necessary

Women and minorities have come a long way in the decades since the civil rights act was passed, but discrimination still exists. In 1991, President Bush and Congress appointed a 21-member Federal Glass Ceiling Commission to identify barriers that block the advancement of women and minorities into decisionmaking positions in private industry. In March of 1995 the Commission reported its findings: The American work force is increasingly diverse. In 1950, white men were 65 percent of the labor force. By 1990, that figure had dropped to 43 percent. During the same period, the percentage of white women in the work force increased from 24.2 to 35.3 percent, while minority representation doubled, to 15.2 percent.

Today's American labor force is gender and race segregated—white men fill most top management positions in corporations. Again, Ninety-five to 97 percent of senior managers at Fortune 1500 companies are men. And 97 percent of male top executives are white. By 1994, Fortune 1000 companies had only two women CEOs. Last year alone, the Federal Government received over 90,000 complaints of employment discrimination. In addition, 64,423 complaints were filed with State and local fair employment practices commissions, bringing the total last year to over 154,000. Thousands of other individuals filed complaints alleging racially motivated violence and discrimination in housing, voting, and public accommodations.

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1 United States v. Paradise, 480 U.S. 149, 183 (1987).

There doesn't seem to be statistical information supporting legitimate business reasons for dismantling affirmative action. This only leaves "political" reasons. The political reasons are rooted in a country that has turned to the "Right" and are very wrong in their scape goat tactics of blaming blacks, the poor whites, women, and government intervention as to what is wrong with America.

This is the time for all corporate leaders, business owners etc., who have learned how to diversify their work force, and remain competitive, to come forward. Let's not, in fact, we will not allow the political right, religious right, even minorities who are now "thinking right." That is they made it without the benefit of any program. Should changes be made to affirmative action policy? Absolutely! What should they be? Let us examine our compelling business reasons, then decide.

Summary

In summary the position of the Detroit Urban League is:

1. Affirmative action programs are still highly needed. The unemployment rate for African Americans is still twice that of Whites. Only 1 in 7 African American families are middle class, compared to 1 out of 3 white families. Affirmative action is a proven method for providing women and minorities an equal opportunity gain access to the American mainstream.

2. Affirmative action is not a perfect program. We need to evaluate affirmative action programs, upgrade and modify them so that they continue to fulfill their original intended objective; to include all Americans in the process of economic development and equal competitiveness.

3. We recognize the emerging diverse and multiethnic society. Corporate America, government, and universities should maintain existing programs and implement new affirmative action programs to ensure an equally diverse work force to meet the needs of a diverse society. Creating diverse work forces is simply good business for companies who want to penetrate *all* available global and domestic markets.

Affirmative Action as a Legal Remedy and as Compensatory Opportunity

By Howard L. Simon

Three decades of litigation has now established the legal principle that it is unconstitutional for the State to mandate or maintain racial separation and discrimination. Similarly, the legal principle that it is unlawful for private parties to discriminate on the basis of race in housing, employment, and public accommodations has been clearly and firmly established by both Congress and the courts.

While these principles are no longer in doubt, there has been strong resistance, not to the legal principles themselves, but to specific claims that these principles have been violated and, even more, to the remedies necessary to correct such violations. Among various remedies, none has proved to be more controversial than affirmative action.

The ACLU believes that even though no single measure can eradicate discrimination, affirmative action remains a moral imperative and an indispensable strategy for giving those disadvantaged by discrimination a temporary leg up.

I define affirmative action, following the 1977 Report of the U.S. Commission on Civil Rights, as "a term which broadly encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future."

Discussion of affirmative action suffers from far too much oversimplification and rhetoric, and too few specific examples of affirmative action which is justified by a judicial or other finding of past discriminatory practice *and* in which there has been a clear benefit to society.

In 1972, a group of African Americans challenged the Alabama Department of Public Safety's longstanding practice of excluding blacks from all positions. In the 37 years of the Department's existence, not one African American person had ever been hired. A Federal court issued an affirmative action order: the department had to hire one black trooper for each white trooper hired until African Americans constituted approximately 25 percent of the work force.

Is that 25 percent a quota? Does this show that affirmative action means quotas? No it isn't, and no it doesn't. Quotas are illegal. Biased practices have been so pronounced in some cases that courts have exercised their power under the Civil Rights Act of 1964 to impose a range of remedies, including hiring goals and timetables—which estimate the number of women and minorities who would have been hired if there were no discrimination. These goals are flexible, remedial, "narrowly tailored" instruments of *inclusion*, while quotas were used historically to *exclude* members of some ethnic groups from workplaces and educational institutions.

A similar story can be told regarding one of the largest discrimination cases and court imposed remedial plans in Michigan history, namely the lawsuit filed by the American Civil Liberties Union and Equal Employment Opportunity Commission against Detroit Edison, in which a Federal court found that "the evidence was overwhelming that invidious racial discrimination and employment practice permeates the corporate entity of the Detroit Edison Co." In 1975, a Federal court found discrimination in appointments, assignments, and promotions in the Wayne County Sheriff's Department. And the integration of the Detroit Police Department came about as a result of an affirmative action plan upheld by the Federal courts.

When a court orders an affirmative action as a *legal remedy*, it does so only after proof that persistent discrimination has excluded racial minorities or women, and only after other methods of achieving equality have failed. Equating remedial goals with "quotas," paints a cartoon characterization of unqualified people being hired or promoted over qualified people.

When used as a *compensatory opportunity*, affirmative action provides broad opportunities to racial minorities and women to make up for disadvantages they have long suffered because of discrimination. Universities and employers are asked to make an extra effort to seek out applicants whom they would not likely find through

traditional methods of recruitment. Compensatory affirmative action sometimes means that a qualified candidate from a disadvantaged group is chosen instead of a candidate who is white and/or male.

Some of the legislation pending in Michigan, as well as in other States, labels affirmative action "preferential treatment." But, preferential treatment is nothing new in the United States, nor under certain circumstances is it criticized. For example, universities often give admission preference to the children of alumni, or to out-of-State students. Preferences based on family connections or geographic diversity certainly are based on considerations other than pure merit. Why is affirmative action to promote geographic diversity acceptable, but affirmative action to address historic discrimination and to promote racial and sexual equality not acceptable?

In the 1940s and 1950s the G.I. Bill of Rights gave World War II veterans—the vast majority of whom were white men—various educational and economic benefits, including preference when they applied for certain civil service jobs. These preferences, which acknowledged the disadvantages many veterans had endured, applied to all veterans regardless of merit, that is regardless of whether they had enlisted or been drafted, seen combat or not, or been economically disadvantaged by their military service or not. Veterans of various wars fought by the United States still receive special benefits. The national consensus has been that, for a certain period of time, veterans should receive assistance in reconstructing their civilian lives so that they can compete on an equal basis with people who have not served.

Such preferential systems have not caused a storm of protest among those who champion the merit system, nor have such preferential systems been generally perceived by Americans as unfair or immoral. Again, why is affirmative action used to compensate for the burdens of military service to the Nation acceptable, but affirmative action to address historic discrimination and promote equality not acceptable?

No reasonable person advocates placing people in positions for which they are not qualified, or giving people jobs they cannot do. It that is happening as a result of affirmative action, it should stop. But thrusting people into positions for which they are not qualified is not a necessary ingredient of affirmative action, nor is it a phenomenon limited to affirmative action.

I must also reiterate that the U.S. Supreme Court, in its latest pronouncement on the subject of affirmative action, *Adarand Constructors Inc., v. Pena*, provided constitutional standards for the misuse of affirmative action.[1] The Court said that all governmental (State, local, and Federal) affirmative action programs must meet the highest constitutional standard of "strict scrutiny" to be justified. That is, there is a presumption against affirmative action programs, unless they can be shown to be necessary to address a compelling governmental interest, such as the eradication of discrimination. That means that the doors of the courthouse are wide open to those who believe they have been wronged by the misuses of affirmative action.

However, it must be pointed out that, at the same time, the court said that affirmative action is an option that should be preserved. Anti-affirmative action proposals, including efforts to enact statutory bans and amendments to State constitutions would prohibit the very strategy to address past discrimination that the court has said should be preserved. Justice O'Connor, writing for the majority, said that:

> We wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional

1 Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995).

constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.[2]

A proposed constitutional amendment in Michigan would alter the political process in a way that specially burdens, and may violate the Equal Protection guarantee of the 14th Amendment.

In *Washington v. Seattle School District No. 1*,[3] the U.S. Supreme Court struck down a statute, adopted through a voter initiative, banning the use of mandatory busing for school desegregation. In his majority opinion, Justice Blackmun began by noting that "[t]the equal protection Clause . . . guarantees racial minorities the right to full participation in the political life of the community."[4] As part of that protection, he wrote, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."[5]

Yet that is precisely what would occur if our State Constitution were amended so as to prohibit any form of affirmative action: women and minorities would have an obstacle placed in their efforts to lobby for affirmative action legislation or policies, an obstacle that other groups do not have to overcome.

Finally, the widespread juxtaposition of affirmative action with "unqualified" itself reflects the pervasiveness of racial and sexual stereotypes in our society. Studies have shown that women and people of color, just by virtue of who they are, are frequently assumed to be less competent than white males for any tasks. This presumption of inferiority is so entrenched that a woman or person of color who is more qualified is often perceived as being less so. Only be increasing diversity in American workplaces and on campuses will such stereotyping die out.

As the world's most racially and ethnically diverse nation, and as a nation founded on constitutional principles of freedom and equality, the United States is ideally positioned to advance if only it can overcome the scourge of discrimination. Affirmative action policies are indispensable in that effort.

By the year 2000, five out of six people in the job market will be people of color, female, or immigrant. If employers continue reserving the most and best jobs for white men, the talents of a majority of the labor force will go untapped and our society will squander the vast human resources it possesses.

The unique diversity of its human resource pool gives our nation enormous potential for developing solutions to all the problems it confronts in education, criminal justice, childcare and affordable housing, to name a few. The key to maximizing that potential is an end to discrimination and fulfillment of the constitution's promise of freedom and equality, so that all Americans can have a chance to live productively and contribute to society.

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2 Ibid., at 2117.

3 458 U.S. 457 (1982).

4 458 U.S. at 467.

5 Ibid., at 468 (quoting *Hunter v. Erickson*, 393 U.S. 385, 393 (1969)).

Affirmative Action and the Politics of Humanism

By Jimmy Myers

Introduction

There have been several historically recent factors that have influenced the current debate over affirmative action. As Vice President under President Ronald Reagan, George Bush became the hand-picked heir to the presidency. His successful campaign in 1988, relied extensively on the political tone and momentum established by Reagan and his administration. One of the lessons Bush apparently learned was how and when to use "race politics" to his advantage.

While president, Mr. Reagan referred to an African American woman receiving welfare as a "welfare queen," which was intended to be a negative reference to both race and affirmative action. Bush, during his campaign used an African American prisoner named Willie Horton, who committed another crime while he was out on weekend furlough as his "race card." Many political observers believe that it was George Bush's skillful use of race politics that led to his victory over Michael Dukakis in 1988.

Another relevant historical development occurred during George Bush's term as President. The Governor of Florida, when faced with a massive surge of illegal immigration from South and Central America sharply criticized the Bush administration for not providing the needed revenue to provide the services the Federal Government required. "No unfunded mandates" became a new rallying cry in a rising tide of anti-Federal Government and antiimmigrant sentiment.

Many would-be politicians clearly got the message and saw the value of using race in a political campaign. However, it was Senator Jesse Helms of North Carolina who made the most profound statement.

Two weeks before the election, when Helms was significantly behind in all the polls, he ran a TV commercial that turned the tide in his favor.

Helms was losing to a younger, black male candidate who stayed away from negative campaigning. Helms, on the other hand, ran a commercial that told the story of a white, middle-aged, laid-off, blue-collar worker who was looking for a job. The man was seated at his kitchen table studying an envelope from a company that was considering hiring him. He knew that when he opened the envelope, he would learn whether or not he had the job. After he had prepared himself sufficiently, he opened the envelope and began to read. The letter stated something to the effect, "Dear Mr. Smith, thank you for applying for employment with our company. You were our first choice, and clearly the most qualified applicant, but because of a government affirmative action program we have to give the job to a less qualified minority person . . ." The man crumbled the letter and formed his hand into a fist, while the camera came in for a close-up shot. You could clearly see all of his anger and frustration in his gestures. Helms went on to win the election.

As a result of these and other similar events, a whole new generation of campaign practices had been established. Race politics had become a very effective instrument of political success. In California, Pete Wilson, former mayor of San Diego used an antiimmigration campaign to help him get elected Governor and as Governor used an antiaffirmative action message to run for president.

In today's highly contentious political environment, instead of providing answers and solutions to an ongoing series of complex domestic and international problems, it has become somewhat the norm for politicians and highly visible talk-show personalities to give the American people someone to blame. High on the list are African Americans, Latinos, Asians, women, immigration policy, unfunded mandates, welfare programs, the Federal Government, the United Nations, foreign aid, gays/lesbians, social security, TV violence, abortion rights, affirmative action, Jews, Native Americans, trade unions, liberals and on and on. Instead of providing vision, leadership, and solutions, the new trend is to blame, accuse, and make enemies of our own people.

Objective

Within this historical context, this paper will examine how leaders of white supremacist organizations are using affirmative action, the political process and labels of humanism to further divide and manipulate the American people, and provide the rationale for engaging us in a race war of all against all to the end.

The White Supremacist Movement

The main objective of most white supremacist organizations is to establish an infrastructure that would assure a system of white racist domination throughout the Nation. As stated publicly, their main thesis is, "if we can't have it all, then no one will have any of it."

The leader of a secretive neo-Nazi group warned his followers that they should be prepared to kill to save the white race.

An open letter to civil rights lawyer Morris Dees, published in an extremist newsletter began as follows:

Dear Morris:

Our future is Oklahoma City. I have a deep and abiding faith in the ultimate depravity of mankind. There will be no brotherhood, Morris, only racial hatred and contempt and fear and loathing and rage until one side or the other in this titanic struggle has perished completely. Count on it, my friend. There is a cruel, cold time coming.

We can make your liberal, New World Order pay for every inch of America in violence and pain and anguish until the ground is sodden with the blood and the tears of my dying race; until the land and the skies of North America are so poisoned with the emissions of the White man's death struggle that you and your kind cannot breathe.

Defining the Terms

Affirmative Action refers to policies and programs for correcting the effects of discrimination in employment or education for members of certain groups, such as people of color and women.

Politics has been defined, among other things, as the art of compromise, the art of the possible, and the will of the people.

Humanism refers to the philosophical position that attaches primary importance to all humans as members of the same species and provides for the individual to attend to his or her own affairs *without the necessity of divine guidance or divine intervention.* According to this belief, success in our endeavors is therefore humanly determined *not* divinely determined.

It is this latter attribute of humanism that provides the controversy and the controversy exists for the following two reasons:

(1) In the current debate over the necessity and value of affirmative action, the *humanism* label has intentionally been misapplied and turned into a harsh accusation and used against the supporters of affirmative action;

(2) The leaders of white supremacy organizations have tied humanism and affirmative action together and are using it as a wedge to further divide the American public and put one against the other.

Discussion

Since the passage of the Civil Rights Act of 1964 there has been an open and active "white backlash" movement in the United States. This white backlash is still going on today and has become louder and more militaristic. It has evolved from an intellectual dialogue, to congressional debate, to the "angry white male" movement, to a publicly stated, worldwide white supremacist movement.

Some observers believe the intensity of this movement has been exacerbated by the constant reminder of the changing worldwide demography. For example, by the year 2050 the total white population of the world will be 9 percent, between 3–5 percent male, 3–5 percent female; while at the same time nonwhite countries such as Nigeria, Iran, Pakistan, and Indonesia have populations that are on the rise, and will move into the top 10 in world population.

Instead of these dramatic shifts in the demography being regarded as a tremendous "diversity challenge," they are being regarded as a racial and cultural threat and have generated a fear-based reaction.

A brief survey of the reaction throughout the world reveals the following:

- In response to a large and continuous influx of North Africans, France has established a national High Commission to reaffirm and

reassert what it means to be French, and wants everyone to conform to their new definition;
- The United Kingdom has established new and much more restrictive immigration policies, as a way of dealing with the significant increase in diversity from their former colonies;
- Germany is having its share of problems associated with reunification and the rise of a new and violent fascist movement;
- the former Soviet Union is being separated into a new kind of federation of ethnic republics;
- Bosnia-Herzegovina has rejected outright the notion of diversity and only recently stopped waging its bloody and very violent war of "ethnic cleansing" against its own population;
- South Africa's white, racist government had never accepted the principles that make diversity work. South Africa's white supremacist history of apartheid is well-known.

The driving force behind all these racial, cultural, nationalistic, and militaristic responses to diversity are the changing demographics, and the very real fear of racial and cultural annihilation.

Politics, Humanism, and the White Supremacist Rationale

When the reunified German government cracked down on the skinheads who were engaged in a systematic and violent campaign of murder, arson, and brutal assaults on Germany's nonwhite population, they simply changed their tactics. They grew their hair back and stopped wearing the characteristic combat boots and brown shirts. Their leadership told them that if what they were doing was illegal, then they would have to become lawmakers and change the laws. The followers were reminded that Adolph Hitler was legally elected Chancellor of Germany and were instructed to get elected to public office on every level, municipal, provincial and national, which they did.

In reunified Germany the skinheads have gone underground, or more correctly have gone mainstream. Their philosophy has not changed, only their methodology.

In the United States, David Duke, who reportedly had a long history of white racist activity, ran a highly visible campaign for president of the United States and later for the U.S. Senate from Louisiana.

Larry Pratt, a former Virginia legislator and former cochair of Patrick Buchanan's 1996 campaign for president, reportedly lends support to the armed militia movement in the United States. Several other supporters have run for elective office or have influential talk shows that are used as a forum to sway public opinion.

The campaign to sway public opinion is directed at certain segments of the population. The "Christian Right" who have legitimate religious objections to certain contemporary social developments are being courted and influenced by the persuasive rhetoric of the white supremacist. One of the more effective tactics is to link Jews and people of color together, and refer to their respective religions as being humanistic and devoid of God's divine presence. Jews are regarded as evil, satanic, and murderers of Christ, while African Americans are regarded as "pre-Adamic," or before Adam, and therefore not really human, but more akin to the beasts of the field.

When concerted efforts are made to continually send these messages year after year to targeted groups, and when vocal alliances are formed over such issues as prayer in the public schools, and antiabortion legislation, the messages and the messengers gradually begin to appear more mainstream than extreme.

The religious leaders of the Christian Right influence their followers from the pulpit against the humanists on a continual basis, and the parents in the congregation influence their children, and the message then completes its cycle.

Those who are exposed to such messages begin to develop opinions about Jews, African Americans, and other people of color, that allows them to only see and hear other messages that reinforce their distorted view. They begin to believe that they are very familiar with them and this "familiarity" forms the basis of their distrust and distaste.

For decades members of the African American community have been chided and admonished for not assuming more responsibility and control over their own lives and their own communities. But when Louis Farrakhan addressed his followers in Washington, DC. during the Million Man March and advised them to, "go back to your

cities, go back to your neighborhoods, your communities and start your own businesses, stop abusing your black women and start protecting them". . . . He also told them that if they had the commitment to do it, then they had the power to do it. These remarks however, were regarded as proof and further evidence of the godlessness of the message, the messenger, the followers, and the people. One commentator on a Christian Right radio station told his listeners, "Mr. Farrakhan let me remind you that no man is an island, and no man can reach his destination without the divine hand of the Lord pointing the way. If you continue to depend on humanism as your religion, you and your people will never rise above your current situation."

Affirmative Action

There is more correlation between opportunity and success than between race and success or gender and success, and affirmative action's basic premise is still equal opportunity.

Affirmative action allows every American a fair chance to achieve success. That basic premise is a central tenant of our constitutional and political system, and is a fundamental, very core value in American culture. It is the fundamental goal of the civil rights statutes, and of affirmative action itself. Affirmative action however, is only one of several tools used in the public and private sectors to move away from a world of lingering biases toward one in which opportunity is truly equal. Affirmative action programs recognize that existing patterns of discrimination and exclusion may require race-conscious, or gender-conscious measures to achieve equality of opportunity.

Expanding opportunity through inclusion and vigorous prosecution of proven instances of discrimination will not by itself close the opportunity gap; discrimination and exclusion have proven too varied and subtle for that. Therefore, to genuinely extend opportunity to all, we must take affirmative steps to bring underrepresented people of color and women into the mainstream of American life. The consequences of years of officially sanctioned exclusion and deprivation are powerfully evident in the social and economic ills we observe today, and in some instances, then race-conscious and gender-conscious measures can be justified.

Virtually all educators acknowledge that a college is a better academic enterprise if the student body, the faculty and staff are diverse. A police department will be more effective in protecting and serving its community if its officers are somewhat reflective of that community. Judges, and governmental policymakers must be able to reflect the concerns, aspirations and experiences of the public they serve in order to do their jobs well and to enjoy legitimacy.

Ultimately, therefore, the test of whether an affirmative action program works is whether it hastens the eradication of discrimination and promotes inclusion of everyone in the opportunities America still promises.

As convincing as these points may seem, the white supremacist rejects them outright. To them equal opportunity and fair play is not a priority. Any progress by people of color is regarded as being at the expense of white people. To the white supremacist, white people are regarded as more deserving than all other people.

An active campaign to maintain a system of white privilege is being waged in all parts of the country.

In addition to affirmative action, all the gains of the civil rights era are under attack. Recently the voting Rights Act of 1965, the act that allowed African Americans and some Latinos to elect their own congressional representatives was repealed. The way this campaign gathers momentum is by positioning the targeted groups as the primary cause of what is wrong with America. For example, "if all these undeserving people would get off welfare and get a job, then we wouldn't have the financial crisis we have today." Or, "it's just unfair, and un-American to deprive more qualified white people of work in order to satisfy some affirmative action program. That's reverse discrimination."

It is difficult to deny the effectiveness of their approach in persuading many nonracist people to embrace their perspective. It is clear that there has been a more effective campaign of miseducating the American people than the supporters have done in educating them. In order to preserve the gains a serious and protracted campaign of reeducating the American people has to be waged. A very deliberate effort must be made to expose the white supremacists' effort to marginalize and trivialize the self-help efforts of some members of

the African American community. The empty charges of "humanism" can only serve to harden existing positions and force people to chose sides, one against the other.

One of the first steps in resolving one of our national difficulties is to stop regarding one another as enemies. There is too much at stake for us not to recognize our mutual dependence, and our potential for mutual gain.

The time is now, and it is never too late to take a new direction in our search for America.

IV. Position Statements on Affirmative Action from National Organizations

Position Statement on Affirmative Action to the United States Commission on Civil Rights

From the Anti-Defamation League*

The Anti-Defamation League welcomes the opportunity to submit this statement to the United States Commission on Civil Rights. We believe this is a subject which warrants public attention and debate, and the League commends the Midwestern Regional Office of the U.S. Commission on Civil Rights for sponsoring this forum.

In the course of the last three decades, this country has made meaningful progress in redressing an historical legacy of segregation and discrimination and in ensuring and promoting minority participation in the full spectrum of American life. For many, this progress reflects the success of the civil rights movement in America, in which the Anti-Defamation League (ADL) has played an integral role. ADL has, in the past, filed *amicus* briefs in the United States Supreme Court urging the unconstitutionality of, or illegality of, racially discriminatory laws or practices in such cases as *Shelley v. Kraemer, Sweatt v. Painter, Brown v. Board of Education, De Funis v. Odegaard, Fullilove v. Klutznick,* and *Memphis Fire Department v. Stotts.* In all of these cases, the League has advocated the position that each person has a constitutional right to be judged on his or her individual merits. ADL clearly and unequivocally adheres to the notion that racial diversity in academic and employment settings is in the interest of this nation. However, the League rejects the concept that allowing special consideration of immutable characteristics is the only means to achieve the goal of full participation by all segments of society.

ADL has long adhered to the position that a primary goal of our society should be the elimination of all forms of discrimination and the establishment of equality of opportunity for all Americans. ADL was one of the first organizations to advocate and support legislative and administrative actions by government to prohibit discrimination in employment, education, housing, and other areas of American life. ADL played a significant role in securing the adoption of such laws and regulations, including the Civil Rights Act of 1964. Recognizing that antidiscrimination laws by themselves would not succeed in leveling the playing field because prior victims of discrimination frequently lacked the education and training necessary to compete in a merit-based process on an equal basis, ADL has supported a variety of traditional affirmative action measures in an effort to foster meaningful equality of opportunity. ADL continues to support affirmative action as it was originally conceived, as an effort to assist prior victims of discrimination.

A just society has an affirmative obligation to help undo the evils flowing from past discrimination by affording its victims every opportunity to hasten their productive participation in the society at their optimum level of capacity. Consequently, ADL advocates and supports provision for special compensatory education, training, re-

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* This position paper was solicited through the Detroit regional office of the Anti-Defamation League. Harlan A. Loeb, assistant director, legal affairs, national office of the ADL, provided the statement. His signed correspondence is on file with the Midwestern Regional Office of the U.S. Commission on Civil Rights, Chicago, Illinois.

training, apprenticeship, job counseling, and placement, welfare assistance and other forms of help to the deprived and disenfranchised, to enable them as speedily as possible to realize their potential capabilities for participation in the American economic and social mainstream.

While supportive of special efforts to recruit minorities and other elements of affirmative action as originally conceived, ADL has consistently opposed quotas, racial preferences, proportional representation, and the use of race as an absolute qualification for any post. Unfortunately, governmentally required numerical goals and timetables have frequently operated as the functional equivalent of quotas. Favoritism based on immutable characteristics such as race and ethnicity do not advance equality. The evolution away from a system of decisionmaking focused on individual merit and toward a system of group preferences has had a demonstrably negative impact on race relations in this country. Resentment has been aroused even among minority communities because the practice unfairly stigmatizes minorities in the eyes of fellow citizens.

The League believes that race-based preferences and quotas cannot be justified on the theory that the 14th amendment protects only racial minorities. Such a concept is wholly contrary to the basic constitutional principles that all persons are entitled to be free from discrimination on grounds of race, religion, creed, sex, or national origin. The equal protection clause protects all individuals, regardless of race, from State-sponsored discrimination. The rights conferred by the amendment are personal and cannot be waived. Even in cases where there is a history of past discrimination, it is generally inappropriate, ADL believes, to use race or ethnicity as a remedial tool. However, under narrow circumstances the League believes that race and ethnicity can be used remedially if a court makes a finding that there is a history of systemic and egregious discrimination, all other remedies have been ineffective, and the remedy is limited in duration. Similarly, the League does not deem it a racial preference if an employer, in response to current egregious and systemic discrimination, considers race and ethnicity in its hiring and promotion practices. Both of these exceptions, while perhaps narrower than the standard set forth by the United States Supreme Court in *Adarand V. Pena*, recognize that there are limited situations in which race must be considered to confront manifest and persistent discrimination.

There is no doubt that the playing field in this country is far from level, and our society has substantial headway to make in eradicating discrimination. To this extent, it is vital that we undertake a renewed commitment to fighting discrimination and promoting opportunity for all sectors of the American human landscape. Tougher and more aggressive enforcement of the civil rights laws is a substantial first step. Rather than cutting funding for enforcement of this country's civil rights laws, funding must be increased. The unprecedented case backlog at the Equal Employment Opportunity Commission is just one of many symptoms that should alert lawmakers that laws are hollow if they are not accompanied by the necessary enforcement resources.

The 1991 amendments to the civil rights act provide for a broader range of damages for successful claimants. Except for the substantial minority of litigants who can afford counsel in discrimination cases, few lawyers take discrimination cases on a contingency fee basis. Therefore, the futility of the damages provisions are obvious if injured parties have *no* day in court. The enormous discrimination lawsuits against Fortune 500 companies like Denny's or Wal-Mart, while appealing news stories, do not represent the bulk of discrimination complaints.

Most forms of discrimination are either too subtle to be actionable or too institutionalized to be penetrable. Therefore, enforcement of antidiscrimination laws is, in and of itself, insufficient. Although most observers candidly admit that discrimination continues in this country, they do not share the same unanimity when confronted with the "solution" question. In part, quotas and other forms of mandated preferences grew out of the recognition that "good citizenship" and "justice" were inadequate catalysts for the elimination of discrimination. It ism, however, possible to provide incentives without resorting to race-based preferences.

In some cities, for example, coalitions have formed between local industry, school representatives, government officials, and other community representatives to begin to grapple with the challenge of promoting diversity and equal opportunity. At the core of these initiatives is the con-

viction that outreach and education will go a long way in facilitating equal opportunity. The League has long believed that there is a positive correlation between ignorance and discrimination and a negative correlation between education and discrimination. For that reason, ADL has developed training and educational programs.

ADL's A WORLD OF DIFFERENCE Institute has documented success in training businesses, local government, and academic institutions in the value of diversity. By breaking down common myths and building an appreciation for diversity, the eradication of discrimination in employment and admissions can be accomplished. Federal and State government should take the lead and mandate compulsory diversity education for all employers that receive Federal or State funds.

Universities and industry, through governmentally created incentives, should be encouraged to develop programs for the recruitment, training, hiring, and promotion of individuals who have a personal history of disadvantage. Economic rather than racial, criteria provide for an equitable basis upon which to develop special hiring and admissions programs. In valuing individual ability to triumph over hardship and adversity, we, as a society, acknowledge grit, determination, and perseverance "qualification criteria." Proactive measures must be taken to pull the outsiders into the economic mainstream, and economic factors furnish the most egalitarian means to accomplish this imperative objective.

ADL welcomes recent legal initiatives intended to restore merit-based decisionmaking and to prohibit any form of discrimination in employment, education, housing, and other areas of American life. Coupled with a commitment to expand the pool of qualities and characteristics which constitute the concept of "merit," there is room to be optimistic that race and ethnicity will not form the basis for privilege or discrimination.

Clearly, there is much room for improvement in this country's crusade against discrimination and bigotry. The Federal Government has the opportunity to take the lead, at least by example, in this most important obligation. The League, therefore, applauds the Commission's initiative in confronting this difficult problem and we thank you for the opportunity to participate.

A Statement on Equal Opportunity and Affirmative Action
The United States Catholic Conference*

Department of Social Development and World Peace
3211 4th Street, N.E.
Washington, DC 20017-1194
May 21, 1996

The Honorable Henry Hyde, Chairman
Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the United States Catholic Conference, the public policy agency of the nation's Catholic bishops, I write in opposition to HR 2128—the "Equal Opportunity Act of 1995." The Catholic bishops conference believes that passage of this bill would set back the nation's attempts to address the vestiges of racism and sexism and the resulting discrimination which have scarred our people, our communities, our government, and our society.

Our nation needs a renewed debate over how best to overcome the lasting consequences and current impact of racism and unjust discrimination in all of its forms. We need to examine which remedies are working well, which are in need of strengthening or reform, and which should be abandoned. Sadly, the often partisan debate and the sweeping nature of this legislation generate more heat than light, more political struggle than public dialogue.

When he came to our nation last fall John Paul II declared: "The basic question before a democratic society is how ought we to live together?" This question is at the heart of this discussion. Are we to see ourselves as isolated individuals competing for limited opportunities? Are we to divide ourselves into competing groups clawing for advantage?

In our 1979 pastoral letter on racism, ***Brothers and Sisters to Us***, the U.S. Bishops strongly state: "Racism is a sin; a sin that divides the human family, blots out the image of God among specific members of that family, and violates the fundamental dignity of those called to be children of the same Father . . . Racism is sometimes apparent in the growing sentiment that too much is being

given to racial minorities by way of affirmative action programs of allocations to redress long-standing imbalances in minority representation and government funded programs for the disadvantaged. At times, protestations claiming that all persons should be treated equally reflect the desire to maintain a *status quo* that favors one race and social group at the expense of the poor and nonwhite."

"Racism obscures the evils of the past and denies the burdens that history has placed upon the shoulders of our Black, Hispanic, Native American, and Asian brothers and sisters. An honest look at the past makes plain the need for restitution where ever possible—makes evident the justice of restoration and redistribution.

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* In response to an invitation from the Advisory Committee, the United States Catholic Conference submitted the following letter from William S. Skylstad, Bishop of Spokane and chairman of the domestic policy committee, to the U.S. House of Representatives Judiciary Committee as its position statement on affirmative action. The signed letter is on file with the Midwestern Regional Officevof the U.S. Commission on Civil Rights, Chicago, Illinois.

We believe that the moral task before our leaders is to search for the common good in this divisive debate, to renew our nation by seeking opportunities for all Americans, acknowledging that this requires appropriate and judicious affirmative action to remedy discrimination and to offer opportunity for all, including those on the margins of our society.

As we said in our pastoral letter, ***Economic Justice for All***, "Discrimination in job opportunities or income levels on the basis of race, sex, or other arbitrary standards can never be justified. It is a scandal that such discrimination continues in the United States today. Where the effects of past discrimination persist, society has the obligation to take positive steps to overcome the legacy of injustice. Judiciously administered affirmative action programs in education and employment can be important expressions of the drive for solidarity and participation that is at the heart of true justice. Social harm calls for social relief."

Affirmative action—clear in purpose and careful in application—remains a necessary tool for reaching equal opportunity. To abandon this tool now would be to retreat in our struggle for justice and limit our hope for an inclusive society that harnesses the talents and energy of all our people.

Sincerely

[signed]

William S. Skylstad
Bishop of Spokane
Chairman, Domestic Policy Committee

The Episcopal Church and Affirmative Action

Introduction

The support of affirmative action by the Episcopal Church is based primarily upon the Church's understanding of justice, and upon the identification of racism as a sin. In the 1985 Blue Book Report to the General Convention, the Standing Commission on Human Affairs and Health address institutional racism in these words:

The new Testament makes clear that "In Christ there is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for all one in Christ Jesus" (Galatians 3:28). Our distinctive natures are maintained whole while our unity is secured "in Christ." We are defined as one, as whole, as unified by our relationship to Jesus Christ. Christians share with people of good will a deep concern and respect for the dignity of human beings everywhere.

The National Council of Churches defines racism as the intentional or unintentional use of power to isolate, separate, and exploit others. This use of power is based on a belief in superior racial origin, identity, or supposed racial characteristics. Racism confers certain privileges on and defends the dominant group which, in turn, sustains and perpetuates racism. Both consciously and unconsciously, racism is enforced and maintained by the legal, cultural, religious, educational, economic, political, and military institutions of societies.

Racism is more than just a personal attitude; it is the institutionalized form of that attitude.

Institutional racism is one of the ways organizations and structures serve to preserve injustice. Intended or not, the mechanisms and function of these entities create a pattern of racial injustice. . . .

Historically, people of European ancestry have controlled the overwhelming majority of the financial resources, institutions, and levers of power. Racism in the United States can, therefore, be defined as white racism: racism as promulgated and sustained by the white majority.

As Christians, we must recognize racism as a sin against God. We make this statement by the National Council of Churches our own and we go on to observe that racism knows no boundaries and penetrates religious and secular communities throughout the worship.

Several General Conventions have passed resolutions opposing racial discrimination within both Church and society. We are pleased to note the creation by the Executive Council of the national Coalition for Human Needs and of the staffing of several "ethnic desks" to address the problem programmatically. We are pleased to note, the National Conference on Racism, sponsored by the Coalition in February of 1982, which brought together 229 persons from 57 dioceses to raise the consciousness of dioceses and Church persons about racism, to confront the effects of racism, to share strategies for combating racism, and to enable dioceses and congregations to enact programs to combat racism.

As of 1984, fourteen dioceses and regional groups have reported substantial steps to enact plans to combat racism. These steps include local conferences, the establishment of diocesan commissions on racism, affirmative action policies, racial audits, and a survey of affirmative action practices by Episcopal seminaries. The 66th General Convention meeting in 1979 at Denver called on the Executive Council to design and implement an affirmative action plan for nondiscriminatory employment within the Episcopal Church Center affecting both clerical and lay persons. Such as Equal Employment Policy and Affirmative Action Program was drafted and adopted by the Council in February of 1982. The following September, the 67th General Convention adopted this affirmative action plan to cover the employees, committees, commissions, boards, and agencies of the General Convention, together with the firms from which Convention purchases goods and services. Programs of education and public witness on affirmative action were also mandated.

The Standing Commission on Human Affairs and Health rejoices in these developments. We observe, however, that the program, as adopted, calls for monitoring; yet it is not evident to us that this is being done. What is needed now is a compelling reaffirmation of that policy and a wholehearted commitment to the implementation of the letter and the spirit of that policy. An increase in the number of persons and families living in or near poverty, a disquieting increase in the number of incidents which appear to be caused by

racial polarization, and the evident erosion in the quality and moral fabric of life are but a few of the indicators which make the need for this commitment to action by the whole Church imperative.[1]

Reference in the report to the 1979 General Convention was to action taken to call for affirmative action for the following reasons:

1. According to the Bureau of Labor Statistics, minorities are more than twice as likely to be in lower paid service industries as the white majority; five times as likely to be private household workers; twice as likely to be farm laborers; while whites are twice as likely to be higher paid skilled craft workers and three and a half times more likely to be managers and administrators.

2. According to the United States Commerce Department, black family median income is 57 percent of white family income, and white high school dropouts have a 22.3 percent unemployment rate as against a 27.2 percent unemployment rate for black youth with a college education.

3. According to Statistical Abstracts of the United States, blacks are underrepresented in the less hazardous and are overrepresented in the more hazardous occupations —e.g., in the steel industry, of those working at the coke ovens, where lung and respiratory cancers are the highest, 90 percent are black.

4. According to the United States Commission on Civil Rights, " . . . overt racism and institutional subordination provide definite benefits to a significant number of whites . . . "—e.g., "exploitation of members of the subordinated groups through lower wages, higher prices, higher rents, less desirable credit terms, or poorer working or living conditions than those received by whites . . ."

5. According to the United States Commission on Civil Rights, many Federal agencies have ignored or subverted affirmative action requirement, thereby impeding minorities from moving into higher paid professional, managerial, and skilled trade jobs.[2] In September of 1992, the following paper was presented to the House of Bishops meeting in Baltimore, to examine the theology of justice and opposition to racism.

Following up on that action, the 1979 General Convention adopted a resolution supporting the principle of affirmative action, and called for programs of education on affirmative action:

RESOLVED, the House of Bishops concurring, That the 66th General Convention supports the principle of affirmative action—especially, special admissions programs for minorities in universities and professional schools and programs to upgrade unskilled workers to the skilled level; and be it further

RESOLVED, the House of Bishops concurring, That this 66th General Convention instruct the Executive Council, within the 1980–82 triennium, to initiate programs of public education on affirmative action at all levels of the Church; and be it further

RESOLVED, the House of Bishops concurring, That this 66th General Convention instruct the Executive Council to communicate our support of affirmative action to the major religious bodies of the United States and urge them to endorse, support and implement affirmative action.[3]

At the 1982 General Convention, the Episcopal Church committed itself to support of affirmative action programs implemented by the Federal and State governments, aimed for voluntary imple-

1 Blue Book Reports, 1985, pp. 123 and 124.

2 *1979 Journal of General Convention*, p. C-133.

3 *1979 Journal of General Convention*, p. C-134.

mentation of affirmative action to place minorities, women, and other underprivileged persons in offices, committees, and commissions of the Episcopal Church, and called upon individual dioceses and congregations to do likewise:

RESOLVED, the House of Deputies concurring, That this 67th General Convention of the Episcopal Church:

1. Commits this Church, in the implementation of its program for 1982–85 to support, through prayer, education, and courageous public witness, the strengthening and advancing of Affirmative Action programs heretofore implemented by the Federal government and the States;

2. Commends the Presiding Bishop and the President of the House of Deputies for their efforts to make appointments to offices, committees, and commissions within this Church in such manner that minorities, women, and underprivileged persons of all kinds may be fairly and affirmatively represented at all levels of service and responsibility in this Church; and

3. Encourages individual Dioceses and congregations to examine the compositions of bodies providing leadership within their respective jurisdictions, with an eye that the membership of such bodies may be more truly representative of our brothers and sisters who came from minority or underprivileged backgrounds.[4]

In the next General Convention in 1985, the Episcopal Church called for the establishment of affirmative action programs at all levels within the Church, and specifically addressed the continuing concern over racism:

RESOLVED, the House of Bishops concurring, That the 68th General Convention calls on all dioceses and related institutions and agencies of the Episcopal Church to establish and publicize an Equal Employment and Affirmative Action Policy and to provide a means for effective monitoring of the same; and be it further

RESOLVED, That the Board for Theological Education is directed to develop, in consultation with the Council of Seminary Deans, an instrument and process to make an audit of racial inclusiveness to be found in the respective student bodies, faculty and trustees as well as in their curricula and field work; and be it further

RESOLVED, That the Executive Council use its existing program agencies and staff to ascertain what specific steps the dioceses and local congregations, the seminaries, and other agencies of the Church have taken to implement the 67th General Convention Resolution on racism which called for implementation of Affirmative Action programs, and report the findings to the Church at large by 1988.[5]

Having taken that general step, the Convention also specifically requested dioceses to not only establish such affirmative action programs, but provided for annual reporting, as well:

RESOLVED, the House of Bishops concurring, That the several Dioceses of the Church be requested to establish Affirmative Action procedures, using as a basis those procedures adopted by the 67th General Convention for the Executive Council, the General Convention, and the interim bodies of the General Convention; and be it further

RESOLVED, That the several Dioceses be requested to report annually their participation in such procedures to the Executive for Administration and to the Committee on the State of the Church, using a form prepared by the Personnel Committee/Department of the Executive Council.[6]

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4 *1982 Journal of General Convention*, p. C-145.

5 *1985 Journal of General Convention*, p. 161.

6 Ibid., p. 162.

In 1988, the standing commission on the Church in metropolitan areas, in its report to the General Convention, again expressed its concern for the sin of racism, and urged a resolution supporting affirmative action, but coupled with a direct addressing of the matter or institutional racism in all areas of life, not just in the religious arena:

Our religious tradition teaches us that all people are created in the image of God and posses an inherent dignity and worth regardless of race or class. Despite this tradition, racism is still deeply ingrained throughout all the institutions in our society, including the Church. Its manifestations are often subtle and devastating. Historically, affirmative action has been seen as one effective remedy to offset past racial injustices. The view has been under hostile attack over the past decade and it needs to be reaffirmed at this stage in our history.[7]

In response to the Commission report, General Convention of 1988 adopted the following resolution:

RESOLVED, the House of Bishops concurring, That this Convention reaffirm its commitment to a vigorous affirmative action program in all institutions in society as a remedy to historical, racial and sexual injustices. Such a program, already instituted at the national Church level, should serve as a model to include an open and vigorous search to fill positions with women and minorities. This should include set targets and an extensive evaluation of performance; and be it further RESOLVED, That this Convention urge all of its dioceses and congregations to address the issue of institutional racism in the political and economic arenas, and also in religious institutions; and be it further
RESOLVED, That congregations help their members to address patterns of racism in the settings where they work in educational and other community institutions, and in housing practices.[8]

In 1991 the Executive Council Commission on Racism reported that it was mandated:

(1) to offer and provide assistance to dioceses, congregations and agencies of the Episcopal Church in developing programs to combat racism;
(2) to offer and provide assistance in the development of affirmative action programs and monitoring implementation of the same;
(3) to offer and provide assistance in the evaluation of such programs;
(4) to report to the executive council annually and to report to the General Convention in 1991 and thereafter.[9]

Goals and Objectives for the Next Triennium

Among the goals and objectives for the next triennium are the following:

(1) Equip church members to understand institutional racism and develop plans and programs to combat racism using data resulting from the institutional racism audit.
(2) Influence and monitor the racial and ethnic composition of interim bodies, commissions, committees and networks of the Episcopal Church.
(3) Provide antiracism training for the executive council.
(4) Monitor implementation of affirmative action program, equal employment policy and purchasing practices at the Episcopal Church Center, which must be a model for the whole Church.
(5) Follow up on recommendations from meetings with Episcopal Church Center units/divisions.
(6) Continue the development of networks of trainers in provinces.
(7) Work with a minimum of 11 dioceses in developing programs to combat racism.

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7 Blue Book Reports, 1988, p. 210.

8 *1988 Journal of General Convention*, pp. 189–90.

9 *Blue Book Reports*, 1991, p. 145.

(8) Request a pastoral letter on the sin of racism from the House of Bishops.[10]

In response to the report, both the House of Deputies and House of Bishops of the 1991 General Convention conducted racism self-audits.[11] In addition, a resolution of specific actions was adopted:

RESOLVED, the House of Bishops concurring, That the 70th General Convention urge each Dioceses to implement and go strengthen initiatives with all congregations in the Diocese toward becoming a Church of all for all races and a Church without racism committed to end racism in the world; and that these initiatives include but not to be limited to:
Prayer and Worship—encourage the establishment of prayer groups and support groups around the theme of combating racism.
Planning and Funding—ensure that funding and planning structures affirm racial equity in appointments to and funding of all diocesan staffs, committees and commissions.
Deployment—support and actively work to assure that parishes who have never considered minority clergy for vacancies do so.
Recruitment—actively recruit and support minority candidates in their progress from postulancy to ordination.
Education—prepare educational material to provide parishes with an educational series on the nature of racism that will acknowledge racism as a sin and will work toward eliminating its existence in the Church.
Racial Survey—conduct a racial survey to determine where minority persons are in the Diocesan structures and parishes to determine if they are present on all Diocesan committees and vestries in proportion to their presence in the Church.[12]

Note: This position statement on affirmative action was received from the Rt. Rev. William Wantland, Bishop of the Eau Claire (Wisconsin) diocese.

10 Ibid., p. 146.

11 *1991 Journal of General Convention*, pp. 90 and 540.

12 Ibid., p. 382

A Human Relations Perspective on Affirmative Action

From The National Conference*

As a national leader in intergroup relations, beholden to no one group and concerned about all, The National Conference works to advance the goals of equality and justice for all races, religions, ethnicities, and cultures.

The National Conference, founded as The National Conference of Christians and Jews, has worked since 1927 to remedy the harmful effects of racial, ethnic, gender, and religious discrimination. Our efforts stem from the belief that our Nation is only strengthened by expanding the protection of equality to those Americans who have traditionally been denied the basic privileges and opportunities of citizenship. The National Conference has taken up the challenge to promote efforts to incorporate women and people of color into areas from which they have too long been excluded. Only by embracing our diversity and recognizing that we must strive to achieve racial and gender parity, can we truly lead the world on issues of social justice. As a human relations organization, The National Conference is concerned with any governmental action that would undermine our mission to "fight bias, bigotry, and racism" and our efforts "to promote understanding and respect for all."

The National Conference is concerned about the recent calls to end affirmative action initiatives. At a time when relations between America's ethnic, racial, and religious groups are often frayed and sometimes violent, efforts to promote diversity and equality are necessities, not merely civic ideals. A key component to the actual achievement of these goals has been and remains the use of affirmative action.

Until a more effective tool to fight bias, bigotry, and racism is developed, we stand firmly behind the continued use of affirmative action initiatives and remain dedicated to the expansion of opportunities and access for all races, religions, and cultures. In fact, affirmative action is arguably the most powerful instrument in the fight against gender and racial bias. In the last 30 years, largely because of affirmative action programs, our nation has made significant strides in providing access and opportunity for women and people of color. Yet, it is much too soon to declare victory over racial and gender bias.

Affirmative action should be viewed as one of the most productive routes for the emergence of people of color and women into the mainstream. It is a tool used to ensure equal opportunity in employment, business contracts, education, and housing.

Affirmative action is a summary of those measures by which Federal, State, and local governments as well as academic institutions and corporations not only remedy past and present discrimination, but also prevent future discrimination. This is a worthy effort which is conceptually accepted by most Americans in order to attain an inclusive society. Affirmative action permits the use of racial- and gender-conscious measures to bring about equality of opportunity. As Justice Blackmun so eloquently stated, "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."

As to the claims that we, as a nation, no longer need affirmative action, there is absolutely no empirical data to support claims that we have leveled the playing field or reached a "color blind society." To the contrary, studies ranging from the Federal Glass Ceiling Commission Report to The

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* This position statement on affirmative action was solicited by the Advisory Committee through the Midwestern Regional Office of the U.S. Commission on Civil Rights. This article was researched and edited by Juan F. Otero, public policy fellow of the Washington National Office of The National Conference, and Brian E. Foss, vice president of The National Conference. The viewpoints expressed herein are a summary of the historical actions and philosophy of The National Conference, but do not represent specific policy statements of the National Office of The National Conference.

National Conference's report on intergroup relations, *Taking America's Pulse*, continue to document the underrepresentation of women and people of color in all aspects of American life, and the continued misunderstandings and distrust between and among racial and ethnic minorities.

It is essential, therefore, for leaders in government, business, and the independent sector to continue their efforts to find avenues of access and opportunity for women and people of color with the objective that, one day, we can live in a world where color and gender are not taken into account. We will advocate the end of affirmative action when racial and gender discrimination have been ended.

This paper presents our philosophic and programmatic support for affirmative action initiatives by briefly examining the historical context of affirmative action, the potential miscommunication and misperceptions caused by such initiatives, and, lastly, suggests a new dialogue needed to bridge the gaps of communications that surround affirmative action.

Affirmative Action: A Historical Context

Affirmative action represents a proven means of empowering women and people of color to have more of a stake in society. For too long, we have allowed racial and ethnic conflict to divide our nation. The reason for this division is our failure to resolve our racial and ethnic conflicts in a meaningful and lasting manner. The effects of centuries of pervasive discrimination still linger. Racism still obscures our history and has blocked the full integration of those Americans who are not of European descent. The race issue pervades this nation's history, and its residue still finds its way into virtually every aspect of American society.

There are calls to rescind affirmative action, which stands at the center of the necessary racial pact that we negotiated just a generation ago. Recently, the leadership of both parties have called for a reexamination of Federal affirmative action programs. On the State level, California Governor Pete Wilson brought the issue to the forefront of political discussion, by calling for a state ballot initiative which would effectively end affirmative action in the Golden State.

Abandoning affirmative action principles would jeopardize progress made to date and restrict future gains by women and people of color. This would hamper the Constitution's promise of equal opportunity for all. Outlawing affirmative action would therefore result in the loss of a necessary remedy in the ongoing struggle to end discrimination and to achieve equal opportunity in the workplace and in higher education.

Intergroup Relations in the Current Affirmative Action Debate

In the context of human relations, affirmative action is one of today's most debated and divisive issues. Simply mentioning the phrase creates tension and taps into the emotions of many. Supporters and opponents alike agree on one thing—after 30 years, this controversial policy has acquired misunderstandings, misinterpretations, and mistakes of intent and execution over time.

It is indeed unfortunate that we have opted to undertake a national debate on affirmative action within this framework of miscommunication and misunderstanding. In order to forego having this debate become overly divisive, The National Conference strongly advocates dialogue, research, and communication on the issue. Our continuing work to find common ground on potentially divisive issues, including affirmative action, has taught us that the search for good human relations most frequently occurs only in the wake of racial and ethnic disruptions.

The current dialogue has become unnecessarily hostile and misinformed on the benefits of affirmative action. The National Conference is working to bring civility to the intense level of discord surrounding this issue. It is our goal to guide this discourse away from the extreme rhetoric of polarization to a place where we can work together in a manner which benefits society as a whole and strengthens and unites our communities.

Tensions between our racial, ethnic, and religious communities bring forth discussions about how our nation, comprised of diverse ethnic, religious, and racial groups, can truly improve understanding and respect for each other. The Rodney King riots in Los Angeles, the Crown Heights murders in New York City, and the recent beating of illegal immigrants in California are a few examples of intergroup conflicts that have given rise to dialogue on methods of improving our interaction with each other.

We hope that the often ill-informed rhetoric, from all parties involved, will be lessened so that we can begin to actually listen to each other and, ultimately, move the debate to a point where we are able to calmly discuss methods to improve and enhance the effectiveness of affirmative action's ultimate goals.

Potential Perils of Affirmative Action in a Human Relations Context

For some, the basic question presented by affirmative action is whether government should consider factors of race and gender in its employment and contracting decisions. Our long history of using race and gender classifications to hold back entire groups and generations of American citizens creates a tension with governmental policies that use skin color and gender as criteria for opportunities and access.

A. Divisions Exacerbated by Affirmative Action

Currently, the affirmative action public policy could be interpreted as detrimental to race relations. Women and people of color compete with white males for benefits and opportunities based on group status rather than individual merit. Intended beneficiaries and innocent victims of redistributive affirmative action plans, concurrently seeking benefits and opportunities in employment and education, succumb to the "You're in, I'm out" conflict. The result of these group-based affirmative action or diversity policies is intergroup resentment and discord.

Moreover, a basic tenet of human rights is that the dignity of an individual should never be sacrificed to any interest, including the national interest. Under this line of thought, affirmative action plans that look to "collective" retribution are regarded as an affront to the concept of individual merit.

We acknowledge that there may be imperfections in affirmative action programs as they are presently administered. We support efforts to review such policies for the purposes of enhancing their effectiveness. Until there is a viable policy alternative in place that can act as a broad based strategy to combat the efforts of past and present discrimination, we will continue to vigorously support the core principles of affirmative action.

B. Misperceptions Surrounding Affirmative Action

By providing accurate information, creating an atmosphere for civic and civil discussion, and facilitating a process for common action by people in need on all sides of this issue, The National Conference hopes to foster a thoughtful societal conversation on affirmative action.

A clear example of the misdirected tenor surrounding affirmative action involves the use of quotas. Quotas have been outlawed by Federal and State statutes and regulations. Only in rare instances of court-ordered, short-term time spans have numerical targets been allowed to remedy egregious discrimination by a specific employer.

Another related misperception concerning affirmative action involves the use of goals and timetables approved by courts and government agencies. In no uncertain terms, goals are not tantamount to quotas. Goals represent useful benchmarks for measuring progress. They allow the achievement of nondiscrimination by schools and employers in their selection and assessment procedures to be measured and analyzed.

A far more serious misperception is that affirmative action gives preferences to unqualified women and people of color. The statistical evidence simply does not support this broad assertion. Neither laws nor proponents of affirmative action support placing unqualified people in jobs. The United States may well be at a point in its human relations evolution that highly specific goals and targets are no longer required, but it is folly to assume that the objectives of affirmative action have been achieved to the point of full and fair inclusion of women and minorities.

Affirmative Action as a Unifying Tool

Affirmative action, as implemented by courts, businesses, educational institutions, the Federal executive branch, and most states is not what is dividing America today. Rather, it is the persistence of the same social ills this public policy was designed to help remedy. Affirmative action is the easier target for those in our society who will not admit to or confront the larger, more challenging problems of intergroup prejudice and discrimination.

Affirmative action directly addresses our current state of race relations by offering an equitable redress to centuries of racial and gender dis-

crimination. In the end, affirmative action is a flexible concept which includes various actions to overcome those barriers not based upon merit and qualifications. As long as such barriers exist, many women and people of color will be deprived of opportunities and access. For example, where an employer formerly may have only used word-of-mouth announcements for new job openings, thus perpetuating an all white-male work force, the employer's affirmative action plan may include job posting and announcements in media targeted to reach women and people of color. An educational institution may use scholarships which are designed to attract students who belong to groups that were historically denied admission, or, realizing the inferiority of instruction and teaching in certain urban public schools, might use tests which would try to reveal the real intelligence and intellect of students who have come from disadvantaged educational environments. Other programs may include training and apprenticeship efforts. Affirmative action also has been a significant and needed tool for effective enforcement of anti-discrimination laws. Not only is affirmative action used as a remedy in cases of proven racial or gender discrimination, it has also been voluntarily adopted to prevent and avoid future racial or gender discrimination.

Conclusion

Affirmative action benefits all Americans, not just its immediate beneficiaries. The fact that women and people of color have made significant gains over the past 30 years is due largely to effective affirmative action programs in both the private and public sectors. Affirmative action acts as a measured, effective response to discrimination designed to achieve real, not illusory, equality for women and people of color. Just as the Equal Protection Clause and the civil rights laws have had to become part of the fabric of American life, affirmative action contributes to achieving a nation that is free of bias, bigotry, and racism.

We are all bound together in a vast network of affirmative action, of mutual support systems, which we take for granted. The National Conference's Survey, *Taking America's Pulse* documented that when Americans were asked "Do you favor full racial integration, integration in some areas of life, or separation of races," 68 percent of Americans favor "full integration" with another 17 percent favoring "integration in some areas." Only 7 percent nationwide would rather see "separation of the races." These statistics provide hard evidence that Americans are not simply giving lip service to the concept of integration and diversity but expressing positive support for programs that promote racial parity. This is seen by the overwhelming 87 percent majority of Americans who agreed that "If America wants to be competitive in the world, it is in our self-interest to educate and give job-training to racial minorities." Culturally, our report showed most Americans ready to embrace the notion of equality of access and opportunity.

In the private sector, many business leaders have dedicated themselves to managing diversity by doing everything possible to advance the careers of women and minorities. Their commitment is rooted in doing what is right for business and doing what is right in order to give every individual an opportunity to develop to their full potential. This kind of commitment is exactly the spirit that brought forth voluntary affirmative action initiatives and it is precisely the kind of commitment that will sustain affirmative action in the future.

This dedication must be expanded in the private sector and preserved in the public sector. We are dangerously close to repeating history by turning back the clock on State and Federal affirmative action initiatives. We urge individuals and all leaders to maintain their support for the core principles of affirmative action in order to advance opportunity and access for all Americans.

National Association of Manufacturers Position Statement on Affirmative Action

The National Association of Manufacturers*

Subject: Affirmative Action

The National Association of Manufacturers (NAM) supports affirmative action as an effective method of achieving civil rights progress. Industry realizes that it is good business policy to encourage and promote programs that enhance minority and female participation at all levels within the workplace.

Affirmative action programs have strengthened the fabric of society and created an environment of cooperation and understanding among people of diverse backgrounds. In endorsing affirmative action, it should be made clear that goals, not quotas, are the standard to be followed in the implementation of such programs.

* This position statement was solicited by the Advisory Committee through the Midwestern Regional Office of the U.S. Commission on Civil Rights. The position statement correspondence is on file with the Midwestern Regional Office, Chicago, Illinois. The date of the statement is May 24, 1985.

Authors

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William C. Brooks, M.B.A., is currently vice president, corporate affairs, for the General Motors Corporation. In this position he is responsible for coordinating diversity programs within the company's operating groups, divisions, and staffs to ensure that GM is meeting both internal and external social responsibilities. Brooks also serves as chairman of the GM Foundation, and is chairman of the board and president of Motor Enterprises, Inc., a subsidiary of General Motors that is a specialized small business investment company. Brooks was appointed by President Clinton to serve as a member of the Social Security Advisory Board, effective 1996, and was Assistant Secretary of Labor for the Employment Standards Division, U.S. Department of Labor, in the Bush administration. Brooks received his bachelor's degree from Long Island University, and his master's degree in business administration from the University of Oklahoma. He was awarded an honorary doctor of humane letters from Florida A&M University.

Ronald L. Griffin is president and CEO of the Detroit Urban League. The Detroit Urban League was founded in 1916 as a nonprofit, non-partisan, community-based social service/civil rights organization. The Detroit Urban League is one of the 114 affiliate organizations of the National Urban League headquartered in New York. The Urban League was formed to assist African Americans migrating from the rural south adjust to the conditions and complexities of the urbanized north.

Ronald E. Hall, M.B.A., is president and chief executive officer of the Michigan Minority Business Development Council. Prior to this position, he served as assistant vice president at New Detroit. A native of Detroit, Hall received his bachelor's degree from Western Michigan University and his master's degree in business administration from Wayne State University. He serves on the board of directors for the following organizations: Family Service of Detroit and Wayne County, Child Care Coordinating Council, Junior Achievement, Metropolitan YMCA, Black United Fund, the Amateur Athletic Union, and the Business Enterprise Development Center. Hall was elected as a delegate to the White House Conference on Small Business for 1995.

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Supply of Black and White Women (1982)," and "Faculty Salaries: Is There Discrimination by Sex, Race, and Discipline? (1976)," as well as making a number of chapter contributions to books in these fields.

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Charles Rouls is the assistant director of the contractual and business services division of the Michigan Department of Civil Rights. He is responsible for providing staff assistance for employers seeking to develop affirmative action plans for approval by the Michigan Civil Rights Commission under the State's Elliot-Larsen Civil Rights Act. Rouls started with the civil rights department in 1968 in the contract compliance section. He has been involved with equal employment opportunity issues in State government as the department's representative to the Statewide EEO coordinating committee since 1985. He also helped develop a program to require affirmative action plans for all of Michigan's 29 community colleges.

Brent E. Simmons, J.D., is associate professor of law at Thomas M. Cooley Law School, Lansing, Michigan. Prior to this position, he served as commissioner to the Michigan Supreme Court, assistant attorney general, Michigan Department of Attorney General, and assistant counsel, NAACP Legal Defense and Educational Fund, Inc. Simmons received his bachelor's degree from Albion College, and his master's degree from George Washington University; his law degree is from the University of Michigan. Simmons has presented and published numerous articles on affirmative action including "Evaluating Minority Business Enterprise Set Aside Programs After Richmond v. Croson (1989)," and has testified on four occasions before the Michigan Committee on Judiciary and Civil Rights and its subcommittee on affirmative action.

Howard L. Simon, Ph.D., has been the executive director of the American Civil Liberties Union of Michigan since 1974. Simon was raised in New York and graduated from the City College of New York. He received a Ph.D. from the University of Minnesota in legal and political philosophy and social ethics. Prior to his present employment he taught philosophy at the University of Minnesota, Indiana University-Purdue University at Indianapolis, and DePauw University. Under Simon's leadership, the Michigan ACLU has been involved in cases and controversies dealing with abortion rights, physician-assisted suicide, religious practices in the public schools, voting rights, freedom of speech, university speech codes, and affirmative action.

Kenneth W. Smallwood is president of Kenneth Smallwood, Inc., a human resources/eeo consulting firm in Detroit, Michigan. Smallwood is retired from the Federal Government, his last position being regional director of the Office of Federal Contract Compliance Programs, U.S. Department of Labor. He received his bachelor's degree in English from Rutgers University. In addition to his present professional work, Smallwood is founder and currently secretary-treasurer of the Detroit area minority construction workers task force, and is serving a second term as commissioner of the city of Southfield's civil service commission and pension board.

Ricardo A. Solomon is chairman of the 15-member Wayne County Commission.

Horacio Vargas, Jr., is the manager for the race relations division at New Detroit, Inc., a coalition of leaders from community-based organizations, labor, business, community, education, and the clergy. It was formed in response to the civil unrest of 1967 to help rectify the twin evils of racial and economic injustice, and is dedicated to the promotion of cultural and ethnic diversity, increasing minority economic development, and enhancing the quality of life of citizens within and beyond the metropolitan Detroit area. Vargas has been with New Detroit since 1979 serving in various capacities including: director of governmental affairs, assistant to the president, and assistant vice president and manger for the community technical assistance division. Vargas is involved in many community activities in the Detroit area, including being a member of the advisory board of the Rehabilitation Institute of Michigan, SER-Metro Detroit, and the Lula Belle Stewart Center. Before coming to Detroit, he worked as a high school counselor with the Lansing School district, and later as a counselor and administrator at Lansing Community College. Vargas received his bachelor's degree in social science from Michigan State University.

Joann Nichols Watson is executive director of the NAACP, Detroit, Michigan branch, the largest NAACP branch in the Nation. Prior to this position she directed the civil rights department of the national YWCA. Watson received her bachelor's degree in journalism from the University of Michigan. She is host to two local talkshows: *For My People* (WKBD-TV50, Detroit) and *Wake Up, Detroit* (WCHB Radio, AM 1200, Detroit), and is an editorial commentator for WGPR, channel 62, Detroit. Her articles

on race relations and affirmative action have appeared in many local publications, including: *the Journal of Intergroup Relations*, *The Michigan Chronicle*, and the *Detroit Reporter*.

Robert L. Willis, J.D., is the assistant-in-charge of the civil rights division, State of Michigan Department of the Attorney General. In this capacity he also serves as counsel to the State's civil rights commission, Hispanic commission, the woman's commission, and American Indian commission. Willis received his bachelor's and law degrees from Wayne State University. Previous to this position, he served as assistant attorney general in the civil rights and civil liberties division of the State's attorney general office.

Appendix

Affirmative Action Papers in the Five Volume Series by State Advisory Committees in the Midwestern Region of the United States Commission on Civil Rights.

The State Advisory Committees participating in this series of consultations on affirmative action are: Illinois, Indiana, Michigan, Ohio, and Wisconsin. The State Advisory Committee report in which the paper appears is listed in parenthesis.

Papers

"A Human Relations Perspective on Affirmative Action," The National Conference (Illinois, Indiana, Michigan, Ohio, Wisconsin).
"Achieving Participation Goals for Women in the Construction Workforce," by Nancy Hoffmann (Wisconsin)
"Affirmative Action: A Critically Important Policy," by Nancy Kreiter (Illinois).
"Affirmative Action: A Latino Perspective" (Illinois)
"Affirmative Action: A Proactive Approach to Equality and Equity in Employment," by Thelma T. Crigler (Illinois)
"Affirmative Action—A Sensible Tool," by Sam H. Jones (Indiana)
"Affirmative Action: An American Tradition," by Donna R. Milhouse (Michigan).
"Affirmative Action: An Employer's Perspective," by Timothy G. Costello and Shelly A. Ranus (Wisconsin)
"Affirmative Action and the Asian Pacific American Community," by Ann E.Y. Malayang (Michigan).
"Affirmative Action as Legal Remedy and Compensatory Opportunity," by Howard L. Simon (Michigan).
"Affirmative Action at the University of Michigan," by James J. Duderstadt (Michigan).
"Affirmative Action: What Is It? A Layperson's Perspective," by Patricia L. Bell and John T. Blackwell (Michigan).
"Affirmative Action and Asian Americans: Lessons from Higher Education," by Yvonne M. Lau (Illinois)
"Affirmative Action and Government Spending: Cutting the Real Waste," by Ronald E. Griffin (Michigan).
"Affirmative Action and Misconceptions in the National Debate," by Marvin A. McMickle (Ohio)
"Affirmative Action and the Conflict of Opposing Conceptions of America's Future," by Charlie Jones (Ohio)
"Affirmative Action and the Practical Realities Confronting Employers," by J. Stuart Garbutt (Illinois)
"Affirmative Action and the Rule of Law," by Robert L. Willis, Jr. (Michigan)
"Affirmative Action as Affirmative Government Purchasing," by Ronald E. Hall (Michigan).
"Affirmative Action as an Antidote to the Socioeconomic Bimodalization of America," by Lynn R. Youngblood (Indiana)
"Affirmative Action as Discrimination: An Historian's View," by Thomas C. Reeves (Wisconsin)
"Affirmative Action as Good Business," by Roland C. Baker (Illinois).
"Affirmative Action at a Small, Private, Liberal Arts College," by Michele A. Wittler (Wisconsin).
"Affirmative Action at Ameritech," by Douglas L. Whitley (Illinois).
"Affirmative Action at Procter & Gamble," by John E. Pepper (Ohio).
"Affirmative Action at Work: Battleground of Competing Values," by Bron Taylor (Wisconsin).
"Affirmative Action Controversy," by Jacqueline H. LaGrone (Indiana).
"Affirmative Action: Equality of Opportunity and the Politics of Change," by Robert T. Starks (Illinois).

"Affirmative Action: Equity and Efficiency," by Dereka Rushbrook (Wisconsin).
"Affirmative Action Hiring in the Milwaukee Police Department," by Joan Dimow and Kenneth Munson (Wisconsin).
"Affirmative Action: Implications for Indiana," by Joanne M. Sanders (Indiana).
"Affirmative Action in Employment: A Commentary on OFCCP Enforcement and Executive Order 11246," by Ann Barry (Wisconsin).
"Affirmative Action in Hiring and Contracting: An Effective Public Policy," by James W. Compton and James H. Lewis (Illinois).
"Affirmative Action in Multiracial America," by Jeryl Levin (Illinois).
"Affirmative Action in the Federal Government—A United States Air Force Perspective," by Michael B. O'Hara (Ohio).
"Affirmative Action in the Twenty First Century," by Ellen Frankel Paul (Ohio).
"Affirmative Action in Wisconsin State Government," by Gregory C. Jones (Wisconsin).
"Affirmative Action into the Twenty First Century: Revision and Survival," by Dulce Maria Scott and Marvin B. Scott (Indiana).
"Affirmative Action: Mend It - But Don't End It," by Sam Thomas, III (Ohio).
"Affirmative Action Plans or Government Investigations: Which Serves Us Best?," by Michael Vlantis (Indiana).
"Affirmative Action Programs in Not-For-Profit Human Service Organizations," by Karen Johnston (Illinois).
"Affirmative Action: Pushing Equal Opportunity," by Maureen Manion (Wisconsin).
"Affirmative Action Recruitment, Hiring, and Employment of People With Disabilities," by Nancy Griffin (Indiana).
"Affirmative Action Set Asides: Bad Programs," by Larry Robinson (Ohio).
"Affirmative Action—Should It Be Continued, Modified, or Concluded," by Charmaine Clowney (Wisconsin).
"Affirmative Action: Still Needed After All These Years," by Samuel Rosenberg (Illinois).
"Affirmative Action: Time To Rethink Anti-Discrimination Strategy," by Lee H. Walker (Illinois).
"Affirmative Action: What is Our Future? What Is Best For America? A Case for Affirmative Action," by Samuel Gresham, Jr. (Ohio).
"Affirmative Action Versus Markets as a Remedy for Discrimination," by John Lunn (Michigan).
"(The) Ambivalent Future of Affirmative Action," by Jonathan L. Entin (Ohio).
"(The) Americans With Disabilities Act and Affirmative Action," by Kent Hull (Indiana).
"The Episcopal Church and Affirmative Action," The Episcopal Church General Convention (Illinois, Indiana, Michigan, Ohio, and Wisconsin).
"An Economic View of Affirmative Action," by Hedy M. Ratner (Illinois).
"An Ethic of Care and Affirmative Action: A Critical Analysis of Supreme Court Jurisprudence," by Francis Carleton (Wisconsin).
"(The) Assault on Affirmative Action and Reality," by Ellen Bravo (Wisconsin).
"Beyond Black and White: Asian Americans and Affirmative Action," by Gail M. Nomura (Michigan).
"Breaking Through Multiple Barriers: Minority Workers in Highway Construction," by Janice A. Schopf (Wisconsin).
"(The) Case For Maintaining and Enhancing the Use of Voluntary Affirmative Action in Private Sector Employment," by Barbara J. Fick (Indiana).
"City of Columbus Predicate Study Summary," by Gwendolyn Rogers and Melinda Carter (Ohio).
"Civil Rights Issues Facing American Muslims in Illinois and the Lack of Affirmative Action Inclusion," by Moin "Moon" Khan (Illinois).
"Affirmative Action—A Success Story for One Minority-Owned Business," by Vijay Mahida (Michigan).
"Detroit Branch NAACP Statement on Affirmative Action," by Joann Nichols Watson (Michigan).
"Disassembling Myths and Reassembling Affirmative Action," by Phoebe Weaver Williams (Wisconsin).
"Effectiveness of Goals in Affirmative Action Programs," by Theodore R. Hood (Indiana).

"(The) Folklore of Preferential Treatment," by Kenneth W. Smallwood (Michigan).
"General Motors Corporation Position on Affirmative Action," by William C. Brooks (Michigan).
"(The) Impact of Affirmative Action on Opportunities in Illinois: Beliefs Versus Realities," by Cedric Herring (Illinois).
"Impact of Affirmative Action on the Hispanic/Latino Community," by Joseph L. Mas (Ohio).
"Mending, Not Ending, Affirmative Action: The Approach of Bloomington, Indiana," by Barbara E. McKinney and Colleen Foley (Indiana).
"Michigan Department of Civil Rights Review of State Affirmative Action Programs," by Winifred K. Avery and Charles Rouls (Michigan).
"Myth Versus Reality: A Call for Integrity in the Debate of Affirmative Action," by Cathy J. Cox (Indiana).
"National Association of Manufacturers Position on Affirmative Action," the National Association of Manufacturers (Illinois, Indiana, Michigan, Ohio, Wisconsin).
"Ohioans Oppose Preferential Programs Based on Race or Gender," the *Ohio Poll*.
"(The) Origins of Affirmative Action in Employment," by Ken Masugi (Ohio).
"Plurality and Affirmative Action: The Social Requirement of Diversity," by H. Paul LeBlanc, III (Illinois).
"Position Statement from the Anti-Defamation League on Affirmative Action to the United States Commission on Civil Rights," The Anti-Defamation League (Illinois, Indiana, Michigan, Ohio, Wisconsin).
"(The) Practice of Affirmative Action by the Wayne County Commission," by Victor L. Marsh (Michigan).
"Practice Versus Politics, A Focus on Affirmative Action," by Alvin L. Pierce (Indiana).
"Proactive Affirmative Action: A Position Paper," by Dennis Gabor (Wisconsin).
"Racial Disparity and Employment Discrimination Law: An Economic Perspective," by James J. Heckman and J. Hoult Verkerke (Illinois).
"Reconsidering Strict Scrutiny of Affirmative Action," by Brent T. Simmons (Michigan).
"Reflections on the Indianapolis Experience in the 1980s with Affirmative Action and Equal Opportunity," by William H. Hudnut (Indiana).
"Reforming Affirmative Action in Ohio," by Governor George V. Voinovich (Ohio).
"Reinventing Affirmative Action," by Boniface Hardin (Indiana).
"(The) Relevancy of Affirmative Action for a Recent Immigrant Among the Minority Population," by Sebastian Ssempijja (Wisconsin).
"(The) Role of Affirmative Action in Promoting Intergroup Relations," by Horacio Vargas (Michigan).
"Southern Illinois: A Case for Affirmative Action," by Don E. Patton (Illinois).
"Statement on Equal Opportunity and Affirmative Action," by The United States Catholic Conference (Illinois, Indiana, Michigan, Ohio, Wisconsin).
"Statement on Affirmative Action from the Mexican American Legal Defense and Educational Fund" (Illinois).
"Strong Affirmative Action Monitoring Guarantees Impartial Employment Opportunities for Women and Minorities Currently Not Welcome in Wisconsin's Construction Industry," by Karen Meyer (Wisconsin).
"(The) Theology of Racism and Affirmative Action," by Rt. Rev. William C. Wantland (Wisconsin).
"Thirty Year Retrospective: Women and Affirmative Action 1965-1995," by Eileen D. Mershart (Wisconsin).
"Time To Dismantle Affirmative Action," by Rebecca A. Thacker (Ohio).
"What Affirmative Action Requires," by Emily Hoffman (Michigan).
"(The) World Your Children Will Inherit," by Jeannie Jackson (Michigan).

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Khan, Moin "Moon," "Civil Rights Issues Facing American Muslims in Illinois and the Lack of Affirmative Action Inclusion" (Illinois).
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Simon, Howard L., "Affirmative Action as Legal Remedy and Compensatory Opportunity" (Michigan).
Skyldtad, William S., Bishop of Spokane, *see* The United States Catholic Conference, "Statement on Equal Opportunity and Affirmative Action" (Illinois, Indiana, Michigan, Ohio, Wisconsin).
Smallwood, Kenneth W., "The Folklore of Preferential Treatment" (Michigan).
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Vargas, Horacio, "The Role of Affirmative Action in Promoting Intergroup Relations" by Horacio Vargas (Michigan).
Verkerke, J. Hoult and James J. Heckman, "Racial Disparity and Employment Discrimination Law: An Economic Perspective" (Illinois).
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