Ohio Consultation: Focus on Affirmative Action

Ohio Advisory Committee to the United States Commission on Civil Rights

March 1998

These papers presented at a consultation conducted by the Ohio Advisory Committee to the United States 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.

The United States Commission on Civil Rights

The United States Commission on Civil Rights, first created by the Civil Rights Act of 1957, and reestablished by the United States Commission on Civil Rights Act of 1983, is an independent, bipartisan agency of the Federal Government. By the terms of the 1983 act, as amended by the Civil Rights Commission Amendments Act of 1994, the Commission is charged with the following duties pertaining to discrimination or denials of the equal protection of the laws based on race, color, religion, sex, age, disability, or national origin, or in the administration of justice: investigation of individual discriminatory denials of the right to vote; study and collection of information relating to discrimination or denials of the equal protection of the law; appraisal of the laws and policies of the United States with respect to discrimination or denials of equal protection of the law; maintenance of a national clearinghouse for information respecting discrimination or denials of equal protection of the law; investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections; and preparation and issuance of public service announcements and advertising campaigns to discourage discrimination or denials of equal protection of the law. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

The State Advisory Committees

An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 States and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 and section 3(d) of the Civil Rights Commission Amendments Act of 1994. The Advisory Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective States on matters within the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters pertinent to inquiries conducted by the State Advisory Committee; initiate and forward advice and recommendations to the Commission upon matters in which the Commission shall request the assistance of the State Advisory Committee; and attend, as observers, any open hearing or conference that the Commission may hold within the State.

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Letter of Transmittal

Ohio Advisory Committee to the
U.S. Commission on Civil Rights

Members of the Commission
Mary Frances Berry, *Chairperson*
Cruz Reynoso, *Vice Chairperson*
Carl A. Anderson
Robert P. George
A. Leon Higginbotham, Jr.
Constance Horner
Yvonne Y. Lee
Russell G. Redenbaugh

The Ohio Advisory Committee submits this report, *Ohio Consultation: Focus on Affirmative Action*, as part of its responsibility to advise the Commission on civil rights issues within the State. The report was unanimously adopted by the Advisory Committee by a 14-0 vote. The Advisory Committee is indebted to the Midwestern Regional Office staff for their assistance in editing and preparing this report.

To explore the issue of affirmative action in a diverse and bipartisan manner, members of the Advisory Committee invited individuals to present papers explaining their understanding and experiences with affirmative action. These papers are presented unedited and unabridged. This publication is one in a series of six reports on affirmative action completed in 1996 by the States of the Midwestern Region. An appendix in this document lists a compendium of all papers received in this series by the participating State Advisory Committees.

A special effort was made by the Advisory Committee to receive papers from all viewpoints, and the papers in this report reflect a strong and diverse sentiment on affirmative action. It is of note that there was real disagreement among the participants on the need for and the effectiveness of affirmative action. No individual submitting a paper, however, opposed the principles of equal opportunity and nondiscrimination.

It appeared to the Advisory Committee that a significant portion of the disagreement over affirmative action emanates from differences in the understanding of the term and the perception of the program's implementation. This suggests that meaningful discussions about the present and future efficacy of the policy need to be framed within the context of a commonly accepted definition and an accurate understanding of the policy's implementation.

The Advisory Committee understands that the Commission has an active interest in this topic and anticipates that the Commission as well as the public will find the material in this volume informative.

Respectfully,

Altagracia Ramos, *Chairperson*
Ohio Advisory Committee

Ohio Advisory Committee to the U.S. Commission on Civil Rights

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Introduction

I. The Ohio Advisory Committee

The Ohio Advisory Committee feels 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 could not ignore the civil rights issue and debate on affirmative action at this time. 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 Ohio Advisory Committee, similar to the U.S. Commission on Civil Rights, is structured to be politically, philosophically, and socially diverse. It includes representation from both major political parties and is independent of any national, State, or local administration or policy group.

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

> A term that in a broad sense encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination from recurring in the future.[1]

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.

Twenty papers from individuals and/or organizations are included in this report, including the Governor of Ohio's 1996 statement on reforming affirmative action. The papers are collected in four sections: (1) Affirmative Action and Its Implementation, (2) Academic Examinations of Affirmative Action, (3) Community Perspectives Regarding Affirmative Action, and (4) Position Statements on Affirmative Action from National Organizations. This report is one of a series of five consultations held in 1996 on affirmative action by the State Advisory Committees in the Midwestern Region of the U.S. Commission on Civil Rights.[2]

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.[3] Title VII of that act prohibits employment discrimination, but it neither requires nor prohibits affirmative action measures.[4] The most recent Federal civil rights legislation, the Civil Rights Act of 1991,[5] expressly preserves lawful affirma-

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

2 The other participating States are: Illinois, Indiana, Michigan, and Wisconsin.

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

4 42 U.S.C. §§ 2000e–2000e-17 (1988 & Supp. 1994).

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

Federal civil rights legislation, the Civil Rights Act of 1991,[5] 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,[6] as amended, the Rehabilitation Act of 1973,[7] and the Vietnam Veterans Era Readjustment Assistance Act of 1974.[8] 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.[9]

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.[10]

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 affirmative 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.[11]

The Indiana Advisory Committee to the U.S. Commission on Civil Rights studied the enforcement of affirmative action by the OFCCP and issued a report with findings on the agency's operations in the State.[12] The study found that although the Federal Government program did mandate hiring goals for companies with Federal

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

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

7 Pub. L. No. 93–112, 87 Stat. 55.

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

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

10 Pub. L. No. 93–112, 87 Stat. 355.

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

12 *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*).

contracts, affirmative action as enforced by the OFCCP was not a program of preferential treatment for minorities and women or a program of hiring quotas to achieve a certain numerical employment position are proscribed.[13] Rather, the program—as enforced by the Federal government in Indiana—required Federal contractors to actively seek and consider minorities and females with the requisite abilities and qualifications in job groups where minorities and/or females were underutilized by the contractor according to their availability. Reviews of Federal contractors by the OFCCP assessed the good faith effort of the contractor in recruiting and considering 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;[14] other Federal regulations call for state agencies participating in the administration of Services for Migrant and Seasonal Farmworkers to develop affirmative action plans.[15]

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*.[16] 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.

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.]

III. Affirmative Action and Public Sentiment

National and State polls indicate widespread support among the American public to help minorities and women succeed. Measures of public support for such "affirmative action" initiatives, however, depend crucially on the question asked. Expanding opportunities for minorities and women are supported provided there is no preference.

In a USA TODAY/CNN/Gallup poll conducted in the spring of 1995, 55 percent of those surveyed supported the broad concept of expanding opportunities for minorities and women.[17] Only a third,

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13 *See generally*, 41 C.F.R. §§ 60-2.11 and 60-2.12(e)(1995).

14 20 C.F.R. § 30.3-30.8.

15 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.

16 115 S. Ct. 2097 (1995).

17 Andrea Stone and Jim Norman, "Affirmative Action: Fairness key to support," *USA TODAY*, Mar. 24, 1995, p. 1A, hereafter referred to as USA Poll.

37 percent, wanted such programs cut back, while 31 percent wanted such programs increased. Twenty-six percent supported keeping them at the current level.[18]

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 affirmative action as the active effort by employers to eliminate existing barriers to equal employment opportunity. Preferences to those less qualified over those more qualified on the basis of race or gender and quotas, which require consideration of abilities and qualifications be subordinated in order to achieve a certain numerical position, are both proscribed by the OFCCP.[19] 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.[20]

When affirmative action is described as "preferential treatment" that seems to give an unfair advantage in school and the workplace to women and minorities, there is widespread opposition. The USA poll found that support for affirmative action programs dropped sharply when affirmative action was placed in the context of quotas. When asked: "Should businesses establish quotas?" 63 percent said they were opposed. Further, The USA Poll revealed:

- 67% oppose setting aside scholarships at public universities for women and minorities.
- 63% oppose hiring quotas.
- 84% oppose hiring a less qualified minority over a white applicant at a business that has few minority workers. Resistance to such favoritism included 68% of blacks.[21]

Political analyst William Schneider was quoted in the article stating that "Americans don't perceive that discrimination is a major problem anymore." The poll reflected that sentiment as 64 percent of the respondents believed that blacks have as good a chance as whites to get a job. In addition, the poll showed white males to be the strongest opponents of affirmative action.[22]

The poll also inquired about personal experiences with discrimination. Among males, 15 percent of the white males surveyed said they had lost a job because of discrimination; 42 percent of black men said they had lost a job because of discrimination.[23]

Similar sentiment about affirmative action when described as preferential treatment was found in a recent poll of Ohio residents. The Cincinnati Enquirer, WLWT-TV and the University of Cincinnati sponsored a statewide survey of Ohio adults on affirmative action hiring programs for women and minorities.[24] The survey was conducted in the Spring of 1996 by the Institute of Policy Research at the University of Cincinnati. The poll defined affirmative action in terms of a preferential treatment of women and minorities. Respondents to the Ohio Poll[25] were asked:

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18 Ibid.

19 *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.

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

21 Andrea Stone and Jim Norman, "Affirmative Action: Fairness key to support," *USA TODAY*, Mar. 24, 1995, p. 1A.

22 Ibid.

23 Ibid.

24 The complete *Ohio Poll* on affirmative action is included as a paper in this report. *See* section III, Community Perspectives on Affirmative Action.

Some people say that because of past discrimination, African Americans should be given preference in hiring and promotion. Others say that such preference in hiring and promotion of African Americans are wrong because it discriminates against whites. What is your opinion? . . . [26]

In releasing the poll, it was reported:

Opposition to preferences in hiring and promotion of minorities among Ohioans is strong. In the most recent Ohio Poll 16 percent of Ohioans say they favor preferential hiring and promotion of African-Americans, 75 percent oppose, and 9 percent are not sure. Opposition to preferences in hiring and promotion of African-Americans has increased from 69 percent in June, 1995. Even among African Americans, support for preferential hiring of African-Americans has declined from 55 percent in June, 1995, to 49 percent today.

Ohioans are similarly opposed to preferences in hiring and promotion of women. Twenty-four percent of Ohioans favor preferential hiring and promotion of women, 69 percent oppose, and 7 percent are not sure. Opposition to preferences in the hiring of women has also increased significantly from 62 percent in June, 1995. . . .

White women as well as white men are strongly opposed to preference programs for African-Americans. Eighty-three percent of white male Ohioans are opposed to preference programs for African-Americans while 75 percent of white women oppose these programs.[27]

IV. 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 House of Representatives House Judiciary subcommittee was described as "tense and sometimes rancorous" as House Republicans considered purging sex and race preferences from Federal laws.[28] Emotions surrounding affirmative action have been chronicled by the press. In 1995 a cover story of *Newsweek* was devoted to affirmative action in which 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."[29]

In 1995 President William J. Clinton directed Federal agencies to review existing affirmative action programs. Reporting on the results, the President stated:

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 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.[30]

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25 The name, "*Ohio Poll*," is registered with the Ohio Secretary of State.

26 The Ohio Poll, release, Apr. 7, 1996, hereafter cited as Ohio Poll.

27 Ibid.

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

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

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. Former Senator Robert J. Dole (R, KS), as 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*, 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.[31]

Ohio Governor, George V. Voinovich, has announced a plan to end a 16-year-old race-based Ohio State contracting procedure known as the minority set-aside program. The Governor asserts he does not plan to eliminate affirmative action, but intends to revise it to be a more successful program. Part of this revision was the issuance of an executive order establishing economic disadvantages as well as social disadvantages for inclusion in Ohio's set-aside contracting program.[32]

V. The Consultation

The Advisory Committee's consultation evoked strong and 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 another chapter in this country's history dealing with issues of opportunity, diversity, and equality in America.

No individual or organization in speaking on affirmative action opposed the principles of equal opportunity and nondiscrimination, nor did anyone or organization express the sentiment that affirmative action was not an attempt to remedy discrimination. But although the concept of equality of opportunity received universal support, affirmative action did not receive universal support. Much of the disagreement over the effectiveness of affirmative action programs emanated from the individual's definition and understanding of the term.

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

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

32 Statement of Governor George V. Voinovich, "Reforming Affirmative Action in Ohio," Mar. 28, 1996.

I. Affirmative Action and Its Implementation

Reforming Affirmative Action in Ohio

Governor George V. Voinovich (R, OH)

Last July (1995) I was asked if I planned to eliminate Ohio's State affirmative action programs. I didn't then, and I don't today. As the grandson of immigrants and the son of first generation Americans, I discovered discrimination against people with last names like "Voinovich" at an early age. My mother couldn't get a teaching job because she was Catholic and ethnic. And my dad couldn't find work as an architect because he wasn't part of "the establishment."

Their experience opened my eyes to the broader problems of discrimination and prejudice against minorities, women, and other disadvantaged people. Because of this experience and my firm belief in the principles of fairness and equal opportunity, I have remained committed to affirmative action throughout my 29 years in public office.

However, I believe today's affirmative action programs are in a necessary period of transition. Recently, the number of court cases has increased significantly, causing Federal and State governments across the country to review and update their affirmative action programs. It was in this context that I ordered a review of Ohio's programs last summer. This review identified each program, assessed its effectiveness, and specific areas where reforms are necessary. The review revealed that, while we have made significant progress in some areas, there still is much room for improvement.

Since 1980, Ohio's set-aside program has been aimed at assisting more minority-owned firms in securing State contracts. We have shown steady improvement in this area. From FY 1991 to FY 1995, there has been a 26 percent gain in goods and services dollars to minority businesses and a 39 percent gain in prime construction dollars to minority businesses.

Yet despite our efforts, the review showed that Ohio's program is not working as well as it should. Of the 28,000 Ohio minority businesses identified in the 1990 census, fewer than 8 percent are registered under the State's certified minority business program. Of that 8 percent, fewer than half receive direct payments from contracts with the State. Also, 80 percent of those dollars went to only 5 percent of the certified MBE[1] contractors.

In other words, a program whose purpose is to help companies that truly need help, has ended up being a program for the large, more successful companies. The review concluded that the system needs to be changed. We need a system designed to help those businesses that have traditionally and continue to struggle to compete in the State's procurement system. And, once a company becomes a viable competitor, it should no longer be eligible for participation in our MBE program so that resources can remain focused on giving struggling companies a helping hand.

That is why I recently signed an Executive Order designed to bring Ohio's program more in line with the successful system now used by the Small Business Administration. The Order establishes a Disadvantaged Business Enterprise designation which looks at economic disadvantages as well as social disadvantages. Specifically, economic disadvantage is determined by the relative

1 MBE refers to Minority Business Enterprise.

wealth of the company seeking certification and the personal wealth of the company's owner. Social disadvantage would cover business owners who are members of traditionally recognized racial groups, or who can show personal disadvantage due to color, ethnic origin, gender, physical disability, or long-term residence in an area of high unemployment. The second part of this program includes a "graduation" provision which removes businesses once they reach a certain size or wealth, or after a set period of time.

The Executive Order challenges State cabinet agencies to work toward a goal of an additional 5 percent of all State contracting dollars to be awarded to qualified, economically and socially disadvantaged businesses, starting in calendar year 1997. It also calls for a more aggressive recruitment program to broaden the pool of qualified disadvantaged businesses.

I called upon the General Assembly to amend Ohio law to require a flat 10 percent set-aside in both goods and services contracts and in construction contracts exclusively for economically and socially disadvantaged businesses. This recommendation should increase the amount of money available to qualified businesses by at least $25 million.

The Nation's courts have ruled time and again that race-based programs are not constitutional. The program I am proposing still gives preference to those who have suffered historical racial discrimination, but also includes others who have suffered discrimination. In order to save affirmative action, we must broaden the base of those we seek to help.

My commitment to affirmative action and equal opportunity has not wavered. But as the review showed, economic realities and legal challenges have changed in Ohio and across America over the last few decades. I want all Ohioans to have the opportunity to compete successfully in the marketplace. Every time we help a struggling business succeed, we help create and preserve jobs and strengthen Ohio's economic foundation.

Note: The Governor made this statement on affirmative action on April 18, 1996. The statement was provided to the Advisory Committee by the Governor's press secretary.

Affirmative Action at Procter and Gamble

By John E. Pepper

Procter and Gamble (P&G) markets a wide variety of consumer products worldwide. Over 95,000 individuals are employed with P&G worldwide. This summary will address diversity as a business imperative and focus on our extensive efforts to recruit talented minorities and women. It will also touch briefly on other key factors that support our diversity goals including training and development, compensation, and accountability for diversity results.

A. Diversity as a Business Imperative

Diversity is a business imperative at Procter & Gamble because developing and managing a strong, diverse organization is essential to achieving our business purpose and objectives. Diversity for us is like any other business strategy. It includes assuring that there are high quality robust systems in place; i.e., recruiting, development, etc., oversight and monitoring in systems, and accountability for results. The senior vice president of human resources has worldwide responsibility for overseeing all human resources processes and programs. These responsibilities include:

- Assuring that we have outstanding systems for attracting and retaining the most talented people available.
- Assuring that we have the proper developmental systems and working environment in which each individual might achieve her or his full potential; and
- Assuring that our reward and recognition systems (i.e., compensation and other nonmonetary elements) are truly top notch.

In short, a role of insurance—insuring that our systems work well and equally for all—particularly for women and minorities. He reports directly to Mr. John E. Pepper, chairman of the board and CEO. Mr. LaVelle Bond, Director Diversity—Procter & Gamble Worldwide, reports directly to him. Our shared objective in this area is clear and simple: to ensure that we have one of the most diverse and inclusive workplaces possible, not just in the U.S. , but around the world.

B. Recruitment

Our company has always operated according to a few key principles:

- Integrity and doing the right thing.
- Respect for the individual.
- Promotion from within.

This is particularly important because of the implications it holds for our business. Unlike many companies, we don't bring mid-level or senior-level managers in from outside. We are recruiting at entry level today the men and women who will run this company in the next generation. This makes it critical that we attract and hire the brightest pool of candidates we can find, and do all we can to help them succeed and advance.

P&G's recruiting results during the past decade demonstrate our consistent commitment to the hiring of talented minorities and women. About 60 percent of management hires are engineers and scientists in our technical functions such as engineering, manufacturing, and research & product development. About 40 percent go into commercial functions like advertising, finance, and sales. Looking at our annual management hiring over the last 10 years, about one-fourth are minorities and two-fifths are women. The following table summarizes the results.

Total U.S. Management Hires

	% Women	% Minorities
1993/94	39%	28%
1992/93	44%	26%
1991/92	44%	21%
1990/91	38%	25%
1989/90	40%	26%
1988/89	45%	33%
1987/88	42%	26%
1986/85	41%	20%
1985/86	38%	16%
1984/85	38%	14%

Successful recruiting of talented women and minorities to join Procter & Gamble doesn't just

happen. Here are some examples of how we invest management time and financial support to achieve our desired diversity results.

1. On-Campus Efforts to Attract Women and Minorities

Our recruiting teams make special efforts to build relationships with outstanding minorities and women at all of our recruited schools. This includes supporting the individuals who head up the minority programs in engineering and business, as well as becoming involved with student groups.

2. Summer Intern Program

We have a large summer intern program that is the key feeder for our full-time hires. This program enables us to attract and build a strong relationship with talented students prior to the time when they reach their final year in school. In 1994 we had 462 summer interns in the program. Two-thirds of these individuals were headed for their final year in school, while one-third were in an earlier phase of their education. Our results show the largest representation of women and minorities among our summer interns.

1994 Summer Interns

Total	Women	Minorities
462	48%	52%

3. Participation in National Programs

We have three focus areas in our participation with national programs; internships, scholarships, and increasing the pipeline. Here are some examples of each.

Internships:

Procter & Gamble is a strong supporter of INROADS. This is a nonprofit organization that develops and places minority students coming out of high school into corporate internships. We see INROADS as an excellent strategic fit with our recruiting objectives. Last year we had 100 INROADS interns, and think this number will grow. We expect about 80 percent will return each year, either as full-time hires, or for another internship. This is well above INROAD's experience with other employers.

Scholarships:

We support an array of organizations for women and minorities, including:

National Hispanic Scholarship Fund
Society of Hispanic Professional Engineers
American Indian College Fund
Society of Women Engineers
National Action Council for Minorities in Engineering

Increasing the Pipeline:

P&G also invests in expanding the pipeline of talented candidates. P&G recognizes that the company's interest and the national interest will be served if a greater proportion of minority students are attracted to engineering and scientific studies. For example, African Americans represent only 4 percent of graduate engineers, even though they are about 12 percent of high school students.

We have chosen to address this opportunity at the grassroots community level. Two P&G managers are the founders of (MSE) Minorities in Mathematics, Science and Engineering, as a collaborative effort of local employers and educators. The program focuses on increasing the motivation and preparation of minority students to go on to college in these fields. (MSE) was given a $4 million grant from the National Science Foundation, and over 5 years has grown to encompass 21 schools and over 2,300 students.

Procter & Gamble is also involved with the United Negro College Fund. We are a major corporate supporter, providing $200 million annually for operating expenses, and currently contributing $1.5 million toward their capital campaign. Perhaps even more important than our financial support is our personal involvement and leadership which we provide this organization. John Smale, a former CEO and current chairman of General Motors, served on the UNCF board of directors for many years, and was chairman of that board from 1984 through 1987. Durk Jager, president of P&G, currently serves on their national board of directors and is chairman of the local UNCF Capital Campaign.

In summary, management recruiting provides the lifeblood for P&G. Because of our practice of promotion from within, this is the way we bring on board the future leaders of our company. It is

a survival issue for us. We approach recruiting with the same vigor, professionalism, and discipline that we use in our other core business processes. Our management hiring results have been extremely strong, and we have programs in place to ensure that our results will continue at this level.

C. Overview of Other Key Areas

Training and Development

The most important training and development happens on the job at Procter & Gamble. Our principle of "promotion from within" demands career-long development for everyone. Every assignment is a "developmental" assignment, every employee is expected to grow and develop. Our working environment encourages teamwork and collaboration; we also learn from working with other talented people.

Training and Development is each manager's responsibility. Each manager's Performance Review stresses "Building Organization Capacity" as well as "Building the Business." Training is individually tailored. Each employee creates a development plan with his/her manager to include projects, assignments, and specific training programs.

With our focus on "on the job training," separate, formal training by design, has been more limited. Specifically we concentrate on:

(1) Training the trainers; improving the manager's ability to develop his or her people.
(2) Improving each person's ability to contribute to business success, via technical training.
(3) Improving interpersonal skills to support an effective collaborative environment.

P&G College is our only corporately required training for everyone when reaching key career stages. P&G College is designed and taught by 200 executives. It focuses on key business skills and strategies and helps create a level playing field for everyone. Diversity principles of the company are covered in all P&G College programs as part of our fundamental principles of business success and in building the organization.

P&G College also offers specific diversity training programs to ensure a supportive environment to retain and develop minorities and women. Our general diversity training has been designed by P&G employees for corporate use. We also offer tailored training to address organizations' specific objectives.

Mentoring is also an important part of P&G's employee development strategy. At P&G everyone can have a mentor. Mentoring provides important support to the retention and development of top minorities and women.

The fact that we promote from within makes the development and utilization of each employee essential. Thus, we put considerable focus on performance development reviews, career discussions and work and development plans.

Compensation

Procter & Gamble's cash compensation objectives are to:

(1) Pay salaries that are competitive with top companies to attract, motivate, and retain employees.
(2) Provide significant pay differences based on individual contribution to the business (pay for performance).
(3) Executive compensation is based on performance against a combination of financial and nonfinancial measures including business results and developing organization capacity.

In addition, employees are expected to uphold the fundamental principles embodied in the company's statement of purpose and environmental quality policy. These include a commitment to integrity, doing the right thing, maximizing the development of each individual, developing a diverse organization, and continually improving the environmental quality of our products and operations.

Oversight, Monitoring, and Accountability

At P&G we manage diversity as we would any other key business strategy—establishing clear accountability and measuring results. This is essential to ensure that our success at eliminating barriers to the advancement of minorities and women into leadership positions shows continual and sustained improvement. Our chief executive personally leads the process that identifies and develops minorities and women for positions of company leadership. The senior vice president of human resources personally oversees annual

diversity reviews with the director of diversity and the top management of each function and each business sector. These systems and processes provide the framework for how we identify and develop our next generation of leadership, and maintain accountability for this critical management responsibility.

Identifying and Developing Top Candidates

Our top development candidates are identified from our worldwide employee base by each of our senior executives. Thus, P&G's U.S. managers are routinely compared and contrasted with other U.S. managers and their P&G international peers. Annually our chief executive convenes the executive committee worldwide to dedicate an entire day to review and discuss development lists and career plans for our top candidates.

During this meeting, our executives also specifically focus on P&G's top minority and women candidates. These lists go further down into the P&G pipeline to ensure that our talented minorities and women get optional career oversight and monitoring, often times well before they are at a level to be considered for the top lists. Diversity reviews are conducted with the top management of each corporate function. Diversity goals are established by each organization and are included as one of the key measurements in achieving overall business results. Diversity reviews evaluate progress versus those goals regarding enrollment and development of personnel. Results are reported directly to the executive committee.

Beyond this executive oversight process, accountability for diversity is incorporated in performance reviews at all levels of the organization. Employee performance reviews are based on a list of "what counts" factors which include an employee's ability to respect and work effectively with diverse people. This gives individuals direct feedback concerning their personal progress. For employees who have others reporting to them, their performance reviews also include assessments of their ability to develop people, including women and minorities.

Affirmative Action in the Federal Government—A United States Air Force Perspective

By Michael B. O'Hara

Introduction

Affirmative action is required to *correct the effects* of past discrimination and to *achieve the goal of a work force* that represents our nation's diverse population. This is a recognized purpose statement for affirmative action and it is the foundation of the Federal program for affirmative action, including the United States Air Force. The Equal Employment Opportunity Act of 1972 covered Federal and other agency employees and required the development of affirmative action plans.

Air Force's Right Approach

It is the Air Force policy to ensure full equality of opportunity regardless of race, religion, color, sex, national origin, age, or physical disability for all individuals interested in employment or currently employed by the Air Force. The Air Force affirmative action program is designed to open doors. Its goal is to reach/exceed parity for all sectors of the population—it is not a quota system. It focuses on results not punishment and mentoring versus neglect. It provides tools through education and training both for employees and managers.

In 1979 the Air Force embarked on the development of an aggressive, standardized, and results-oriented approach to managing equal employment opportunity (EEO) and affirmative action programs. In 1981 the Air Force implemented a 5-year affirmative action plan. Under this plan the Air Force has continued to make significant gains in all categories most notably in the employment of women and minorities and the increase in the number of protected group members in mid and upper management positions. Some of the initiatives were facilitated through the integration of staffing (recruitment and retention/promotion) and EEO functions at all levels. This merger brings EEO into the mainstream of personnel management and integrates affirmative action goals and concepts into day-to-day staffing practices and procedures.

The Air Force also initiated a heightened awareness of minority group needs through the Special Emphasis Programs (SEP). A "Handbook for Special Emphasis Program Managers" was developed to provide in-depth guidance for SEP managers. These managers are responsible for providing advice and guidance to management officials on the enhancement of employment and advancement opportunities for minorities and women.

Furthermore, the Air Force has established a variety of programs such as the Developmental Opportunity Program which encourages managers to move employees in limited opportunity positions to positions with growth potential, thereby providing broader opportunities and specialized training.

The Air Force vision has even extended into the student employment programs for high school and college-level employees. One of the goals of these programs is to create such a culturally diverse pool of applicants for future employment that affirmative action goals will become unnecessary.

The Air Force not only encourages its civilian and military members to support the affirmative employment philosophy, but it also rewards them for their efforts. The Secretary of the Air Force annually awards Air Force distinguished equal opportunity awards in 11 categories.

I. The Wright-Patterson Program

At Wright-Patterson Air Force Base it is our philosophy that affirmative action must become an integral part of every human resource program to include performance management and discipline, in addition to hiring, retention, and advancement. Furthermore, affirmative action must become an integral part of the business plan and a key component of business decisions made by the mission units. A successful affirmative action program relies on senior management involvement, accurate and comprehensive data and analysis, adaptable human resource systems, and a part-

nership with the community. To that end, Wright-Patterson has taken the following initiatives.

Performance Management (Appraisals) as a Positive Tool

QUALITY REVIEW COMMITTEES—Following accomplishment of the annual appraisals, but prior to final approval, each organization reviews its appraisals to insure they meet the requirement for the equitable distribution of scores and awards across all employees within their organization. Their designated quality review committee accomplishes this review, and the chief of the organization certifies to the civilian personnel office that the review and an equitable distribution was accomplished.

STATISTICAL ANALYSES—Following the annual processing of the appraisals, a series of statistical analyses are put together for management review showing the actual distribution of appraisal scores (numbers and percentages) by protected group categories (women and minorities) in comparison to each groups work force representation. This is a tool for management to use in conjunction with prior years' reports to show how they are progressing. The data can be "peeled back" to identify trends or localize problems.

The overall work force has been steadily declining. From 1992 to 1995 the number of civilian employees at Wright-Patterson AFB declined by 25 percent. However, as an example, while the percentage of black males in the population remained static during the decline, the percentage of black males receiving superior performance ratings increased from 2.76 percent in 1992 to 3.33 percent in 1995. Thus, in spite of shrinking employment, management has been able to continue to improve upon its distribution of appraisal scores.

Civilian Discipline and Adverse Actions

Over the past several years there has been a government wide concern that the rate of disciplinary actions for minority civilian employees is disproportionate to the representation of minorities in the overall work force. In April 1994 the Office of Personnel Management (OPM) released a study conducted by Brown University, showing that a racial disparity in the discharge rate of Federal employees does exist.

We felt confident that all disciplinary and adverse actions administered at Wright-Patterson AFB were warranted and properly substantiated. However, statistics showed that the disciplinary action rate for minorities was more than double their representation. Our conclusion was that some supervisors were reluctant to properly administer discipline in situations involving non-minority employees, thus resulting in disparity. Positive and aggressive actions were taken to address this problem.

A team of employee relations specialists was established to review the matter and find solutions. Some of these solutions included education of managers and employees regarding civilian conduct and discipline; increased awareness on the part of the servicing employee relations specialist; management of organizational demographics; culturally diverse servicing personnel specialist teaming; and improved communications between personnel specialists and employees.

As a result of these efforts the disciplinary/adverse action rate for minority employees at Wright-Patterson AFB was reduced from 35 percent in 1994 to 28 percent in 1995.

Maintaining Diversity While Downsizing

The current environment of reducing and streamlining in the Federal Government poses a significant challenge to implement affirmative action goals to further diversify the work force and provide advancement opportunities. But it remains critical that the government develop ways to keep pipelines open for the influx of "new blood" into the work force. The opportunity to hire is a key component of affirmative action and it is essential to the current operations and future advancements of the government's missions.

At Wright-Patterson we are experiencing reshaping and sizing of our permanent infrastructure. To combat the freezing effect we are suing flexible work force initiatives, such as term appointments (not to exceed 4 years) for clerical, administrative, and professional engineering/scientist positions. Announcement of these opportunities are open to the public. In addition, we have launched an aggressive recruitment program at predominantly minority institutions and colleges. Particularly for recent college graduates, these term positions offer experience and on-the-job

training. For the Air Force, these employees provide a pipeline of future resources.

Affirmative Action as a Good Business Practice

The installation commander at Wright-Patterson AFB holds quarterly EEO committee meetings as required. In order to take a closer look at specific issues, a cultural diversity focus group was established in 1995. The focus group membership is comprised of the senior organization directors who meet bimonthly for an open forum to discuss impacts of a cultural diverse work force, highlight affirmative action accomplishments, analyze statistics that highlight EEO barriers, and develop plans and actions to address and remove the barriers.

Community Relations

In 1995 a minority community outreach committee was established at Wright-Patterson AFB to foster a direct link between the Base and the surrounding community representatives. The Miami Valley Council of Native Americans, the Dayton Urban League, the Dayton Filipino-American Society, the Wright State University Disability Office, and Dayton and Greene County chapters of the National Association for the Advancement of Colored People (NAACP) are represented on the committee. This rapport has allowed information to be channeled into the community through sources other than the media, and provide sources of information, training, and collaboration for the Base's affirmative action program.

Conclusion

As we review our affirmative action employment program a Chinese proverb best sums up our history. "I hear and I forget; I see and I remember; I do and I understand." For years prior to the development of our plan we heard the issues but seemed to forget what they were when we went to the planning tables. In more recent years, as a result of both good and bad stimulants, our vision has improved and we now clearly see our problems and are actively working many initiatives to correct them. Now we must do, for surely we understand.

Affirmative Action Set-Asides: Bad Programs

By Larry Robinson

Introduction

"Load up them buses" was our clarion call, "we're goin' on a hit." And off we headed for another protest action, or "hit" as we called them, against another bureau. For most of my adult life, I have been involved with community groups, many of which have been predominantly black. I live in a predominately black neighborhood. My neighbors and I have gone on bus rides to Washington, trying to make our government officials see problems in our communities: social injustice, crime, bank "redlining," and the lack of affordable housing. Usually bureaucrats didn't see very much unless we made it very clear to them that we meant business.

Ford Prefect, a popular 1980's science fiction character insightfully noted man's difficulty in seeing: "An S.E.P." he said, "is something that we can't see, or don't see, or our brain doesn't let us see, because we think that it's somebody else's problem. That's what S.E.P. means. Somebody Else's Problem. The brain just edits it out; it's like a blind spot. If you look at it directly you won't see it unless you know precisely what it is. Your only hope is to catch it by surprise out of the corner of your eye."

I'm not a trekkie, but I couldn't help relate to Ford's commentary on human behavior. Americans don't jump or turn their heads quickly enough to catch a glimpse of lots of problems "out of the corner" of their eyes. For years minorities have felt that many are blind to their difficulties. Likewise, many are blind to the racism exacted by race and gender-based affirmative action programs. Often I've wondered why architects haven't seen the problem; why they haven't started yelling and protesting. Are they blinded by some mysterious bias? Are they just being cavalier? Or do they simply believe it is S.E.P.?

The architectural set-aside programs throughout government are good examples of bad programs. Unfortunately, most architects are very reticent to complain about anything bad. It is hard to find a more stolid and stoic group, a group which still refrains from using television ads. For nearly half a century, the unwritten canon of architecture has been to not rock any boats.

Architects take a sweeping end-around run when confronted with governmental obstacles. Most rationalize that they just don't have the time or money to fight corruption. As long as architects are doing what they enjoy and surviving (regardless of how low that standard of survival might be), they won't rock any boats. Architects—unlike teachers, baseball players, musicians and countless other professionals—don't have the penchant to protest.

I agree that corruption is not new. However, race and gender based quotas and set-aside programs are legalized corruption. They arrest our constitutional rights to life, liberty, and the pursuit of happiness. Legal set-asides are the type of corruption for which there is no remedy other than fearless opposition. Race/gender based quotas and goals are not S.E.P, somebody else's problem, they are everyone's. We need to look directly at them.

It is time, or maybe past time, to tinker with our government's affirmative action programs. Tinkering may require greater modifications in some areas than others. I will defend the position that major modifications are needed in the area of architectural contracting. Via this hearing and solicitation of documents from affected persons such as myself, the U.S. Commission on Civil Rights may affirmatively take a good first step in redressing some of the injustices born out of our affirmative action policies. Affirmative action—in the field of architecture at least—is no longer an instrument to help the underdog when the underdog has become the nonminority.

While it may be argued that my perspective is limited to architecture, analogous examples exist in other professions. I encourage others to take the plunge, to step forward and publicly explain how affirmative action has negatively impacted their lives. I hope the U.S. Commission on Civil Rights can open some windows via these hearings.

It is time architects did rock their boat. After all, what harm can come in rocking a boat when

the river has run dry. Ah, but it is a wide and raging current that flows for the minority business enterprises of the architectural world!

This paper will analyze the dilemma of why so few are receiving so much. It will also explore some ways to tinker with it and make it better for all Americans.

Historical Overview

Historically minority architects have been underutilized, particularly in the private sector. While African Americans represent 12.6 percent of America's population, they comprise only 1 percent of the architects. This makes African Americans the most underrepresented group practicing architecture today. Other ethnic groups may qualify as MBE architects. However in Ohio, the vast majority are African American firms. Seventy-five percent of Ohio's MBE architectural firms are African American: 12 African American, 2 Asian, 1 Latino, and 1 Asian Indian.

Conversely, during the past two decades, affirmative action has pervaded every level of architectural contracting including public, nonprofit, quasi-governmental, collegiate, and even the private sector. The private sector is hiring minorities, and the public set-aside quotas far exceed a fair adjustment to compensate for past social injustices. It has soared to the extent that minority architectural firms have been overutilized, trivializing affirmative action and trampling on the rights of nonminority architects in the process.

Originally, affirmative action had a noble ring to it—to set aside architectural work for a class of professionals who, it was argued, had historically been excluded from the system. Today, however, the pendulum has swung too far. Many of affirmative actions original goals have been met, or supplanted with spurious offshoots.

Government Intervention

For years the main argument for set-asides has been that since the private sector was not responsive in hiring enough minorities, government should benevolently step in to adjust architectural selection mechanisms. Legislatures prescribed unbelievably high quotas for very few individuals possessing a certain skin color or sex. Hypocritically, such sanctions have been implemented by selection committees comprised overwhelmingly of white males. Nonminority business enterprises—which I shall hereafter refer to as NMBEs—often struggle to make ends meet. Excessive set-asides hurt the majority of firms. According to the State Board of Architectural Examiners, small NMBEs (fewer than eight employees) comprise over 80 percent of all firms.

Many proponents of MBE quotas have said to me "why complain about MBEs getting 15 to 20 percent of the public work when white guys get most of the private sector work, which is the lion's share of the pie." Such is not the case anymore. U.S. public construction spending is projected to be almost $100 billion for 1996, nearly on par with the private commercial construction spending of $119 billion. Government construction is no longer a token, and neither are set-asides.

Government set-asides for architects are so large in proportion to the available work force that many MBE architects live better on set-asides alone than NMBEs competing in all sectors for work. In 1994, nearly $62 million worth of building construction was set aside for MBEs in Ohio State contracting alone, or about 16 percent of the total dollar amount. Architectural work comprised about 90 percent of the contracts, or $56 million. At an average fee of 9 percent this equates to $5,040,000 or an average of about $315,000 for each of the 16 MBE architectural firms. Incredibly the average MBE makes as much on State set-asides alone as many nonminorities make on all work. This effectively works against one of the original goals of affirmative action—to bring MBE's into the competitive mainstream. Consider the following facts:

1. There are approximately 900 registered African American architects out of a total of 100,000 in the U.S., or less than 1 percent.
2. There are 37 African American architects out of 5700 in Ohio, or about 0.6 percent.
3. There are 5 African American architectural firms out of about 210 total architectural firms in Central Ohio, about 2 percent.
4. There are 16 African American architectural firms out of approximately 1,600 in Ohio, only 1 percent.
5. In 1994, the Ohio Department of Public Works awarded design work for about $62 million worth of construction projects to MBEs, nearly 17 percent.

This is not an I.Q. test, but if it were, which of these five facts seem out of place? It doesn't take a genius to correctly answer this question. Clearly number 5, the 17 percent stands out. Too much architectural contracting is awarded to too few. And this is only the minority set-aside work. Who knows how much open, nonset-aside work goes to MBE's through State contracting? Nonset-aside work is not recorded.

Private Sector Reality

MBEs' above average earnings are largely the result of State set-asides. However, work stems from other sources as well. Work is available in the private sector if MBEs are willing to rigorously compete for it like NMBEs do. In fact, many MBEs could compete well on private sector projects because of their striking resumes. However, the entire private sector construction industry is very competitive. Since 1965 the number of building contractors has increased 400 percent while construction spending has increased only 35 percent.

Such excessive competition has severely diminished the standard of living for architects. It has reached the point where many firms are performing private sector work for 2–4 percent of the construction cost. Given that 5 percent is customarily considered to be the break even point, clearly competition is cutthroat. No car dealer can stay in business long selling below wholesale. The same holds true for architects. From 1983–1986, 51 Columbus Ohio architectural firms, nearly a quarter of the total, either went out of business or reorganized; the effected firms were all nonminority. In addition, the unprecedented number of architectural students entering America's 93 architectural schools will increase competition even more.

The way to stay in business today is to achieve a balance in the firms workload. Challenging, often low-paying private sector work may keep the "design cutting edge" sharp, but some government work is necessary to pay the bills. Frankly, government pays better than private sector work.

Public Set-Aside Work

Public sector jobs are superior for two reasons. First, the fee is greater, generally ranging from 8-15 percent of the construction cost. Secondly, the construction budget—from which the 8-15 percent fee is taken—is larger because prevailing wages pay 25–35 percent more for the same basic work. The prevailing wage system has devolved into a huge porkbarrel for the fortunate few who receive contract awards. The word prevailing—supposedly meaning widespread—is, itself, a misnomer since 80 percent of all construction work in the private sector is nonunion. Except for very small exempted contracts, prevailing wages must be paid on 100 percent of government work.

For example, assume that a $1 million private sector project pays 3 percent to the architect, or $30,000 in architectural and engineering fees. A $1 million government building requiring the same amount of architectural thought, imagination, and action, might pay as much as $130,000 in fees. Granted there is more red tape involved in administering a government job, but you can buy a lot of red tape for $100,000.

Yes, government work is good, and there's a lot of it, but there are a lot more architects than jobs. For example, in 1994, 131 State architectural or engineering contracts were awarded, as reported in the *Ohio Register*, a publication which advertises State jobs. There are about 1,600 architectural firms in Ohio, of which only 16 are MBEs. Not surprisingly, out of the 1,600 firms, only a fraction have applied for State work.

Many NMBEs have stopped trying to get any State work. Considering the odds in favor of minorities it is no wonder: 15 percent minimum MBE quota, coupled with many mandatory MBE joint-venture projects, along with bonus points for MBE consultants; and lastly, the ever increasing number of nonset-aside projects awarded to minorities.

Using the 1994 data above, on average the 16 MBE architectural firms stand a chance of getting a job every 18 jobs (16 percent of 131 total jobs) 16 firms, or a little over one job a year. Using similar units, the 1,600 NMBE architectural firms, would average a job every 110/1,584 or every 14 years. Even more startling is the fact that one MBE firm received six State jobs in 1 year. It would take the average NMBE 86 years to accomplish such a feat.

How, you ask, does this relate to MBE set-asides? MBE work is regular work and prevailing wage work, the best of both worlds. If the proportions of the pie are much larger for doing the same work, then what incentives are there for MBEs to

solicit thankless, low-paying work in the private sector. It becomes so much more tempting to rely on government handouts. Again, this works against one of the original goals of affirmative action: to bring minorities into the mainstream of American commerce.

Public NonSet-Aside Work

MBEs are also commanding large amounts of nonset-aside public works. These comprise projects which are available to all firms, after the set-asides have been doled out. The reason why so much public work is forced on MBEs is not very clear. It probably stems from the very nature of the architectural selection process itself.

This bureaucratic compulsion to hire skin color, may somehow be related to a classical behavioral pattern of rewards and punishments; tacit approval or career advancement, for hiring an MBE and, conversely, real or perceived punishment if one doesn't. This is one way to bureaucratically "climb the ladder." Kind of like the "good old boy" system in reverse.

Qualification Based Selection System

The current selection system lends itself very well to this pattern of behavior. It is called the qualification based selection system or QBS for short. QBS does not lend itself well to firms who have had a dearth of recent past government work. Recent similar jobs are very important criteria in determining which firms get work; QBS is predicated upon similar work in the past. It's the old dilemma: how do you establish credit without first acquiring credit. Once upon a time, small jobs were frequently given to small, struggling firms to try and give them a "jump start." It was a fair and humane way to let outsiders into the loop and to gauge their performance on a job. Today, the architectural market is so competitive that large, established firms including most MBEs with hundreds of examples of similar jobs compete with the little guys. Unfortunately selection committees generally keep on picking the established insiders.

Most small architectural firms find it very difficult to compete with firms with a mile-long list of similar work. Many NMBEs have told me they just decided to "throw in the towel," not because they were short on talent, but because they felt that they had virtually no chance of winning. The typical governmental "qualifications based selection system" varies only slightly between governmental layers.

The MBE Dilemma

Clearly there is far too much work for the insignificant number of MBE architects who are available to do it. A typical architect is only capable of producing plans for about a million dollars worth of construction work a year. With $62 million worth of State set-aside work alone, along with all the other millions going to only 37 African American architects in Ohio, who is doing the work? Who is "getting the lead out" to borrow an old architectural saying. The math presents a real dilemma. Such a feat is physically impossible.

The riddle is solved by the fact that it's not the minorities, but the nonminorities who are "getting the lead out." MBEs hire vast armies of predominately white, male architects to actually design and produce the work. What an irony. Affirmative action has become a vehicle for white, males to gain employment. A glance into any of the large minority architectural offices will confirm this twist of fate.

Sometimes when MBEs get especially busy, work is subcontracted out to NMBEs. Whether it's set-aside work being done in-house or out-of-house by nonminorities, it is still improper. This utterly works against one of the original goals of affirmative action: to set aside meaningful employment for minorities, not to fashion ways to provide work for the nonminorities.

The NMBE Dilemma

NMBEs experience the opposite dilemma—not enough work. NMBEs must expend incredibly large amounts of time and money trying to win shortlist competitions against almost impossible odds. It is usually not cost-effective.

Whenever I share my concerns with others they often ask why I don't simply hire a black, turn over 51 percent of the firm, and become certified as an MBE. Voilá! This, they profess, would solve our dilemma. Well, not exactly. First, why should we be required to hire a new owner, when our current firm's owner, who has invested the last 40 years of his life building this company, is doing just fine? Secondly, why should we be required to hire someone solely because of their skin color? Is this not bigoted? Lastly, even if our

firm decided to compromise our principles and recruit a new minority owner, it would be virtually impossible to find one who would work for wages we could afford to pay. The task is not as simple as hiring some good minority worker off the street and handing over 51 percent of the company. I would rather make 49 percent of a zillion dollars then 100 percent of nothing. The problem is that the very scarcity of minority architects defines their worth—it's the old supply and demand, and are MBEs ever in demand.

People often volunteer another friendly tip, why not joint venture with an established MBE? The problem is that joint-ventures are often prearranged long before the shortlist selection starts. One firm calls another and speculates that should either firm be shortlisted, a commitment is made to create a mutually exclusive partnership. Usually the nonminority contributes several desirable attributes such as past similar work, friends within the hiring agency, and technical skills. The minority complements the team by adding the "bonus points" as well as intangible qualities such as an "underdog" persona.

When our small NMBE firm calls to propose working with a minority consultant, they often turn us down because we have fewer apparent resources, and a much shorter list of past work than the ol' boy firms. When we call the ol' boy firms to try and joint venture with them, they reject us because we have nothing of political consequence to offer. Our firm is keeping a list of MBEs who have turned us down. It is becoming more difficult to find an MBE who will work with us on projects. Another NMBE dilemma is: What do you do when a government request-for-proposal sanctions you to team up with an MBE consultant and either you can't find one, or find one who will work with you? This also works against one of the original goals of set-aside programs: to create joint ventures between small, struggling, emerging firms, not to perpetuate more work for the established firms.

Recommendations for Improvements

Obviously it is time to tinker. Modifications must be made to correct the misguided directions affirmative action has taken. I'm elated that open hearings are finally being conducted to revisit this invidious miscarriage of government. I have tried for many years to revisit it with my State and Federal representatives, to no avail. Those charged with the responsibility to listen, must listen to all of their constituents.

I don't want our representatives to abolish affirmative action, merely to improve it. I support the concept of graduation; I want graduation to be the law. Without a meeting with a legislator a change in the law is impossible. For more than 10 years, not one representative would meet with me about graduation or any other ideas for improving the system. During this period I felt powerless. I remember many times wishing there was some kind of a commission I could complain to about the racist way I was being treated. Other than the very expensive judicial route, white males have no government body to appeal to when they feel threatened by such racist attitudes. This fosters a great deal of resentment.

Fortunately the City of Columbus has been responsive to improving affirmative action. For 3 years I volunteered my time, working in conjunction with Richard Sensenbrenner and the City of Columbus' office of economic opportunity in developing the predicate study. Among other things we were able to enact a city ordinance called "graduation." This ordinance mandates that when an MBE reaches the point where gross earnings exceed the average income for 2 consecutive years, the MBE will then graduate into the "real" world of competition. I merely wanted the State representatives to at least consider the idea at the State level. No one would meet with me—not the legislators, not the Governor, not anyone. Soon, I hope graduation will become the law of the land.

Without graduation, many well-to-do MBEs will continue to make a mockery of affirmative action. Without graduation, less experienced MBEs often find it difficult to compete against established MBEs. The less experienced firms become minorities within a minority. This also works against one of the original goals of affirmative action: to break down the barriers and open up opportunities for all minorities, especially the emerging firms and the ones which have historically been overlooked in contracting.

Another idea I developed is called proportionate representation. Any prescriptive goals for increasing minority participation must be indexed to the available pool of workers in respective service classifications. Any goal setting must be tailored to the available, proportionate representa-

tion of workers who can, if called upon, start to work tomorrow. 1 percent of the architects are minorities, and that one percent is sanctioned 15 percent of Ohio's architectural contract awards. That is disproportionate representation. That is racism.

At our city council, I also introduced an idea called "equitable distribution of work." Under this proposal, contracts would be "spread" around, not because a contract award is an entitlement, but because firms need the opportunity to demonstrate their abilities. Equitable distribution would give a "hand up" to firms who, through no fault of their own, had historically been overlooked because of the QBS practice of considering past experience in awarding contracts. Equitable distribution would expand MBE protection to the economically and "contractually" disadvantaged. With such a system even small, politically vapid firms would have a realistic chance at government work. Equitable distribution of work should be converted from metaphor to law, empowered with as much fury and robustness as MBE set-asides have been.

Currently, there is a breath of fresh air wafting from the State Architects Office where an attempt is being made to "spread" a substantial amount of work around to firms who have been by-passed. Unfortunately, it's the old "good news, bad news" routine; at the instant when the State is trying to improve the situation, a simultaneous event could undermine it. A bill is being considered to decentralize contract awards. Under the decentralized system, architectural selection for construction contracts of $4 million or less, most of the contracts, will be handled by many individual State agencies. The bill is due for a vote in the summer of 1996. Unfortunately there appears to be little resistance. I hope that the State architect will address this situation and make every possible effort to see to it that his goals permeate the entire State contracting system.

Education is also a keystone to any long-term improvements in affirmative action. Efforts should be made to increase the architectural enrollment of any group of Americans when it becomes obvious that such groups are conspicuously under-represented such as African Americans are in architecture. Otherwise there will never be an available work force of MBEs. The same old MBEs will just be force fed like pigs.

Of the 93 fully accredited architectural schools in America, only 4 are predominately black. The remaining 89 schools have an extremely low minority census, generally about 4 percent How, in good conscience, can universities that train only 4 minorities out of every 100 architectural students, require 15–20 percent of their buildings to be designed by MBEs? Such bureaucratic sanctimony would be laughable were it not for the fact that it effects such great numbers of NMBEs very survival.

The extremely low percentage of minority students will have a profound impact upon the available MBE work force for years to come. The architectural curriculum requires 6 years to graduate, then 2 years for apprenticeship, and finally an average of about 1 1/2 years to pass the State board exam, ten years to become an architect. Therefore, if minority enrollment were to increase astronomically next year, it wouldn't be until 2007 that available MBEs could conceivably begin to justify the 15-20 percent set-aside for public contracts. If there is a place for more architectural affirmative action, it is at the architectural degree awards level, not at the architectural contract awards level.

Graduation, proportionate representation, equitable distribution, and education are four realistic ways to improve affirmative action. There are probably many more. However, until Americans freely and openly discuss affirmative action, we'll never know. Most bureaucrats have shied away from tinkering with set-asides. The Commission on Civil Rights has made a good start by opening the floor for comments. Affirmative action is a very complex issue with a plurality of viewpoints. We all need to bring it out in the open and start clearing the air.

Legal Implications

Set-aside programs, such as Ohio's quota system and other more benign, goal-oriented programs, are not only morally wrong, they are illegal. In the U.S. Supreme Court Case, *Adarand v. Pena*, even the dissenting justices wrote that remediation programs should contain provisions which 1) place time limits on remedial programs,

and 2) graduate MBE firms when they earn above average revenues.[1] Neither of these provisions are part of the Ohio minority enterprise law or federal statutes.

When asked how the Ohio minority enterprise law can coexist with the *Adarand* ruling, several Ohio legislators told me that Ohio conducted an anecdotal study in the early 1970s, to demonstrate that a pattern of discrimination had existed for many years. When I tried to find the study, I found that it apparently no longer exists. Talk about the heights of ridiculousness, we currently contract work dictated under a State set-aside law based upon a 20-year-old anecdotal report, documenting events that allegedly happened 30 to 80 years ago; and, incredibly, the report no longer exists.

The U.S. Supreme Court said in *Adarand* that even the goal oriented, benign remedies must "withstand strict judicial review." That means that government can't remediate by presuming that whole classes of people have been discriminated against a priori. Government must tailor cases individually. In essence, there must be but one race when it comes to public contracting—Americans. Every time the government rewards one class at the expense of another, the slavery of one class is simply traded for the slavery of another.

Conclusion

Our firm, like so many other small architectural offices, needs relief from the discriminatory pattern of hiring which has plagued our profession for so long. Our government's contracting officers need relief from the quotas, which in many cases are virtually impossible to fill. Affirmative action is no longer a "payback" for past injustices, it's a "payoff."

Times are changing, however. Only recently has the public attitude on affirmative action begun to shift away from unquestioned allegiance. Until now, if someone publicly reproached quotas, that individual would be branded, at least tacitly, a racist. In some areas such a label would be like putting a big bulls-eye on that person's back. Such targeting is itself bigoted and serves only to build walls between the races.

Race and gender-based affirmative action have probably done more to breed resentment among Americans than any other program since the Civil War. With all of the billions of dollars and all of the pro-minority incentives in our workplace today, many struggling whites wonder why "Buppies" (black urban professionals) are still so dissatisfied. Ironically, affirmative action has done very little to engender trust among blacks. Could it be that some blacks don't really trust the basic values underlying affirmative action itself? Many creditable blacks probably find it repugnant to accept contracts based upon numerical quotas. In other cases, blacks seem to choose not to participate. This, too, is very hard for a struggling nonminority to comprehend, for how can one expect to succeed if one does not participate. Many struggling nonminorities would love to have a program to participate in.

In closing, let us not lose sight of the original mission of affirmative action: to help the needy with a hand up, not the rich with a hand out. It's time some of those good people "load up them buses and head off for a hit" against race and gender-based affirmative action. We must make the world see how unfair and ineffective race/gender-based affirmative action really is.

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1 *Ed. note:* On the topic of graduation, the dissenting justices acknowledge only that the section 8(a) program provide for periodic review to help ensure that DBEs will "graduate" to nondisadvantaged status. 115 S.Ct. at 2130.

II. Academic Examinations of Affirmative Action

The Ambivalent Future of Affirmative Action

By Jonathan L. Entin

There is no more contentious issue confronting our society than the future of affirmative action. Despite the benevolent intentions of its advocates, affirmative action is widely condemned as morally equivalent to the race and sex discrimination it was designed to overcome. As a result, many Americans have profoundly ambivalent views on this subject. At one level, we want to endorse the first Justice Harlan's eloquent dissent in *Plessy v. Ferguson*[1] (1896): "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." At another, however, we recognize that race and sex are social facts that do affect our attitudes and behavior.

In this paper, I want to do several things. First, I will summarize the law of affirmative action as expounded by the Supreme Court. The Court has not eliminated affirmative action but has made it much more difficult to justify race- and sex-based affirmative action programs. Second, I will explore the origins of affirmative action and suggest that the persistence of discrimination raises disturbing questions about proposals to leave the amelioration of inequality to the private marketplace. Third, I will try briefly to assess the case for affirmative action in education, employment, public contracting, and legislative districting. My purpose here is to focus attention on whether affirmative action is more appropriate in some contexts than in others. Finally, I want to consider the possibility that the controversy over affirmative action might help us to think more clearly about the concepts of merit, representation, and opportunity not only for racial minorities, but for everyone.

I. Affirmative Action in the Supreme Court

The Equal Protection Clause of the 14th amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has also held that the due process clause of the 5th amendment requires the Federal Government to adhere to the requirements of equal protection.

The Court has never interpreted the equal protection principle to forbid government from making any distinctions whatever. Rather, the idea is that similarly situated persons should be treated alike. But the Court has applied different standards for judging equal protection claims. In most instances, the government must show only that a classification is rationally related to a permissible interest. But in cases involving explicitly race- and sex-based government policies, the Court has taken a more rigorous approach. Because racial distinctions so often rest upon invidious motivations, the Court has applied strict scrutiny in such cases: a race-based classification must further a compelling governmental interest and be narrowly tailored to the achievement of that interest. Sex-based classifications, which the Court views as more dubious than most legal distinctions but less troublesome than race-based ones, are evaluated under intermediate scrutiny: a sex-based classification must be substantially related to an important governmental interest.

Using strict scrutiny in race cases seemed perfectly sensible when the issues involved segregation or other exclusionary policies directed at African Americans. But affirmative action is designed

1 163 U.S. 537 (1896).

to remedy discrimination by taking race into account as a positive factor, not a negative one. Not surprisingly, therefore, the Supreme Court has had difficulty agreeing upon a standard to evaluate so-called benign racial classifications.

Its first foray into this arena, *Regents of the University of California v. Bakke*,[2] involved a challenge to a public medical school's policy of reserving about one-sixth of its seats for racial minorities. Justice Powell's lead opinion, which no other justice fully endorsed, allowed the university to consider race as one factor in the admissions process but prohibited the reservation of a fixed number of seats in the entering class on the basis of race.

Of particular importance, Justice Powell concluded that strict scrutiny applied because the program relied upon a racial classification. The only interest that Powell found to be compelling was diversity in the medical school's student body. He rejected a quota system as illegitimate but at least implicitly approved the university's use of flexible enrollment goals.

Two other asserted justifications for affirmative action that were rejected in *Bakke* have played a prominent role in later cases. The university could not engage in affirmative action as a remedy for societal discrimination; race-based remedial programs had to be justified by findings of past discrimination on the part of the institution itself, and there were no such findings in this case. And the university could not favor minority applicants on the theory that members of minority groups are more likely to provide medical services for traditionally underserved communities; this was racial stereotyping.

Two years later, again with no majority opinion and no agreed-upon standard, the Court in *Fullilove v. Klutznick* rejected a challenge to a Federal statute providing for a 10 percent minority set-aside in federally assisted public works projects at the State and local level.[3] Congress had made findings of discrimination in the construction industry as the basis for passing this remedial statute. For the next few years, the Court struggled with affirmative action in a variety of contexts.

In *City of Richmond v. J.A. Croson Co. (1989)*[4] six justices endorsed strict scrutiny as the test for evaluating a municipality's set-aside plan for public contracts. Applying this standard, the Court invalidated the program. The plan could not be said to further a compelling interest, nor was it narrowly tailored to promote such an interest. First, the city relied only upon generalized assertions of past discrimination in the local construction industry rather than upon probative evidence of such discrimination. The Court would not allow the city to rely upon the congressional findings concerning nationwide discrimination that had been accepted in *Fullilove*. Second, the city failed to demonstrate any connection between the extent of past discrimination in its own community and the 30 percent set-aside in the challenged program, nor did it even consider race-neutral approaches.

The Court also implied that State and local governments have less latitude to engage in race-based affirmative action programs than does the Federal Government. The lead opinion, in a section endorsed by only three justices, emphasized that the equal protection clause is "an explicit *constraint* on state power"; only Congress is authorized to enforce its provisions. One of the principal purposes of the 14th amendment was to enhance Federal authority to remedy racial discrimination, because State and local governments had shown themselves incapable of dealing with racial issues in good faith.

The implications of this federalism theory seemed to bear fruit the following year. In *Metro Broadcasting, Inc. v. FCC*[5] (1990), a five-member majority upheld agency policies that allowed only minority applicants to bid for broadcast licenses in certain limited circumstances. The Court ap-

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2 438 U.S. 265 (1978).

3 448 U.S. (1980).

4 488 U.S. 469 (1989).

5 490 U.S. 547 (1990).

plied intermediate scrutiny to those policies, which it regarded as "benign race-conscious measures mandated by Congress." The policies at issue would enhance programming diversity, even though not all members of minority groups necessarily shared the same, distinctive viewpoint. This reasoning suggests the difference between intermediate and strict scrutiny: recall that in *Bakke* Justice Powell, applying strict scrutiny, had rejected an analogous argument that minority physicians would be more likely to work in underserved minority communities.

The federalism theory of equal protection was rejected, and *Metro Broadcasting* overruled, last year in *Adarand Constructors, Inc. v. Peña*.[6] Now strict scrutiny applies to all governmental racial classifications, whether those classifications are undertaken by the Federal Government or by State and local governments, and whether those classifications are characterized as invidious or benign. Justice O'Connor, writing for a five-member majority, found three controlling principles for this conclusion: *skepticism* of all racial classifications; *consistency* of review regardless of which race is affected; and *congruence* between the rules applicable to Federal actions and those governing State or local policies.

Reiterating themes she had emphasized in *Croson*, Justice O'Connor explained that the strict scrutiny standard was meant "to 'smoke out' illegitimate uses of race" and was necessary because of the difficulty of distinguishing between benign and invidious racial classifications.[7] The equal protection clause, although perhaps intended primarily to ameliorate the conditions of newly freed slaves after the Civil War, was written in general terms applicable to persons of all races. And it would be "unthinkable" for the nondiscrimination principle applied with less force to the national government than to the States and their subdivisions.

We might, as the dissenting justices did, ask whether it is really so hard to distinguish between invidious and benign racial classifications; even if there might be some difficult calls, that does not necessarily require us to treat all race-based affirmative action measures as the moral equivalent of apartheid. Although the Federal Government has not always been virtuous in dealing with racial issues, the historical record suggests that the Federal Government has been more forthright than the States in addressing discrimination. And there is no small irony in a legal rule that makes it easier to justify remedial programs aimed at sex discrimination than those aimed at racial discrimination. Racial discrimination has been deemed so inconsistent with the Constitution that it triggers the highest level of judicial scrutiny, whereas sex discrimination receives only intermediate scrutiny. According to *Adarand* governmental efforts to redress this grievous problem are now to be viewed as more dubious than similar efforts to redress the presumably less serious malady.

Whatever questions might be raised about the Court's analysis, though, we must accept that *Adarand* is the Court's most recent and authoritative statement about the constitutionality of affirmative action. For present purposes, the most important aspect of that decision is that the Supreme Court has not necessarily invalidated race-based affirmative action programs. In her opinion for the Court in that case, Justice O'Connor repeatedly underscored that applying strict scrutiny does not ineluctably lead to the invalidation of all race-based affirmative action measures. For example, near the end of her opinion she sought "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" This is entirely consistent with her earlier emphasis that "strict scrutiny does take 'relevant differences' into account—indeed, that is its fundamental purpose. . . . The point of [strict scrutiny] is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." And she added that this approach "says nothing about the ultimate validity of any particular law; that determination is the job of the

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6 115 S.Ct. 2097 (1995).

7 Adarand, 115 S.Ct. at 2112 (quoting for Croson).

court applying strict scrutiny. . . . The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the [racial classification in question]."

Indeed, the Court left open the possibility that the program at issue in *Adarand* might actually survive strict scrutiny. That program, like the one upheld in *Fullilove*, has an annual goal of awarding 5 percent of the value of all Federal contracts to "small business concerns owned and controlled by socially and economically disadvantaged individuals." The statute contains a rebuttable presumption that "socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration." Rather than resolve the many questions about precisely how the program works in practice or whether it is narrowly tailored to serve a compelling governmental interest, the Court remanded the case for further proceedings.

The fate of this program therefore remains unclear. Two justices expressed deep skepticism that the government could ever carry its burden of justification under strict scrutiny. And the Court's recent decisions evincing hostility to majority-minority congressional districts implies that even a somewhat more flexible approach to strict scrutiny could well be fatal most of the time. In *Shaw v. Reno*,[8] the same five-justice majority that prevailed in *Adarand* held that white voters could challenge a bizarrely shaped district; in *Miller v. Johnson*,[9] those justices made such challenges easier to maintain by suggesting that any district, regardless of the shape, is vulnerable if race was "the predominant factor" in its design.

In short, the current Supreme Court is deeply skeptical and profoundly ambivalent about the constitutionality of affirmative action. We clearly have not heard the final judicial word on the subject, but for now it is safe to conclude that defenders of affirmative action now face perhaps their most daunting challenge when such programs become the subject of litigation. But even if the Supreme Court ultimately upholds some forms of affirmative action, this debate will continue in the political arena. Proposals like the California Civil Rights Initiative and the abolition of race and sex preferences by the regents of the University of California make clear that critics will seek to end or curtail affirmative action through legislative or executive initiatives. Much of the debate on those proposals has ignored the history of affirmative action, a subject to which I now turn.

II. How and Why Affirmative Action Began

Affirmative action has its roots in the often violent response to the Supreme Court's ruling in *Brown v. Board of Education*.[10] That landmark decision formally outlawed segregated schools, but it left unresolved precisely what was to happen next. A plausible reading of the opinion was simply that formal requirements and official support of segregation should end but that no particular amount of integration was required. The reaction to *Brown* was so defiant—the opposition was dubbed Massive Resistance—that eventually the Court came to define compliance in terms of outcomes (how many students of different races were attending school together) rather than process (elimination of laws or policies mandating segregation).

For example, Prince Edward County, Virginia, one of the school districts involved in *Brown*, closed its public schools for 5 years rather than desegregate them. Almost every white student in the county enrolled in a newly established private school that was subsidized by State tuition grants, while most black children went without formal education. President Eisenhower had to send Federal troops to Little Rock to enforce an order admitting nine African American students

8 113 S. Ct. 2816 (1993).

9 115 S. Ct. 2475 (1995).

10 347 U.S. 483 (1954).

to a previously all-white high school. Likewise, President Kennedy had to send thousands of soldiers and U.S. marshals to facilitate desegregation of the University of Mississippi after both the Governor and lieutenant governor were held in contempt for defying court orders, and two persons were killed in segregationist riots. Even where resistance was less overt, very little desegregation actually took place during the decade after *Brown*. By 1964, barely 1 percent of black elementary and secondary school pupils in the Deep South had white classmates.

These developments finally led the Supreme Court to conclude that desegregation should be assessed in terms of numerical results rather than formal processes; beginning with *Green v. New Kent County School Board* it rejected freedom-of-choice and similar devices that did not lead to black and white children actually attending the same schools.[11] School districts were required to eliminate segregation "root and branch" and to adopt programs that would "work *now*." Before long, the Court extended *Brown* to northern and western communities that had not required segregated schools in 1954 but in which educational authorities had taken steps to keep students of different races apart.

Ultimately, desegregation resulted less from judicial rulings than from the Federal Government's threat to withhold education funds from discriminatory school districts. But the whole experience suggested that racism and resistance to genuine opportunities for African Americans was widespread and intense, and that many whites would not support black progress without governmental intervention. Numerous subtle and not so subtle indications of persistent racial bias reinforced this pessimistic notion. Recent empirical studies using matched pairs of testers have revealed widespread bias unfavorable to black job applicants and homeseekers.[12] The apparent intractability of discrimination and of racial disparities in income and occupational status implied that racial bias was deeply embedded, often at a subconscious level, and that racial awareness could never be eliminated. This pessimistic view led many observers to conclude that vigorous, result-oriented programs were required to eliminate racial inequality in many other aspects of American life. It also prompted the federal government to launch affirmative action initiatives, such as Executive Order 11246 and the Philadelphia Plan, and also stimulated widespread state, local, and private efforts that have become increasingly controversial.

III. Evaluating Affirmative Action

As noted earlier, *Adarand* subjects race-based affirmative action programs to strict scrutiny, thereby regarding any consideration of race as problematic and requiring the government to justify racial classifications against the highest form of judicial skepticism. This approach treats some remedial efforts as morally equivalent to the previous racial discrimination they are designed to combat.

Yet *Adarand* also recognizes that affirmative action has costs. Distinguishing between benign and invidious racial classifications is not always easy; some forms of affirmative action might rest on paternalistic suspicions that African Americans cannot always compete equally with whites. This might encourage members of the majority to look for "the best black" on the theory that no member of the minority could be the most qualified person without regard to race.[13] Even if it is not so difficult to differentiate between legitimate and illegitimate consideration of race, long-term use of affirmative action might imply to some whites that blacks really are less able and could also lead some truly talented African Americans to doubt their own abilities. These concerns are clearly reflected in Justice Thomas's concurring

11. 391 U.S. 430 (1968).

12 Margery Austin Turner, Michael Fix, and Raymond J. Struyk, *Opportunities Denied, Opportunities Diminished*, (Washington: Urban Institute Press, 1991); and John Yinger, "Housing Discrimination Study: Incidence and Severity of Unfavorable Treatment," U.S. Department of Housing and Urban Development, Office of Policy Development and Research, 1991.

13 Stephen L. Carter, *Reflections of an Affirmative Action Baby* (New York: Basic Books, 1991).

opinion in *Adarand*, in which he bluntly criticized what he called the "racial paternalism exception to the principle of equal protection":

> So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. . . . 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.

The mere existence of costs does not justify abandoning affirmative action, however. Discrimination and persistent racial disparities also have costs. The economic gap between the races remains quite large and has not changed very much over the past 15 years.[14] More troubling, about one-fifth of the income disparity cannot be accounted for by differences in education, experience, hours worked, and similar factors.[15] And racial disparities in wealth are substantially larger than are those in income.[16] Proponents argue that affirmative action is necessary to ameliorate those problems.

The debate over affirmative action is not a purely empirical matter, though. Researchers disagree, for example, about whether blacks have experienced greater employment opportunities with firms that are subject to Federal affirmative action requirements than in firms that are not and about how much the enforcement of antidiscrimination laws has contributed to economic gains for African Americans (Jaynes and Williams 1989, 316-19). And even if the statistical evidence were less ambiguous, the debate is fundamentally normative, not quantitative.

The normative arguments do not necessarily point to a single conclusion. Affirmative action arises in different contexts. Focusing on context and form might help to illuminate the discussion. I will focus mainly on education, the field I know best, but will also touch on employment, public contracting, and legislative districting because similar issues have arisen in those areas.

A. Education

Although the Supreme Court has not ruled in a case involving affirmative action in education since *Bakke*, the role of race in admissions and financial aid decisions has generated continuing litigation. Recently, a panel of the U.S. Court of Appeals for the Fifth Circuit ruled that the University of Texas could not consider race at all in deciding whom to admit to its law school. The panel majority concluded that *Bakke* had been superseded by later decisions and that student-body diversity was no longer a sufficient justification for taking account of race in the admissions process.[17] Meanwhile, another lower court invalidated a program that set aside scholarships for African Americans at a formerly whites-only university in *Podberesky v. Kirwan*.[18]

It is important to understand that these decisions do not endorse a purely quantitative conception of academic merit. Almost no minimally selective institution makes admissions decisions strictly on the basis of grades and test scores. Grades are not self-explanatory: schools differ in their rigor, courses and fields of study vary in their difficulty. Besides, nonacademic factors can

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14 Reynolds Farley and Walter R. Allen, *The Color Line and the Quality of Life in America* (New York: Russell Sage Foundation, 1987), pp. 297–99; Roderick J. Harrison and Claudette E. Bennett, "Racial and Ethnic Diversity," in Reynolds Farley, ed., *State of the Union* (New York: Russell Sage Foundation), pp. 174–75 and 191–94; Gerald David Jaynes and Robin M. Williams, Jr., eds., *A Common Destiny* (Washington: National Academy Press, 1989), pp. 287–88.

15 Reynolds Farley and Walter R. Allen, *The Color Line and the Quality of Life in America* (New York: Russell Sage Foundation, 1987), pp. 337–38; Roderick J. Harrison and Claudette E. Bennett, "Racial and Ethnic Diversity," in Reynolds Farley, ed., *State of the Union* (New York: Russell Sage Foundation) pp. 182–85.

16 Gerald David Jaynes and Robin M. Williams, Jr., eds., *A Common Destiny* (Washington: National Academy Press, 1989), pp. 291–94.

17 Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

18 *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

affect student achievement. Some students must work to support themselves or their families, others have personal or domestic crises that affect their studies, and many (especially at the graduate and professional level) have additional experience that is not reflected in their transcripts. Meanwhile, admissions tests might be a common measure of all applicants, but scores on those tests only imperfectly predict future academic performance.

These lower courts recognized the limitations of grades and test scores but concluded, for reasons similar to those emphasized by the Supreme Court in *Adarand*, that race was an illegitimate consideration. Before accepting this conclusion, we should consider some of the qualitative factors that these courts find acceptable.

Many universities award scholarships to students who, as a group, have lower grades and admissions test scores than others. This is, in other words, a special admission program. Its beneficiaries are athletes. Even institutions that do not award athletic scholarships, such as those in the Ivy League, generally admit athletically talented applicants who are statistically less qualified than nonathletes. The courts have not questioned this practice, although intercollegiate sports are of limited educational value. Indeed, both Justice Powell in *Bakke* and the court of appeals in *Hopwood* specifically endorsed taking account of athletic ability as a positive factor in admissions decisions.

To be sure, athletic programs do have some positive impact. Successful teams bring favorable publicity to the institution, stimulate some additional alumni contributions, generate revenue, and may make a State legislature more sympathetic at budget time. But not all teams are successful, too many programs are not profitable (and some that are wind up subsidizing other money-losing sports rather than the institution's general fund), too many athletics departments operate in a netherworld of cheating and corruption, and sports frequently divert campus and public attention from the intellectual and educational priorities that are really important for colleges and universities, particularly at a time of widespread concern over the quality of American education at all levels.

This is not the only example of departure from traditional admissions criteria. In some States marginal applicants are often accepted with the sponsorship of legislators and other politicians.[19] And in others, including States in which race-based affirmative action has been a particularly salient issue, public officials have been known to intercede on behalf of applicants who might otherwise not be admitted.[20] Meanwhile, most institutions have been known to give some preference for children or close relatives of alumni.

Again, there might be legitimate reasons for these practices. The point is that they tend to benefit those who are sophisticated or well-connected rather than those who would otherwise be overlooked. But affording educational opportunities for those whose ancestors were excluded or discriminated against on purely ascriptive grounds or who might need encouragement to pursue higher education is the principal rationale for affirmative action in this setting. Why, then, is taking race into account regarded as more problematic than giving weight to athletic ability, association with prominent officials, or relationship to previous graduates? After all, nobody seriously suggests that these statistically less qualified applicants will feel stigmatized by the special consideration they received in the admissions process. The answer seems to be that race is different because our history of racial discrimination should make us very reluctant to start down that slippery slope without a powerful justification.

Defending affirmative action in admissions under *Adarand*'s strict scrutiny regime therefore requires us to focus on the value of diversity, the

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19 Patrick Healy, "legislator-Awarded Scholarships Come Under Attack in 3 States," *Chronicle of Higher Education*, Apr. 5, 1996.

20 Ralph Frammolino and Mark Gladstone, "Politicians Sought Aid of UC Lobbyist's Office," *Los Angeles Times*, Mar. 27, 1996; Ralph Frammolino, Mark Gladstone, and Amy Wallace, "Some Regents Seek UCLA Admissions Priority for Friends," *Los Angeles Times*, Mar. 16, 1996.

only interest that Justice Powell found to be compelling in *Bakke*. Unfortunately, he did not offer a particularly detailed defense of what he characterized as diversity's "paramount importance" to the educational process. He simply stated that a diverse student body "is widely believed" to promote "[t]he atmosphere of 'speculation, experiment and creation' [that is] so essential to the quality of higher education." He then dropped a footnote quoting an alumni magazine article by the president of Princeton University explaining the intangible learning that many (though not all) students experience from heterogeneity among their peers.

Ironically, a stronger defense of diversity appeared 45 years ago in a decision that invalidated segregation at the University of Texas law school, the same institution that was the focus of the Fifth Circuit's recent *Hopwood* ruling. Explaining why segregation was impermissible, Chief Justice Vinson in *Sweatt v. Painter*[21] wrote that no knowledgeable person would want "to study in an academic vacuum, removed from the interplay of ideas and exchange of views" that are essential to effective legal education. He added that the blacks-only law school "excludes from its student body members of the racial groups which number 85 percent of the population of the State and include most of lawyers, witnesses, jurors, judges and other officials with whom [the African American applicant to the University of Texas] will inevitably be dealing" after he became a lawyer.

Still, this argument applies more strongly to law schools than to other areas of higher education. Justice Powell conceded that diversity may be more important in some fields than in others and more significant at the undergraduate level than in some graduate and professional programs, and that ethnic or racial diversity is only one element to be considered.

Aside from constitutional concerns, there are pragmatic reasons why affirmative action in the admissions process should count race only as a positive factor. The notion that all, or most, minority students are evaluated by different standards than other applicants can be corrosive to an institution. Whites may regard all of their classmates of color as special admittees who could not compete on the "normal" criteria, and students of color might at least unconsciously come to agree, thereby leading them to lower their academic aspirations. Accordingly, if we think that grades and test scores are relevant but incomplete measures of academic qualification, we should be willing to consider a broad range of qualitative factors for applicants of all races.

There are costs to this approach, however. First, the more an admissions committee looks at "the whole person" rather than traditional quantitative predictors, the more time, energy, and expense will be devoted to screening applications. We need to assess the value of diversity, broadly defined, so that we can decide how much effort is appropriate to attain the desired amount. Second, the more we encourage applicants to tell us how much they have had to struggle to overcome various kinds of disadvantage, the greater will be the incentive to dwell on incidents of victimization rather than to get on with life.

I raise these cautionary questions without proposing definitive answers. These are not easy matters to resolve. The difficulty of resolving them does not mean that we should abandon diversity as a goal. It means only that we need to come up with better answers to these questions than we have so far devised.

B. Other Fields

In the limited space remaining, I want to touch briefly on some additional areas in which controversy over affirmative action has arisen. As with education, I will propose more questions than answers, but I will also suggest that an appropriate defense of some types of affirmative action could help us to think more clearly about some basic concepts.

1. Public Contracting—Set-aside programs of the kind at issue in *Adarand*, *Croson*, and *Fullilove* are intended to promote greater opportunities for minority business enterprises. That is a laudable purpose, but reservation of a particular percentage of public contracting funds for

21 339 U.S. 629 (1950).

members of designated groups poses a variety of risks. To begin with, public contracting, particularly at the local level and sometimes at the State level, has been rife with corruption. Periodic scandals around the country demonstrate that public officials too often seek to reward their friends with shady deals that provide jobs for politically well-connected workers. Against this background, the Court's skepticism about the Richmond set-aside program in *Croson* might reflect suspicion that the newly elected African American majority on the city council was simply trying to reward its supporters in the old-fashioned way. The city's failure to make specific findings about the extent of discrimination in the local market as well as its inclusion of groups that had little or no presence in the community among the beneficiaries of the plan might have confirmed suspicions that this program was just a traditional patronage scheme.

But even a Court that was more sympathetic to the notion that set-aside programs promote worthy goals might ask some probing questions. For example, one might wonder whether such programs could make minority business enterprises rely too heavily on public contracts and leave those enterprises vulnerable to changes in government policy or electoral trends. Yet more troubling, set-aside programs also offer the possibility of manipulation, corruption, or fraud by unscrupulous manipulators who set up nominally minority-controlled companies for the sole purpose of capturing set-aside money. A highly publicized example is the Wedtech scandal.[22]

These questions do not necessarily require the elimination of set-aside programs. Indeed, in the wake of *Croson* many communities have made strenuous efforts to document the extent of discrimination in the industries involved in public contracting and to justify whatever set-asides that are adopted. The questions do suggest, however, that skepticism about set-asides is well-founded.

2. Employment—The Supreme Court's recent affirmative action decisions have not focused specifically on employment, but the Court has ruled in a series of cases over the last two decades that suggest some broad analytical contours. These cases distinguish between affirmative action in hiring and promotion, on the one hand, and layoffs on the other.

For instance, *United Steelworkers v. Weber*[23] upheld a private employer's voluntary set-aside of half the positions in one of its job-training programs where there was a history of racial discrimination; the set-aside was a temporary measure that did not unduly trammel on the rights of white workers. Similarly, in *United States v. Paradise*[24] and *Johnson v. Transportation Agency*,[25] the Court upheld public employers' consideration of race and sex as factors in promotions.

By contrast, the Court has typically rejected race-based dismissals as justified under affirmative action plans. *Firefighters Local Union No. 1784 v. Stotts* rejected a plan that would have overridden seniority in deciding which employees should be laid off during a reduction in force.[26] And *Wygant v. Jackson Board of Education*[27] invalidated a contract provision requiring the maintenance of a specified percentage of minority employees in the event that dismissals were required.

These rulings rest on the notion that hiring and promotion decisions typically do not implicate strong reliance interests, whereas layoffs affect workers who are likely to have accumulated some degree of experience and an expectation of stability. *Stotts* and *Wygant* do not absolutely preclude considering race in layoffs, but they do mandate

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22 *See* James Traub, *Too Good to Be True* (New York: Doubleday, 1990).

23 443 U.S. 193 (1979).

24 480 U.S. 149 (1987).

25 480 U.S. 616 (1987).

26 467 U.S. 561 (1984).

27 476 U.S. 267 (1986).

that public employers demonstrate compelling reasons and narrow tailoring—the classic elements of strict scrutiny endorsed in *Adarand*—to justify using race as a factor. Nothing in *Adarand* suggests changes in the law in this area.

3. Legislative Districting—Creating legislative districts that are likely to elect African American candidates is promoted on the grounds that blacks, as a group, have different political interests than whites and that whites, as a group, are unlikely to vote for a black candidate. Indeed, the Supreme Court has upheld efforts to draw so-called majority-minority districts where racially polarized voting exists.[28] But the Court's recent rulings making it easier to assert racial-gerrymandering claims raise questions about the vitality of efforts to enhance the number of such districts.

Before jumping to unduly pessimistic conclusions, however, we should consider some of the concerns that have been raised about such districts and think about appropriate responses to those concerns. For example, single-mindedly creating majority-minority districts might increase the risk that the political interests of blacks will be ignored by other legislators who need not take account of those interests. Packing African-American voters into a few districts could enable candidates in adjacent districts who are apathetic about or hostile to black concerns to win seats that would otherwise go to more responsive candidates.

Whether and to what extent these concerns are well-founded is, to some extent, an empirical matter. But instead of dismissing the Supreme Court's deep skepticism about using race as a factor in drawing district boundaries, we might entertain truly novel approaches to voting that could benefit not only African Americans but political minorities of all races. Instead of relying upon single-member districts, we could ask if black political interests might be furthered by alternative voting mechanisms such as proportional representation or cumulative voting. Justice Thomas raised questions about our reliance upon single-member districts in his concurrence in *Holder v. Hall*,[29] and Lani Guinier has explored the utility of different voting systems.[30]

These ideas have been attacked as a form of racial special pleading, particularly in the shrill debate over Guinier's failed nomination as assistant attorney general. Overlooked in that rhetoric was the larger implications of these approaches. Not only blacks, but political minorities more generally might benefit from alternative voting systems. If the discussion had proceeded from the premise that departures from winner-take-all, single-member districts could benefit Republicans in Chicago and Democrats in much of downstate Illinois, for example, we might seriously consider whether the advantages of empowering those who can rarely if ever prevail under the current system outweigh the disadvantages that might arise from the short-term difficulties of implementing an alternative that is unfamiliar to the vast majority of Americans and the possibility that a different voting regime might encourage the creation of multiple parties that could reduce the stability provided by the traditional two-party system.

IV. Conclusion

To paraphrase Mark Twain, reports that affirmative action died in the Supreme Court's *Adarand* decision are greatly exaggerated. *Adarand*'s apparently more flexible approach to strict scrutiny suggests that race can still be explicitly considered in some circumstances. But even where race-based affirmative action cannot be justified, a more general approach could sometimes be desirable because both blacks and others will benefit thereby. Whether or not the Court demonstrates that flexibility in later cases, we need to approach the subject in a more sophisticated fashion than we sometimes have in the past. The ongoing controversy about affirmative action

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28 *See Thornburgh v. Gingles*, 478 U.S. 30 (1986).

29 114 S. Ct. 2581 (1994).

30 *See* Lani Guinier, *The Tyranny of the Majority* (New York: Free Press, 1994).

should not obscure the broader lessons of efforts to improve opportunities for African Americans in higher education, the political process, and elsewhere. Thinking about the problems that affirmative action programs typically address has led us to consider more carefully traditional notions of merit, representation, and opportunity. There is no reason to restrict what we have learned from this rethinking to the racial context. Some of what is being or might be done in race-based affirmative action programs could be applied more generally to benefit others who might be overlooked by traditional approaches.

Affirmative Action in the Twenty-first Century

By Ellen Frankel Paul

Future historians of affirmative action may regard 1994–96 as watershed years, a turning point with social and political implications far beyond anything that we can imagine today. It has been truly astounding how rapidly affirmative action has become a burning social issue, when a mere handful of years ago it was thought so sensitive that it was almost beyond the pale of civilized discussion. To doubt the benefits or philosophical principles of affirmative action was to court instant charges of racism, and few in public life, or even in the relative seclusion of the academy, found it prudent to raise words of doubt. A few cracks did appear in this wall of silence beginning in the early 1990s.[1]

In the universities, quick retribution ordinarily followed when anyone was imprudent enough to break ranks on affirmative action. A Georgetown law student, while working in the admissions office, triggered both the wrath of his school and a media feeding frenzy when he published purloined records of the significant disparity in test scores and undergraduate grades between white and minority admittees to the first-year law class. Universities had long held the details of their affirmative action admission policies and, even more importantly, the results as virtual trade secrets.

With the Georgetown revelations and the work of other enterprising researchers, disparities of a similar substantial order have been revealed at other selective colleges, graduate programs, and professional schools. Several public universities, such as the University of Texas and the California university system, have had their affirmative action methods and results released as a result of law suits brought by disappointed white applicants, or their parents. It became clear that "goals" for admitting minorities to selective universities could not be met except by employing extraordinary methods—such as considering minorities in a separate pool or on different criteria, and by admitting minorities with significantly lower test scores and grades than those of whites and Asians.

Revelations in 1990 that the Federal Government had been race-norming its standard employment test given to millions of Americans and used by businesses to make hiring decisions, drew much media criticism, and the Bush administration was forced to abandon the practice. Yet from the comparative comfort of the early years of this decade, it could not be predicted how rapidly the consensus of silence on affirmative action would come to an abrupt end, triggered by two crusading, little-known California professors and their proposal to put a referendum on the State ballot in 1996 that would end racial preferences in State agencies, including the universities. This California civil rights initiative is a perfect example of the adage that in politics timing is everything. In quick succession, several court cases severely wounded affirmative action; Governor Pete Wilson of California initiated, by executive order (of June 1, 1995), a ban on preferences in State operations not mandated by law[2] and successfully encouraged the regents of the University of California system in July 1995 to vote to end preferences in admissions and hiring; and Senator Dole (R., Kansas) and Representative Canady (R., FL) proposed the Equal Opportunity Act of 1995 which called for an end to all preferential programs in the Federal Government.[3] Recent polls have shown an erosion of support for affirmative

1 During the first term of the Reagan administration, criticism of affirmative action was raised, but the suggestion of revision met with such an outcry that the administration backed off from issuing an executive order to modify Federal programs. Federal district and appellate judges and Supreme Court justices were appointed, however, who were critical of affirmative action, and these appointees have had an effect upon court decisions in this area, as we shall see.

2 But the Governor failed so far in a suit to dislodge five affirmative action plans in his own agencies. See: "Court Denies Affirmative Action Suit," *San Francisco Examiner*, Oct. 25, 1995.

action. While results differ depending on how the question is phrased,[4] huge majorities oppose racial preferences: about 80 percent of whites and 46–56 percent of blacks. As a presidential candidate, Senator Dole has continued to support terminating racial preferences, and has endorsed the California initiative, and the Clinton administration has vowed to "mend not end" affirmative action.

This much altered and more open climate of discussion suggests that it is an opportune time to ask two questions: first, will affirmative action in the form of racial preferences survive into the 21st century; and second, should it survive? Before engaging these questions directly, it will be helpful to review a brief history of the development of affirmative action as racial and gender preferences.

From "[U]nlawful" Preferential Treatment to Lawful Preferential Treatment

How did we get from the color-blind ideal enshrined in the Civil Rights Act of 1964 to counting heads by race, goals, and timetables that are thin veils for quotas, and charges of reverse discrimination by angry white males? This is a fascinating tale illustrating how fateful *unintended consequences* can be in politics. As the French, mid-19th century political economist, Frederic Bastiat, warned in writing about economic regulation by the State, legislation has a visible element—what the legislators intend—and an invisible or unpredictable element—what will become of the legislation once enacted. Bastiat called it "what is seen and what is not seen,"[5] and it is a very useful aphorism for analyzing the effects of legislation in general, and the 1964 Civil Rights Act in particular.

There should have been two insuperable barriers to the adoption of affirmative action as racial/gender preferences, and "goals and timetables" as surrogate quotas. First, the Constitution's 14th amendment's equal protection clause, which states "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." What this clause means essentially is that individuals are to be treated equally before the law, that their rights of person and property are to be equally protected, and that they have access to the courts to redress wrongs on an equal basis.[6] This amendment arose out of a need to protect the freedmen after the Civil War, who were still routinely denied equal access to the courts of the former Confederacy. The second barrier should have been title VII of the Civil Rights Act of 1964, which declared employment discrimination on the basis of race, color, national origin, and sex to be unlawful. A friendly amendment proposed by the Republican minority leader, Senator Everett Dirksen, and accepted as compatible with their intentions by the bill's sponsors, presumably clarified what prohibiting employment discrimination *did not mean.* It is difficult to imagine more explicit legislative language, or more explicit legislative language that perversely led to its polar opposite. The amendment prohibited requiring employers to:

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3 A. 1085, 104th Cong. 1st Sess. (1995).

4 Support is higher when the question is phrased like this: "do you support reaching out to disadvantaged minorities" rather than like this: "do you support racial or gender preferences." In California, for example, support for the initiative is higher (58 percent) when "preferential treatment" is used to describe it, than when "affirmative action" is used (32 percent). See: "Wording Affects Polls on Affirmative Action," *San Francisco Examiner*, Sept. 14, 1995; "Affirmative Action After Adarand," *Labor Relations Reporter*, Bureau of National Affairs, Aug. 7, 1995, p. 41, citing *Los Angeles Times* poll of January 1995, and a Harris poll.

5 Frederic Bastiat, "What is Seen and What is Not Seen," in *Selected Essays in Political Economy* (Irvington-on-Hudson: The Foundation for Economic Education, 1964), pp. 1–50.

6 Although the 14th amendment is limited to State action, the equal protection clause has been extended to the Federal Government by the Supreme Court which read it into the due process clause of the fifth amendment: see *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Weinberger v. Wisenfeld*, 420 U.S. 636, 638 (1975); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

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 any race, color, [etc.] . . . in comparison with the total number or percentage of persons of such race, color, [etc.] . . . in any community or in the available work force in any community . . . [7]

During the next few years after the passage of the civil rights act, this prohibition would become a virtual script for what government agencies, large companies, labor unions, and universities *must do* in order to comply with the law.[8] Through zealous advocacy by enforcement agencies, executive orders, and court decisions, Senator Dirksen's amendment was turned on its head.[9]

From its early years, the Equal Employment Opportunity Commission (EEOC), created by the civil rights act, favored an affirmative attack on discrimination, which required counting by race to judge success or failure. Before the passage of the act the civil rights community had abhorred and had fought long and hard to abolish any racial identification in the hiring process. President Lyndon Johnson's Executive Order 11246 built another pillar of the affirmative action edifice, resulting in the Office of Federal Contract Compliance Programs' (OFCCP) affirmative action rules for monitoring the hiring practices of Federal contractors. During the Nixon administration, "goals and timetables" became the compliance tool of choice for OFCCP, after the "Philadelphia Plan" was implemented to integrate that city's construction unions. The Justice Department's Civil Rights Division is the third main pillar, given by title VI of the civil rights act the responsibility to monitor recipients of Federal funds, such as universities and hospitals, to ensure nondiscrimination in their federally supported programs.

With the now familiar EEO-1 reports—filed annually by all Federal contractors, Federal agencies, and all employers with over 25 employees—all but the smallest enterprises are subject to counting their workers by sex and race in each of their job categories. The EEOC may require of offending employers that they sign conciliation agreements that set goals for the hiring, promotion, and retention of minorities or women, or the agency can go to court to force recalcitrants to adopt affirmative action plans by court order or through consent decrees. OFCCP's annual utilization analyses monitor Federal contractors and mandate that underutilization of specific groups be remedied according to "goals and timetables," under threat of banishment from bidding on future Federal contracts. The Justice Department has brought suits against State and local governments, police and fire forces, State universities, and other recipients of Federal aid, with resulting court orders and consent decrees requiring affirmative action remedies.

With amazing rapidity Senator Dirksen's concerns about number crunching and quotas were taken as a script for how to measure underutilization—by comparing the employer's minorities and women to the surrounding labor force, or to the available qualified workers in the area. Dirksen's

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7 Civil Rights Act of 1964, Title VII, Sec. 703(j).

8 In employment cases as well as school desegregation cases, the Supreme Court, in less than 7 years after the passage of the 1964 act, would come to embrace results-oriented measures of discrimination. In the desegregation cases [beginning with *Green v. Country School Board*, 391 U.S. 430 (1968); and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970)], the Court would endorse busing to achieve desirable ratios of blacks and whites, thus requiring the labeling and counting of people by race. Employment discrimination cases under title VII of the Civil Rights Act took much the same course, with a judicially created category of "disparate impact" discrimination, altering title VII's focus on intentional discrimination, to allow remedies in cases where statistics indicated that tests or hiring practices prevented an appropriate number of minorities from being hired. From these mathematical disparities, discrimination could be inferred, the Court allowed. Here again, accounting for one's employees by race became of utmost importance in warding off or winning potential cases. See: *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

9 For two excellent histories of the development of affirmative action see: Herman Belz, *Equality Transformed: A Quarter-Century of Affirmative Action* (New Brunswick, N.J.: Transaction, 1991); Hugh Davis Graham, *The Civil Rights Era's Origins and Development of National Policy* (New York: Oxford University Press, 1990).

fears became predictions, and with the Supreme Court's querulous acquiescence, the law of the land.

The Supreme Court's treatment of affirmative action cases since its first tortured effort in the famous *Bakke*[10] case of 1978 is a sorry tale of ambivalence, vacillation, and timidity.[11] In that case there were six written opinions, with no one of them commanding a majority of the justices. Curiously, the most influential opinion, quoted frequently in lower Federal court decisions and in subsequent affirmative action cases that reached the high Court, is that of Justice Powell, whose opinion commanded only his own assent.

Allan Bakke had been a failed applicant to the University of California Medical School at Davis despite test scores and grades that set him significantly above admitted minority candidates. In analyzing Bakke's predicament, Justice Powell paid obeisance to our long tradition of individuality and fairness in the law by applying a strict scrutiny test, examining a State medical school's racial preferences for admission under the highest standard of judicial scrutiny.[12] Yet he could not bring himself to condemn a remedy that worked, whereas principled impartiality would have surely failed. Powell wrote that race could be taken into account in university admissions, but a university couldn't be too explicit about setting aside a set number of positions for minorities, as the university here had designated 16 out of 100 slots for minorities. Powell's colleague, Justice Blackmun, in a declaration destined for widespread repetition in future cases and commentaries, put it this way: "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."[13] With race counted as a 'plus factor,' universities could and did proceed to weigh minority candidates on a different scale than their white peers, even in some instances setting aside minority candidates in separate pools, to be examined by separate committees, and to be judged on relaxed standards. If Bakke did not provide universities with a carte blanche for racial preferences, it did allow them to classify and judge by race, but with the fig leaf of Bakke for cover.

With the addition of a case from private industry decided by the Supreme Court in 1979, the affirmative action architecture, as wobbly and as riddled with holes as it could be, was put in place: *United Steelworkers v. Weber*[14] upheld a training program negotiated between Kaiser Aluminum and its union, which designated half of all openings for blacks until the number of blacks in crafts

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

11 One leading commentator on the Supreme Court's affirmative action cases characterized them this way:

> The Supreme Court's affirmative action rulings have not brought order. On the contrary, they are a study in ambiguity and ambivalence. In none of the cases have the justices been unanimous; in all of them, they have spoken out in a multitude of concurring and dissenting voices. Indeed, in only a handful of the affirmative action cases has the Court been able to issue an opinion endorsed by a majority of the justices.

David L. Kirp and Nancy A. Weston, "The Political Jurisprudence of Affirmative Action," 5 *Social Philosophy & Policy* 225 (1987).

12 *Strict scrutiny* insists first that the government must show a compelling interest that requires the racial distinction, and second that the remedy it has chosen is narrowly tailored to achieve that compelling end. *Intermediate scrutiny* calls for a more lenient inspection that asks whether the government acted for an important reason, and whether its chosen vehicle is reasonable. Whenever strict scrutiny is applied, whether in 5th or 14th amendment contexts, the outcome is usually fatal to the challenged governmental practice. That is why the debate over levels of scrutiny is so intense: it usually settles the ball game before the first pitch is thrown. Debate has also flourished over what constitutes a compelling interest in these cases: is it just remedying the proven past discrimination of the institution and not societal discrimination in general (the conservative position, although paid obeisance by Powell in *Bakke*), or can increasing diversity in the university population, in the workplace, or among recipients of Federal contracts count as a compelling interest as well (the liberal position, which is also more hospitable to remedying systemwide or societal discrimination with affirmative action).

13 Bakke, 438 U.S. at 407 (1978, Blackmun concurrence in part).

14 443 U.S. 193 (1979).

positions in its plants mirrored their number in the surrounding population. A majority of the Court upheld this plan, calling it, in a peculiar use of the term, a "voluntary" program[15] designed to remedy past discrimination, as inferred from the low percentage of blacks in the plant and the general history of craft-union discrimination against blacks. The Court compared the less than 2 percent of minority skilled workers in the plant to a surrounding work force that was 39 percent black, and from this drew an inference of discrimination.

Unlike Bakke, who framed a constitutional challenge against a State actor, Weber's suit fell under the civil rights act's title VII because its target was a private organization. As a title VII case, it is difficult to conceive how the scheme of racial preferences that Weber objected to could possibly survive the Dirksen amendment. Nevertheless, the Court endorsed the plan,[16] and its decision proved influential, as the Court and lower courts would in the future echo elements of it: that an affirmative action program should remedy past discrimination (whether societal or corporate would remain unsettled), that it not completely foreclose jobs for whites, and that the remedy be temporary and subside when the present effects of past discrimination have been rectified.

In later years, the high Court would be most suspect of affirmative action programs that breached seniority in conducting layoffs (even if court mandated).[17] The Court would be deferential towards Congress in establishing percentage set-asides in Federal contracting for minority businesses or preferences for them.[18] It would permit gender to be used as a factor in promotion where women had been underrepresented in certain job categories,[19] uphold a court-ordered 50 percent of promotions for black police officers in the Alabama State police where no blacks had been hired prior to being sued,[20] and uphold a 29.23 percent minority hiring goal for a discriminatory labor union.[21] All in all, a record lacking in consistent principle or effective guidance to society about the scope and permissibility of race-conscious policies to rectify past discrimination or increase diversity in the workplace, government agency, or university.

New Legal Developments and Their Repercussions

Two recent cases have substantially altered the legal landscape and already had broad implications for politics and society. When combined with other societal developments—the California anti affirmative action initiative, the increased public awareness of how affirmative action actu-

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15 Here, "voluntary" means little more than not-court-imposed, or not the result of an EEOC proceeding. Under title VII (as interpreted by the EEOC and then the courts) and Executive Order 11246, all large employers were under pressure of lawsuits, agency action, or loss of contracts to adopt affirmative action plans, so "voluntary" is hardly used in its normal meaning of acting from one's own free will.

16 Justice Brennan, writing for the majority, simply finessed Sec. 703(5), the Dirksen Amendment, by contending that Congress could have added a ban on "permitting" and not just a ban on "requiring" racial preferences.

17 Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). Title VII's ban on interfering with a "bona fide seniority or merit system" was another one of Dirksen's additions, one that survived better than his prohibition on quotas. See: Civil Rights Act of 1964, Title VII, Sec. 703(h).

18 Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding a Federal 10 percent set-aside for minority businesses); Metro Broadcasting Inc. v. Federal Communications Commission, 487 U.S. 547 (1990)—overruled, in part, by Adarand Constructors v. Pena, 115 S.Ct 2097 (1995)—(upholding an FCC regulation granting preferential treatment to minority applicants for broadcast licenses).

19 Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987) (a reverse discrimination case, like Weber).

20 U.S. v. Paradise, 480 U.S. 149 (1987).

21 This rigid quota of 29.23 percent for minority hires was for a labor union that had had no black members prior to 1969, and had repeatedly stymied past judicial efforts at integration by flouting court orders: see: Local 28 of the Sheet Metal Workers Intl. Assoc. v. EEOC, 478 U.S. 421 (1986).

ally works at universities and businesses, the action of the California Board of Regents in outlawing racial preferences in the university system, etc.—a synergistic effect has magnified the cases' impact. Adarand Constructors, Inc. v. Pena[22] (June 1995) completed the work of a seminal 1989 case, *Richmond v. J.A. Croson*,[23] in which a conservative majority ruled that a strict scrutiny standard should be applied to a set-aside program for Richmond public contracts that designated 30 percent of the funds for minority businesses. Croson was an incomplete victory for strict scrutiny, since it had maintained a rather unconvincing distinction between Federal set-asides (which it had approved in 1980 on a relaxed standard deferential to Congress and did not yet overrule) and State and local set-asides (which the majority now held to the higher standard of strict scrutiny). Incomplete as it was, Croson nevertheless roiled cities, States, and counties throughout the country, which now had to either scuttle their programs or conduct disparity studies. Croson provided a windfall for consulting firms, which were hired to conduct studies to demonstrate that these governments had actually discriminated, and that their programs were narrowly tailored to remedy their own prior discrimination.

Adarand completed the promise (or threat, depending on one's perspective) held out by Croson by eliminating the dubious distinction between Federal and State set-aside programs, by subjecting Federal set-asides to the same strict scrutiny as it had earlier applied in Croson to States and local governments.[24]

Adarand Constructors had objected to being denied a subcontract for guardrails in favor of a higher-bidding "socially and economically disadvantaged" company in a typical Federal program in the Department of Transportation that gave monetary incentives to prime contractors to hire minority firms.[25] Adarand saw this government use of a race-based presumption of social and economic disadvantage as a violation of the fifth amendment's equal protection component of its due process clause.[26] Justice O'Connor, writing a majority opinion of the Court in its essential parts, concluded that from the Supreme Court's checkered history of racial-preference cases, a consensus could be synthesized on three propositions: that skepticism ought to be shown towards any preferences based on race and a desire to

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22 ___U.S.___ 115 S.Ct. 2097 (1995).

23 488 U.S. 469 (1989).

24 Adarand specifically overruled Metro Broadcasting v. F.C.C., 497 U.S. 547 (1990), decided in between Croson and Adarand, in which a single vote defection from the Croson majority had given the majority to the liberal position of intermediate scrutiny, under which racial classifications for broadcast licensing were upheld. A much altered Court roster decided Adarand, with only one of the Metro Broadcasting majority remaining on the Court, and with the conservative forces strengthened with the addition of Justice Thomas. Adarand also criticized Fullilove, 448 U.S. 448 (1980), which was the original case condoning Federal set-asides, thus harmonizing the equal protection test for all levels of government.

25 This policy covered all Federal Government contracting and set a goal of 5 percent of the value of prime contracts for socially and economically disadvantaged businesses. The Small Business Administration, through its "8(a) program" designates eligible businesses that must be (1) "socially disadvantaged"—and it is presumed that blacks, Hispanics, Asian Pacifics, subcontinent Asians, and native Americans qualify—others must prove social disadvantage; and (2) economically disadvantaged, as provided in SBA criteria setting limits on the owner's and business' wealth 15 U.S.C. § 637 (Supp. 1993). The Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. No. 95–599, 92 Stat. 2689) at issue here, set a floor of 10 percent of appropriations for contracts with disadvantaged businesses enterprises (DBE's) (including minority and female controlled businesses). The act includes the same groups as the SBA, and also the same rebuttable presumption that members of this group qualify (a presumption that could in theory be challenged by a third party). Prime contractors are awarded an extra 10 percent of the amount they subcontract to DBE's.

26 This gets rather tricky and technical, for the Federal Government, under the fifth amendment, is not explicitly subject to an equal protection requirement, as the States are under the 14th amendment. But the Supreme Court has read a 14th amendment type of equal protection into the fifth amendment's due process clause: see note 5. The Court has perceived various and subtle differences between these equal protection requirements, as discussed in Adarand, 115 S. Ct. at 2099.

subject them to heightened scrutiny (of what degree remained contentious); that the standard of review must be consistent, whatever the race of those burdened or benefited by a classification; and that fifth amendment and 14th amendment equal protection standards ought to be congruent.[27] From this valiant attempt to make sense out of the Court's messy and inconsistent affirmative action precedents, the majority concluded that "any person of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[28] The majority specifically overruled Metro Broadcasting and its more lenient intermediate scrutiny standard because that test undermined the principle that equal protection should be the same for the Federal as for State and local governments; it applied different standards of review to "benign" racial classifications, without recognizing that these categories are difficult to assess in the absence of searching judicial inquiry; and it disparaged the majority's reasoning in Croson. But more importantly than all of these reasons, what disturbed the Adarand majority the most was that Metro Broadcasting undermined the principle that the constitutional theory of equal protection safeguards "persons, not groups."[29]

The *Adarand* decision sent shock waves through the Federal Government and beyond. Its standard of strict scrutiny, requiring government organs to show a compelling interest in rectifying their own past discrimination and to fashion programs both narrowly tailored to achieve this limited end and of limited duration, provided a much more rigorous hurdle for set-asides and, by extension, all affirmative action programs to surmount. Bureaucrats and politicians scurried for cover and President Clinton in July 1995, the month after *Adarand* was handed down, ordered his administration to thoroughly examine set-aside programs to see whether they could meet the strict scrutiny test. The first results on the Federal level inclined toward wishful thinking: President Clinton's mend-not-end affirmative action stance is a case in point,[30] as is his administration's conclusion that perhaps only one set-aside program in the Pentagon would fail the Adarand test because it designates specific contracts for minority bidding only, while other programs that work by assigning extra points to minority bidders or price advantages could be preserved if the agencies had first tried other race-neutral means. It is unclear at this point how the administration classifies the Small Business Administration's section 8(a) program, which formed the backdrop for Adarand, since it too restricts bidding on designated contracts to disadvantaged businesses,[31] but section 8(a) is already under assault in the House.[32] Thus, at this time, it is difficult to say what exactly *Adarand* will mean for Federal minority contracting programs: whether business as usual will persist under the fig leaf of some accom-

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27 Ibid., at 4529.

28 Ibid., at 2100.

29 Ibid. at 2100.

30 In his July 19, 1995 speech on affirmative action, the President blamed any excesses on private businesses and pledged to crack down on them. The head of OFCCP took the same tack, averring that her program never intended to rely on quotas or mandate hiring by the numbers regardless of qualifications. Labor Secretary Reich commented that affirmative action requirements only make employers "cast a wider net." These statements are difficult, at the very least, to reconcile with OFCCP's numerical goals and timetables, and the EEOC's conciliation agreements setting hiring goals to the decimal point for minorities and women.

31 *New York Times*, Mar. 8, 1996, p. A1, A10.

32 Jan Meyers (R., Kansas), chair of the House Small Business Committee, will introduce legislation to end the program, after serious criticisms of its operations by the General Accounting Office and the SBA inspector general. These various criticisms have included claims that millionaires have qualified for its benefits, that 60 percent of its beneficiaries are from the Washington, D.C. area, that firms are not being graduated out of the program, etc. See: "Set-Asides: Rep. Meyers Aims to Kill SBA's 8(a) Program . . . ," *BNA Federal Contracts Daily*, Apr. 25, 1996.

modation to *Adarand*'s strict scrutiny test; or whether real change towards race neutrality will occur. Early indications, however, favor the former.

Adarand has already had repercussions beyond the Federal Government and beyond the issue of set-asides, and I would like to discuss a few of the more conspicuous ramifications, particularly those occurring in the State of Ohio. But before turning to Ohio, a case from the Fifth Circuit Court of Appeals deserves mention.[33] Several rejected nonminority applicants challenged the University of Texas Law School's admission policies that designated goals for admission of blacks and Mexican Americans (5 percent and 10 percent, respectively), and considered applicants from these groups under different and lower admissions standards and by a different selection committee.[34] The disappointed white applicants who brought suit had much higher grades and test scores than admitted minority applicants. After a partial victory for the challengers—a "pyrrhic" victory "at best," as the appeals court described it—the case reached the Fifth Circuit Court of Appeals.[35]

Relying heavily on the recently decided *Adarand*, the appeals court applied the strict scrutiny test and found the law school's scheme unsalvageable. It could find no compelling justification on 14th amendment equal protection grounds for "elevat[ing] some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body."[36] The appeals court found from a reading of *Croson, Adarand*, and the dissent (now vindicated) in the overruled Metro Broadcasting, that the diversity argument of the law school could not stand as a "compelling state interest," leaving only one compelling interest: remedying past racial discrimination caused by the organization itself.

The appeals court focused much attention on the "segregated" nature of the law school's admissions program, which color-coded minority applications, sent them to a separate committee where every applicant was carefully scrutinized, made the decision of this committee final, and maintained "segregated" waiting lists. This "segregated" mechanism apparently piqued the judges' moral sense by treating people as members of groups and not as individuals, and their reading of the equal protection clause, which likewise dictates individualism rather than group entitlements. The judges were particularly disconcerted by the diversity argument's presumption that "a certain individual possessed characteristics [or viewpoints] by virtue of being a member of a certain racial group."[37] Therefore, the court rejected "any consideration of race or ethnicity by

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33 Hopwood, et al. v. State of Texas, et al., 78 F. 3d 932 (5th Cir. 1996).

34 The disparity in admission standards between minority and non-preferred applicants to the UT law school are compatible with other affirmative action discrepancies that have been revealed in recent years at other elite universities, graduate, and professional schools. The school divided applicants into three groups: presumptive admits; a middle discretionary range in which applicants would be carefully scrutinized; and a presumptive deny category. Different ranges of test scores on the Law School Admission Test plus grades (the Texas Index) were used to place minority group members in these three categories than were used for nonminorities. Non-preferred applicants needed a score of 199 or better to place in the presumptive admit category, and those below 192 were placed in the presumptive-deny category. For blacks and Mexican Americans, a score of 189 placed the applicant in the presumptive admit group, and a score of 179 in the presumptive-deny. Thus, a preferred minority applicant would be almost certainly admitted at a score at which a white or non-preferred minority would be almost certainly rejected, as the court noted. Hopwood, ibid. at 937.

35 The district court granted the plaintiffs a one dollar award each, permitted the would-be law students to reapply, allowed the law school to continue to use race in admissions, and simply required the law school to compare all applicants at some point in the admissions process (striking down the separate admissions committee for applicants in the discretionary category). Curiously, the district court had used strict scrutiny, but in a way that the appeals court, after *Adarand*, found entirely too lax, e.g., the district court allowed the law school to remedy discrimination caused by the entire educational system of the State. See: Hopwood v. Texas, 861 F.Supp. 551 (W.D. Tex. 1994).

36 Hopwood, 785 F. 3d at 934.

37 Ibid., at 946.

the law school for the purpose of achieving a diverse student body,"[38] but it did allow consideration of talents or social and economic disadvantage on an individual basis.

For the one remaining prong of "compelling state interest," the appeals court engaged in rigorous examination, concluding that only the law school's own prior discrimination and its proven present effects could qualify as compelling. Again, the court found the law school's justification wanting. The school's claim that it was remedying system-wide discrimination in Texas public education did not survive analysis, since many favored minority students attended out-of-state or private schools. Rather, the law school's program smacked of "racial social engineering rather than a desire to implement a remedy."[39] Under strict scrutiny, the judges argued, the law school could only remedy its own prior discrimination that had present effects, and they found evidence of present effects deficient, since the law school had been actively pursuing minority students under various affirmative action plans since the late 1960s. Having found no "compelling state interest" the court said that it did not need to proceed to an examination of whether the law school's remedy—its affirmative action program—was "narrowly tailored," as strict scrutiny required.

If Hopwood[40] proves prophetic about the scope of review that is required under the Supreme Court's toughened *Adarand* strict-scrutiny test, it will be very difficult for many if not most university affirmative action plans in their current guises to withstand judicial scrutiny. The fate of such programs at universities unlucky enough to be sued by failed white applicants will depend to some measure on the ideological composition of the presiding judges. But with precedents like Hopwood and Podberesky v. Kirwan[41] (a Fourth Circuit case that overturned race-based scholarships at the University of Maryland, and did so a year before *Adarand*), universities, government agencies (and employers too) can count on expensive litigation and searching judicial examination of challenged affirmative action plans. Even liberal judges, otherwise inclined to uphold affirmative action programs, will have to engage in scrupulous analysis of the elements of the strict scrutiny test. Hard evidence, rather than the old reliance on inferences of discrimination drawn by friendly judges, will have to be provided by defendants. Judges of a more conservative bent, as in Hopwood, will have a field day parsing and refuting every argument of the defense and every shred of evidence, as strict scrutiny mandates. Universities and other institutions seem to be placed in a catch-22 position, between law suits and courts (in which their affirmative action programs are likely to fail), and government mandates from the Education and Justice Departments, OFCCP, or the EEOC requiring racial preferences to achieve diversity goals.

In this new, highly charged environment, it would not be surprising if some universities choose to settle rather than contest law suits that they will probably lose by *Adarand*'s strict scrutiny standard. As we turn now to developments in the State of Ohio, one such post-*Adarand* settlement has already garnered some notoriety. At the end of March, 1996, Ohio State University agreed to settle a suit brought by Henry Painting Co.[42] (a non-minority-owned business) against the university's set-aside program that established a 100 percent set-aside of painting contracts for minority businesses. By virtue of this, Henry Painting was excluded from bidding for painting

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38 Ibid., at 943.

39 Ibid., at 951.

40 The State of Texas will appeal the Hopwood decision to the Supreme Court; the Fifth Circuit has stayed its decision until the appeals process is completed. *Wall Street Journal*, Apr. 24, 1996, p. B1. *Ed. note.* Since this article was written, Texas appealed the decision and the U.S. Supreme Court denied cert. See Texas v. Hopwood, U.S. 16 S.Ct. 2581 (1996).

41 38 F. 3d 147 (4th Cir. 1994).

42 Henry Painting Co. v. The Ohio State University, Case No. C2-94-0196 (USDC, Southern District of Ohio, Eastern Division, 1996).

contracts as it had done successfully prior to its banishment in 1986. In a persuasive brief, the Center for Individual Rights, a Washington, D.C. public interest legal foundation (and the same group that had brought the Hopwood litigation against the University of Texas law school), argued that the 100 percent set-aside discriminated against its client in violation of the 14th amendment's equal protection clause.[43] Relying heavily for their arguments on *Adarand*, Henry Painting's counsel argued that the 1980 Ohio law, the Ohio Minority Business Enterprise Act—which mandated 15 percent minority set-asides for all goods and services purchased by State agencies and 5 percent for all construction contracts let by the State—is "nothing more than blatant social engineering . . . "[44] Ohio State University's plan achieved "goals" higher than those mandated by the State, yet for the purchase of certain goods and services for which minority businesses were more available, it established 100 percent set-asides to make its achievement, and over-achievement of these goals possible. The plaintiffs pointed out the paucity of evidence of discrimination available to the legislature when it adopted the 1980 Act, and the absence of justification of discrimination and its present effects by the university itself.

The university settled, agreeing to pay Henry Painters $368,000 in damages, and to cancel its minority set-aside program for painting contracts. The settlement is not a complete victory for the opponents of affirmative action by any means—since *all other* components of the university's set-aside program, and, indeed, the rest of the State's set-aside programs remain untouched by the settlement. But this scarcely seems a tenable solution. Presumably, some of these other set-aside provisions will be nibbled away piecemeal by other contractors and their public-interest lawyers, with high costs to the State.

Coincidentally, or not, at the same time that the settlement was reached by the university with Henry Painting (late March 1996), Governor Voinovich announced his "new" approach to the State's set-aside programs. The Governor's recommendations to the legislature and his executive orders follow the findings of a committee that he appointed in August 1995—in the wake of *Adarand*—to study the effectiveness and legality of set-asides in Ohio.[45] The committee found that 8 percent of Ohio's 22,000 minority firms had qualified to participate in the set-aside programs, with only half of them receiving any money at all, and with a mere 5 percent of the certified companies receiving 80 percent of the funds.[46] The *Cleveland Plain Dealer* also studied Ohio's set-aside programs and found similar though not identical results: that 75 percent of the $225 million that the State spent on minority contracts went to just 5 percent of the eligible minority enterprises.[47]

While the proposal that the Governor endorsed may be little more than smoke and mirrors, cobbled together to preserve set-asides in some form that will satisfy the strict scrutiny standard, it has, nevertheless triggered the predictable responses: from minority contractors, advocacy groups, and minority legislators, who think the governor has in effect gutted set-asides; and from some Republican legislators who would like this Republican Governor to go further, even to abolishing set-asides completely.[48]

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43 Plaintiff's Brief in support of Motion for Summary Judgment, *Henry Painting Co.*, February 20, 1996.

44 Plaintiff's Brief, at 3.

45 See: "Report to the Governor: State-Sponsored Equal Opportunity Programs in Ohio," available from the Governor's press office.

46 Ibid., at 3.

47 The *Cleveland Plain Dealer*, Mar. 24, 1996.

48 "Johnson wants to add money to set-aside pie," *The Plain Dealer*, Mar. 27, 1996 (urging more money for set-asides since the Governor's plan would include women and social and economically disadvantaged groups and not just the traditional minorities); "Senator wants to dump minorities' set-asides," *The Plain Dealer*, Apr. 2, 1996 (for the contrary views).

The Governor's executive order, entitled "Socially and Economically Disadvantaged Business Policy,"[49] makes for rather perplexing reading, for what he cobbled together seems to have little likelihood of satisfying an *Adarand/Hopwood* type of strict scrutiny. Economically and socially disadvantaged businesses, rather than just the old minority businesses, now will be the beneficiaries of State set-asides, but the standard for establishing disadvantaged business status (DBE) is by the Governor's intent roughly the same as the Federal Small Business Administration's section 8(a) program, precisely the program that established the racial preferences that the Supreme Court considered probably suspect in *Adarand*,[50] and the same section 8(a) program that the Clinton Administration finds in legal limbo. Governor Voinovich's "Statement," urging the legislature to adopt his plan of substituting social and economic disadvantage for race, sets an immediate goal of an additional 5 percent set-aside for DBEs, presumably because of the expansion of the eligible to include the disabled, women, and the socially disadvantaged.[51] Like the section 8(a) program, Voinovich's policy preserves the rebuttable presumption that all minority businesses are socially disadvantaged, expands the Ohio program to extend the section 8(a) type standards to women, the disabled, and those with "long-term residence in an environment isolated from the mainstream of American society," or with businesses located in an area of high unemployment. And it sets section 8(a) type standards for economic eligibility (a cap on the net worth of the owner) and on the duration of eligibility for the program.

The executive order and the Governor's proposal to the legislature to enact it into law are a hurried effort to salvage a political spoils system that is under assault by the Supreme Court. But will sweetening the pot with more State funds and enlarging the eligibility pool so that more people have a stake in its perpetuation salvage set-asides in Ohio? It seems doubtful. As political theater, though, it serves its purpose by fashioning a middle ground until the dust settles on *Adarand*. But all it does is barely muddle through, while awaiting the next lawsuit.

Affirmative Action: Will It Survive? Should It Survive?

As we have seen, muddling through is what affirmative action has done in the courts since its inception. It is no wonder that for years the Supreme Court has been fractured into shifting alliances, as even supporters and occasional supporters of racial preferences are troubled by classifications by race that go so much against the grain of America's tradition of striving for equality, and that striving's enshrinement in the 14th amendment's equal protection clause. That explains why even supporters on the Court have reiterated time and again that these measures must be temporary in order to pass constitutional muster.

Courts do not function in a political vacuum. They are influenced by fears of racial unrest born

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49 Executive Order 96-53V, Mar. 28, 1996. Issued in conjunction with Executive Order 96-54V, "Policy on Equal Opportunity in State Employment," which called for cabinet-level agencies to "continue and renew their efforts to recruit and hire qualified minorities and women in all job categories," and to keep better records and amend hiring goals for women and minorities in light of recent and specific availability date.

50 I say "probably suspect" because the Court in *Adarand* did not reach a final judgment on the Transportation Department's set-aside program, but rather set the strict scrutiny standard and remanded the case back to the lower court to determine whether the program could survive under the newly invigorated standard. Justice Scalia, in a concurrence, thought that it would surely not survive (and shouldn't, according to him), and a fair reading of the majority opinion would lead one to strongly suspect that it will not.

51 The Governor's statement accompanying his executive order tries but fails to clarify how much of his program can be achieved by executive order and what only the legislature can accomplish, since his executive order diverges from State law. He says that he "orders all cabinet level agencies to immediately begin implementing" his new social and economic disadvantage program, but that agencies must "of course follow existing state law until it is changed by the Ohio General Assembly or through court ruling." But until that time, he orders all cabinet-level agencies to pursue his goal of a 5 percent increase for a program directed at socially and economically disadvantaged businesses.

in the riots of the late 1960s, the desire of most Americans to remedy past injustices against blacks, and the growing resentment of white males against preferences that seem to advantage everyone but themselves. All of these disparate factors have and will continue to play a role in future court decisions. In the legislative arena, politics plays even a larger and more overt role. As evidenced by student and faculty protests and hunger strikes by students[52] in California on the heels of the Regents' approval of a measure that would end by 1997 selection by race in the university system, affirmative action will not go gently into the night. Following the California anti-affirmative action initiative, bills of a similar nature have been introduced in about half of the States, while competing bills to strengthen preferences also have been proposed.

On a theoretical level—the "Should it survive?"—arguments for and against affirmative action have been rehearsed so many times that it is difficult to imagine that anything new could be said on the matter on one side or the other. We are all familiar with the proponents' contentions. Society must redress the injuries caused to black people by our history of slavery, segregation, and their lingering effects—the historical, what philosophers call, backward-looking argument. It is upon this history of injustice—real, horrible, undeniable, and violative of the moral principles upon which this country was founded—that racial preferences garner their strongest support. The more recent emphasis upon so-called forward-looking arguments—for diversity on the campus and in the workplace, inclusion, multiculturalism, role models for minorities, etc.—all derive their appeal from the arguments of historical iniquity.

We are all just as familiar with the rebuttals of affirmative action's opponents. They reply that the historical argument weakens with the passage of generations because it becomes impossible to identify actual victims, and instead compensatory programs must aim at group rather than individual rectification. Compensatory racial preferences just create new victims and more social animosity by placing the costs on innocent people who were born mostly after the end of de jure segregation. Group rights arguments are weak, they claim, because an injury to one person long dead cannot be truly recompensed even by compensating his far-removed descendants, let alone by giving favors to other people who share his skin color or ethnicity. Preferences only stigmatize those they are designed to help. Individual merit rather than group entitlement is the mantra of the opponents, and they see only Balkanization from policies that divide Americans by qualities that they, and the civil rights movement in its earlier years, considered irrelevant. It is a great historical irony that it is now a conservative Justice Scalia, in his *Adarand* concurrence, who reflects the sentiments of Martin Luther King, the champion of a color-blind ideal in which the content of one's character would matter, not the color of one's skin. As Justice Scalia framed the same thought:

> To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.[53]

With affirmative action under assault from many fronts, some of its theoretical defenders have hit upon a strategy for salvaging as much of it as possible: substituting class for race in preference programs. Social and economic disadvantage—favoring those from impoverished backgrounds or members of groups which have been socially stigmatized—is the fallback position for some supporters who recognize that retrenchment or repackaging will likely be necessary in the current political atmosphere. Even the

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52 "Protests Today on All 9 UC Campuses: Anger over end of affirmative action," *San Francisco Examiner*, Oct. 12, 1995, p. A19; "Affirmative Action Hunger Strike Goes to the Capitol: Students' protest enters third week," *San Francisco Examiner*, Nov. 1, 1995, p. A17; "Faculty Oppose Gutting Affirmative Action at UC," *San Francisco Examiner*, Oct. 21, 1995, p. A13.

53 Adarand, 15 S.Ct at 2119 (Scalia, J. concurring).

California regents allowed for the possibility of giving consideration in university admissions to those suffering from social and economic disadvantage, as did Governor Voinovich's executive order on set-asides. It is probably too early to say exactly how this will develop, but I predict one likely outcome: that social and economic disadvantage will be a stalking horse for racial preferences, that is, that presumption of social and economic disadvantage will flow from membership in a minority group, just like it does in the Federal Government's section 8(a) program and in Voinovich's set-aside order.

Whether this strategy will satisfy the courts or keep affirmative action's legislative opponents at bay for long is unlikely. As a matter of principle, it does not seem desirable to cast America as a class-ridden society after a quarter of a century of racial preferences has already instilled the notion that we are an irredeemably racist society. The prospect of college applicants pleading their social and economic disadvantage—I am more impoverished and woebegone than the next applicant—rather than their accomplishments, does not seem a healthy trend, either.

It is premature to deliver an answer to the question of whether affirmative action will survive, but it is already severely wounded. Undoubtedly, if it is to be preserved it will have to be much more scrupulously tied to rectifying past discrimination in a particular institution and its lingering effects—in order to satisfy the courts on a strict scrutiny test. It remains to be seen whether affirmative action can be successfully repackaged as class conflict: I doubt that it can.

Should affirmative action survive? This is a question the answer to which depends upon one's philosophical orientation and, also, upon a pragmatic assessment of what is politically palatable. On philosophical grounds, I think that whatever good affirmative action has done in the nearly quarter century of its operation—in accelerating the development of a black middle class of professionals and business managers—its liabilities have finally caught up with it. American tradition, although we as a nation have not always lived up to it, is one that values freedom, individuality, personal responsibility, equality before the law, and fairness—and affirmative action has always had difficulty reconciling itself with these fundamental values. The Supreme Court has always said that these programs must be temporary, and it seems now that the time has come to begin phasing out programs of racial and especially gender preferences as we approach the 21st century.

As the World War II generation passes from the scene, and as the baby boomers come to take their place, most of the population will have little direct experience of segregation and its effects, and will increasingly find affirmative action the offending instrument in present social injustices rather than the remedy for past injustices. This generational shift may explain why racial incidents have suddenly cropped up at campuses around the country in the last few years.

A gentle, gradual phaseout by a date certain would be a desirable and, perhaps, politically feasible course. I expect that corporations and universities, even if they lost their preference schemes, would continue to "cast a wider net," offer remedial programs to bring talented minorities up to competitive levels.[54] I doubt that America would become more segregated. There is still a tremendous reservoir of good will, but it is now being undermined by affirmative action in its present form as racial preference.

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54 As indicated by the University of California at Berkeley's announcement of new outreach programs to encourage and train minority students while still in public school so that they will become more competitive for university slots. The Berkeley pledge includes a promise to raise $60 million for scholarships, and has an outreach program to include summer sessions, mentoring by professors, and active recruitment. See: "Tien's Alternative to Affirmative Action," *San Francisco Examiner*, Jan. 2, 1996, p. A14.

Affirmative Action and the Conflict of Opposing Conceptions of America's Future

By Charlie Jones

I strongly support the affirmative action program in both concept and practice. I believe that the fate of this program will portend the future of America. The affirmative action issue represents a fundamental split in America. It is not the cause of the split; it is simply a manifestation of that split. Without this split in America, affirmative action would be a nonissue. The affirmative action issue represents a split between those who would move America forward to her future and those who would return her to some imprecisely perceived or falsely remembered past. Quite obviously, the two groups are attempting to pull America in opposite directions. Affirmative action proponents represent those people who believe that America's best interest lies in facing a future that is decidedly different from her present and past but no less promising and rewarding. Affirmative action opponents represent those who believe that America should address the political, social, and economic changes occurring around her by resorting to her past. It is no wonder, then, that the issue is so controversial. The issue of affirmative action epitomizes two diametrically opposed conceptions of what America's future should be.

Is there any evidence that supports the position that the affirmative action issue represents and epitomizes the conflict of opposing conceptions of what America's future should be? There certainly is. That evidence can be found in the history of affirmative action. Although the genesis of affirmative action dates to President John F. Kennedy's Executive Order 10925 of 1961, the clash of opposing conceptions of America's future is not apparent, at least in the literature on the issue, until 10 years later when Marco Defunis, a white male, charged the University of Washington law school with reverse discrimination for failing to admit him.[1] The term affirmative action first appears in Kennedy's Executive Order 10925 of 1961. The order required Federal agencies to review their employment practices and recommend additional affirmative steps for eliminating discrimination.[2]

Although Kennedy's effort at affirmative action suggests his hope for an American future of nondiscrimination, it would have been an innocuous attempt to address the problem of racial discrimination save for its introduction of bureaucrats into the effort. Although Kennedy's executive order was limited by its reliance on the good will of bureaucrats and Federal contractors, it did open the door for bureaucrats to participate in addressing discrimination or in the shaping of America's future. It is not surprising that Kennedy took no bolder (albeit significant) action than he did to deal with racial discrimination. In an America of the early 1960s where Americans were accustomed to their racism, a more forceful position would certainly have been the kiss of death for his political career. Kennedy's important and significant, but limited, attempt to address racial discrimination only suggests the conflict between those who envisioned a future without (or less intrusive) racial discrimination and those who wish to protect the dominance of white males in America.

President Lyndon B. Johnson's attempt at affirmative action was much bolder than Kennedy's. It was bolder on a couple of grounds. Johnson's Executive Order 11246, as amended in 1968, focused protection against discrimination on the basis of race, color, national origin, and added prohibition against sexual and religious discrimination. Additionally, Johnson's executive

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1 DeFunis v. Odegaard, 5007 P. 2d 1169 (WA 1973).

2 Jonathan Tompkins, *Human Resource Management in Government*, (New York: Harper Collins College Publishers, 1995) p. 163.

order provided an enforcement mechanism as a means of ensuring compliance with the order. This order did not rely on the good will of bureaucrats and Federal contractors. The order requires contractors and subcontractors to establish affirmative action plans to ensure equal employment opportunity.[3] Enforcement authority for Executive Order 11246 was given to the Department of Labor and its Office of Federal Contract Compliance Programs. The Office of Federal Contract Compliance Programs can investigate complaints of discrimination by job applicants and employees and can take steps to negotiate a conciliation agreement where such complaints have merit. The Secretary of Labor can impose sanctions in cases of noncompliance and declare contractors ineligible for future contracts. The Secretary of Labor may also refer complaints to the U.S. Attorney General for prosecution in the courts.

Clearly, Johnson's Executive Order 11246 represents a relatively bold attempt to address discrimination in the American society and it reflected a vision of a future America that had solved its problem of discrimination. This vision of America's future was not shared by all. Apparently, there were those who found his vision of the future of America appalling. Johnson's position on affirmative action and civil rights certainly contributed to him being only a one-term president. Nevertheless, the information here only suggests a conflict between those who envisioned a future without discrimination and those who wish to protect the dominance of white males in America.

Affirmative action took a radically aggressive turn under the Nixon administration. In 1971, Revised Order No. 4 was issued by the Secretary of Labor to implement Executive Order 11246. Revised Order No. 4 authorized the use of numerical goals and timetables to help correct gender and racial imbalances in the labor force.[4] The means of achieving affirmative action goals had shifted from a focus on the use of recruitment and training programs as advocated by both Kennedy and Johnson to more controversial means. Those more controversial means include adverse impact analysis, workplace analysis and hiring goals, and quotas.

Affirmative action's radical change under the Nixon administration owes less to Nixon's vision of a future America than to affirmative action taking on a bureaucratic life of its own. A number of Federal programs served as fodder for bureaucratic action in the area of affirmative action. The Equal Pay Act of 1963, title VII of the 1964 Civil Rights Act, and the Age Discrimination in Employment Act of 1967 are only a few such Federal programs that were designed to address discrimination and encourage affirmative action. With these programs and many other on the books and court actions (like *Griggs v. Duke Power Company*) that encouraged affirmative action, it is not surprising that affirmative action took on a bureaucratic life of its own. Thus, it is likely that the radical turn that affirmative action took during the Nixon administration had less to do with a vision of America's future than with the dynamics of bureaucratic operation.

The clash of visions is apparent in the *DeFunis* case. *DeFunis* is the earliest reverse discrimination case. Marco DeFunis, a white male, applied to the University of Washington Law School in 1971. His application was rejected by the law school and he filed a suit contending that the School's admission procedure had admitted minority applicants with test scores and grades lower than his.[5] DeFunis was convinced that he and/or some other white applicants in very similar circumstances would surely have been admitted had his skin been of a different color.[6]

In ruling against *DeFunis*, the Washington State Supreme Court makes the argument for those who would move America forward to a future without (or less intrusive) discrimination.

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3 Ibid., p. 167.

4 Ibid.

5 Nicholas Henry, *Public Administration and Public Affairs*, 6th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1995).

6 Carl Cohen, *Naked Racial Preference: The Case Against Affirmative Action* (Lanham, Md: Madison Books, 1995).

The Washington court concluded "that the preferential admissions policy of the University of Washington law school, aimed at insuring a reasonable representation of minority persons in the student body, was not invidious. The Constitution, said the court, "is color conscious to prevent the perpetuation of discrimination and to undo the effects of past segregation."[7] Clearly, this position does not suggest that white males are less valued in society; rather, it makes the argument that others are valued too. The goal is a society where all racial groups, sexes, ethnic and religious groups are valued. This is a vision of the future of America.

Cohen in critiquing the Washington State Supreme Court's decision in the *DeFunis* case makes an illustrative argument for the position that would return America to her past. The court ruled against DeFunis and for preferential admission procedures. Cohen clearly believes that preferential admission procedures should not be used as an affirmative action method to address current and past discrimination. He argues that:

> Preferential admission procedures certainly do result in the discriminatory appointment of benefits on the basis of race or ethnicity. When any resource is in short supply, and some by virtue of their race are given more of it, others by virtue of their race get less. If that resource be seats in a law school, procedures that assure preference to certain racial groups in allotting those seats necessarily produce a correlative denial of access to those not in the preferred categories. This plain consequence must not be overlooked. Whether the numbers be fixed or flexible; whether "quotas" be established and called "benign," whether they be measured by percentage or absolute quantities; whether the objective be "reasonable proportionality" or "appropriate representation"—the setting of benefit floors for some groups in this context inescapably entails benefit ceilings for other groups.[8]

Ironically, Cohen seems to believe that affirmative action represents "positive steps aimed at uprooting a long-ensconced pattern of racial injustice."[9] His concern is over the means used to achieve this objective.

Cohen's position against preferential admission and perhaps affirmative action in concept is based on the assumption of a zero-sum game (i.e., whatever one player wins, the other loses). To him, there are clear winners and losers in the case of affirmative action. That is, if minorities gain admission to law school through an affirmative action program, minorities win and white males lose.

Clearly, Cohen's argument against affirmative action and the assumption on which it rests set in place conditions that would make affirmative action and the goals that it attempts to achieve impossible. Under the zero-sum conception where there are clear winners and losers, affirmative action by any means would make white males the losers. The only way to avoid white males being the losers is to eliminate affirmative action, not only selected methods of the program but also affirmative action in concept. This, of course, would mean restoring the past condition of unquestioned white male dominance in America. This vision of America's future is what is sought by opponents of affirmative action.

A number of well-known cases since *DeFunis v. Odegaard* in 1974 further illustrates the conflict of opposing conceptions of America's future. For example, in *Regents of the University of California v. Bakke*, 1978; *Firefighters Local Union #1784 v. Stotts*, 1984; and *City of Richmond v. J.A. Croson Co.*, 1989, the U.S. Supreme Court ruled against quotas. In these cases the Court argued that affirmative action in principle is fine but the use of quota as means to achieve affirmative action goals is illegal. The Court in these and similar cases takes a position like that presented by Cohen. Quotas are viewed as unfair to white males no matter the goal of the quota system or the affirmative action program.

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7 507 P.2d at 1181.

8 Ibid.

9 Ibid., at 14.

On the other hand in *United Steelworkers of America v. Weber*, 1979; *Wygant v. Jackson Board of Education*, 1986; and *Johnson v. Transportation Agency, Santa Clara County*, 1987, the U.S. Supreme Court ruled in favor of quotas. Generally, the Court ruled in these cases that the quota method is acceptable as a means of redressing past discrimination.[10] In these cases the Court's ruling is similar to that rendered by the Washington State Supreme Court in the *DeFunis* case. The Washington Court's decision represents a nonzero-sum game where all win in the future.

What is the source of this split in America? At the heart of the conflict are our disparate belief systems. We have a conflict between two orientations that are an important part of American history and experience. On the one hand, Americans are individualistic. On the other hand, Americans have a strong communitarian tendency. For years, especially between the 1930s and 1970s, American society was dominated by its communitarian side. Prior to the 1930s American individualism predominated. Since the 1980s America has renewed her lust for individualism. The nature of American individualism, as Ball and Dagger indicate, is a focus on one's own self-interest above all and a belief that humans are inherently competitive.[11] In the political arena, individualism:

> emphasizes politics as a means of advancing the social and economic interests of groups and individuals. Political activity is undertaken for personal benefit or group advancement. Politics is based primarily on group obligations rooted in personal relationships; general political issues or public service motives are secondary. Professional politicians who look after the material interest of their own constituents are preferred to moralizing amateurs. Government intervention in private life should be minimal, although large public bureaucracies may result from efforts to give jobs (patronage) to large numbers of people.[12]

This is the conception of politics and American life that predominated America from its inception to the 1930s. Its dominance was replaced between the 1930s and 1970s. Individualism started to reassert itself, however, in the 1980s. Reaganomics and the subsequent feeding frenzy (corporate mergers, takeovers, and downsizing) on wall street characterize this renewal or reassertion of individualism as a driving force in Americans' lives. This orientation is captured in the movie *Wall Street* when a leading character utters: "Greed is good."

It is not surprising, then, that those who operate under this belief system view affirmative action as a zero-sum game. From this perspective, if minorities and women gain in society, white males (or whites in general) lose. Thus, those who subscribe to this orientation cannot be comfortable with programs like affirmative action. Affirmative action and similar programs are distasteful and appalling. A better future for America for those who operate under this orientation is one in the past—a past where affirmative action does not exist to help minorities and females gain equality.

Those who subscribe to communitarianism, however, have no such problem with affirmative action. Communitarianism embraces affirmative action and such programs as beneficial to the common good. Communitarians tend to stress individuals' responsibility to promote the good of the community.[13] Elazar characterizes this orientation in the political arena as moralistic.

> A moralistic political subculture emphasizes a common public interest—honesty in government, selflessness, and a commitment to the public welfare by those who govern. Every citizen has a duty to participate in polit-

10 Nicholas Henry, *Public Administration and Public Affairs*, 6th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1995).

11 Terence Ball and Richard Dagger, *Political Ideologies and the Democratic Ideal*, (New York: Harper Collins College Publishers, 1995).

12 Daniel Elazar, "American Federalism: A View from the States," as presented in Thomas Dye's *Politics in States and Communities*, (Englewood Cliffs, N.J.: Prentice-Hall, 1991).

13 Amitai Etizioni, *Rights and the Common Good: The Communitarian Perspective*, (New York: St. Martin's Press, 1995).

ical affairs, and office holding is looked upon as public service demanding high moral obligations. Politics should be concerned with general issues and programs, not narrow special interests or selfish office-seeking. Nonpartisanship is preferred over party politics, and citizen (amateur) officeholders are preferred over professional politicians. The moralistic political subculture allows a great deal of government intervention into the social and economic life of the state or community in order to promote the "common good."[14]

This orientation predominated in American politics, and perhaps to a large extent in Americans' lives, from the 1930s to the 1970s. The dominance of this orientation coincides with great changes and advancements in civil and individual rights and the rise of the American middle class. Generally, tremendous civil rights reforms took place during this period. Civil rights laws dealt with the issues of race, sex, age, and disabilities. Individual rights enhancements are characterized by cases like *Mapp v. Ohio*,[15] *Gideon v. Wainwright*,[16] *Escobedo v. Illinois*,[17] and *Miranda v. Arizona*[18] which dealt with the individual's protection against unreasonable searches and seizures, the guaranteed individual right to counsel, and prohibition against police action and procedures that infringe on certain individual rights.

Finally, tremendous growth in the American middle class occurred during this period. No other period in American history witnessed such a growth. This growth was fueled in part, if not entirely, by this communitarian orientation. Social Security, for example, represents this orientation and contributed to growth of the middle class. Other examples include the GI Bill benefits, Federal home loan programs, and medicare.

There is no inconsistency between this orientation and affirmative action in concept or practice. This communitarian orientation supports affirmative action. The most important benefit of the communitarian orientation, however, is that it conditions an American future in which minorities, women, and the disabled play an increasingly important role. It is also a future where white males play an important role. It will not be a world that is defined by the zero-sum perspective.

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14 Daniel Elazar, "American Federalism: A View from the States," as presented in Thomas Dye's *Politics in States and Communities*, (Englewood Cliffs, N.J.: Prentice-Hall, 1991).

15 367 U.S. 643 (1961).

16 372 U.S. 335 (1963).

17 378 U.S. 478 (1964).

18 384 U.S. 436 (1966).

The Origins of Affirmative Action in Employment

By Ken Masugi

I. A Preface from 1996: Affirmative Action and Two Anniversaries of American Dissenters

As the Nation thaws out from an extended winter we joyfully note the commencement of baseball season. With arms unwinding and bats cracking once again, with traditional rivalries renewed, America can revive itself through the rituals, observation, and practice of the all-American sport. And this makes it all the more astonishing, and virtually unbelievable to those under 40, that this season marks the 50th anniversary of the racial integration of organized baseball with Jackie Robinson. Robinson's heroic achievement continues to provide lessons for us today, especially in light of a less happy anniversary.

On May 18, we note the 100th anniversary of *Plessy v. Ferguson*,[1] the infamous Supreme Court opinion enfeebling the reconstruction amendments designed to give the freed slaves the rights and duties of American citizenship. The *Plessy* case marked the formal beginning of an era of legalized discrimination on the basis of race, in which we are still mired.

One hundred years ago, the Supreme Court held that it was perfectly reasonable for a state to impose racial segregation on persons within its jurisdiction. By making the astounding assertion that black Americans should not take offense at State segregation laws, the Court weakened the 14th amendment's requirement of "equal protection of the laws." Racial segregation was perfectly reasonable, and no one, black or white, should think there is a principled constitutional or moral objection to it.

Fifty years ago, Robinson's breakthrough marked the end of a farce of a facade. One hundred years ago, the Supreme Court razed all but the most modest constitutional barriers to racist behavior on the part of State and local governments.

Fifty years ago, an individual effort of excellence, encouraged by private business, shamed Americans into demolition of irrational discriminatory practices. One hundred years ago, the American conscience was unburdened of any constitutional need to fight the degradation of segregation, and its separate but unequal treatment of black Americans.

It would be nice to report a happy ending: racial segregation dead and Jackie Robinson triumphant, but that would be too naive a gloss. In 1954, just a few years after Jackie Robinson earned rookie-of-the-year honors for the Brooklyn Dodgers, the Supreme Court declared in *Brown v. Board of Education*[2] that segregation laws violated the Constitution. Yet this opinion did not decisively challenge the bad principle of the *Plessy* case. The *Brown* opinion rested its conclusions on highly dubious psychological testing evidence—segregation made blacks feel bad and therefore actually become inferior—and not principles of constitutionalism and human dignity. Thus the reasonableness standard of *Plessy v. Ferguson* remains the law of the land: It is still constitutional for government to legislate upon the basis of race, as the vitality and range of racial preference programs—now for some members of various minority groups—throughout the land reflects. The 100 year-old legacy of the *Plessy* case lives on, dividing Americans in as irrational ways as the segregation of baseball did 50 years ago.

The fact remains, we have as yet to embrace the famous color-blind Constitution standard defended by the sole dissenting justice in the *Plessy* case, John M. Harlan. To quote briefly from his thundering dissent:

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1 163 U.S. 537 (1896) overruled by Brown v. Board of Education, 347 U.S. 483 (1954).

2 347 U.S. 483 (1954).

[The post-Civil War amendments,] if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. . . . These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. . . .

[I]n the view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. . . .[3]

Note what Harlan and the contemporary advocates of the colorblind Constitution are advocating. They are not saying that *society* can ever be colorblind. In social matters, race has a force, oftentimes unfortunate and stunting of human development. Race may function as a blinder, preventing us from seeing each of us as a creation of God. Harlan was not being utopian. What he was saying is that the equality of rights implicit in the rule of law can be a means of making us flawed creatures more reasonable, more civilized. But such rights can be beneficial only to the extent that they are exercised in a colorblind way, that is, devoid of the passion of racial preference.

Consider the example of America's greatest black thinker, who died just a few years before Harlan's declaration of principle. Abolitionist orator Frederick Douglass urged all Americans to renounce the notion of racial pride and taught Americans of all races the central significance of character for citizenship. "The only excuse for pride in individuals or races is in the fact of their own achievement," he declared in 1889. In fact, to cultivate racial pride is "a positive evil. It is building on a false foundation."

As we struggle with the flawed policies of racial preference, we need to benefit from the wisdom of dissenters of a century ago. It is hard to fathom that equal amounts of time separate Jackie Robinson—that living embodiment of the lessons of Frederick Douglass—from the *Plessy* case and from us Americans today. We still need to learn those lessons of Jackie Robinson and call forth and repeat that heroism in both high and modest circumstances today. Harlan's ideal of colorblind legislation can still inspire us.

That we need this inspiration is absolutely clear. Consider the Sunday *New York Times Magazine* cover story of April 28, 1996, entitled "The Harvard Class of '00." The cover photo features four attractive young men and women—a black woman, an Asian, a man of Middle Eastern ancestry, and a white woman. The cutline provokes us: "At Van Nuys High in California, these four top seniors applied. One got in." Must I relate that one can tell at a glance who got in?

And that is exactly why we need the wisdom and example of American dissenters from 50 years.

II. Affirmative Action in Employment: The Dubious Origins

The great confusion in the debate over affirmative action[4] today occurs in the assumption of an identity of affirmative action and civil rights. We see this on the very first page of the 1995 briefing paper for the U.S. Commission on Civil Rights on affirmative action.

The concept [of affirmative action], however, coincides with the passage of the Civil War Amendments. The first major Reconstruction legislation enacted specifically for the benefit of African Americans was the 1865 Freedman's Bureau Act.[5]

It would appear from this statement that to oppose the idea of affirmative action is to oppose

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3 163 U.S. at 555-559.

4 Remarks adapted from a review essay of Alfred W. Blumrosen, *Modern Law: The Law Transmission System and Equal Employment Opportunity* (Madison, WI: University of Wisconsin Press, 1993).

5 U.S. Commission on Civil Rights, "Briefing Paper for the U.S. Commission on Civil Rights: Legislative, Executive, & Judicial Development of Affirmative Action" (1995).

the idea of emancipation! Moreover, from this description we would have no idea that this description of the Civil War Amendments is a subject of great academic dispute: Was the Freedman's Bureau to aid only the ex-slaves, or all persons whose lives were disrupted by the Civil War?[6]

It is not my purpose here to summarize this debate, but merely to note that the assumption of a scholarly consensus here is problematic.

Indeed, the entire history of civil rights is marred not only by partisan statements but by partisan actions in implementing the Civil Rights Act of 1964. Significant and highly unappreciated documents for this purpose are two books by Alfred W. Blumrosen, *Modern Law: The Law Transmission System and Equal Employment Opportunity* (1990) and *Black Employment and the Law* (1971). Blumrosen, Thomas A. Cowan Professor of Law at Rutgers University, can credibly claim credit for having founded at least the employment law portion of the affirmative action regime, an enduring legacy. As the U.S. Equal Employment Opportunity Commission's (EEOC's) first chief of conciliations, he was able to become "de facto Chairman" of the Agency through his ingenuity. He transformed a fundamentally color-blind law into a law demanding color-consciousness, a law focusing on individual, intentional discriminatory conduct into one seeking numerically driven, classwide remedies:

> As an administrator for EEOC, I attempted to bring my model of an aggressive and effective agency into reality. The fact that I had a model gave me a great advantage in the early days at EEOC. The model gave me a basis to propose and evaluate substantive and procedural decisions which would shape the agency. . . . I felt that most of the problems confronting the EEOC could be solved by creative interpretations of Title VII which would be upheld by the courts, partly out of deference to the administrators.[7]

The very first page of Blumrosen's first book, a memoir of his EEOC experiences, exemplifies well his "creative interpretations" of civil rights law. "The issue to which these essays are addressed is whether we can rid our society of *patterns* of racial discrimination."[8]

> This question of definition is of fundamental social importance. If discrimination is narrowly defined, for example, by requiring an evil intent to injure minorities, then it will be difficult to find that it exists. If it does not exist, then the plight of racial and ethnic minorities must be attributable to some more generalized failures in society, in the fields of basic education, housing, family relations, and the like. The search for efforts to improve the condition of minorities must then focus in these general and difficult areas, and the answers can come only gradually as basic institutions, attitudes, customs, and practices are changed. We thus would have before us generations of time before the effects of subjugation of minorities are dissipated.
>
> But if discrimination is broadly defined, as, for example, by including all conduct which adversely affects minority group employment opportunities—and this is the basic thrust of these essays—then the prospects for rapid improvement in minority employment opportunities are greatly increased. Industrial relations systems are flexible; . . . they can be altered either by negotiation or by law. If discrimination exists within these institutions, the solution lies within our immediate grasp. It is not embedded in the complications of fundamental sociology but can be sharply influenced by intelligent, effective, and aggressive legal action. . . .
>
> This is the optimistic view of the racial problem in our nation. . . . In this view, we are in control of our own history. The destruction of our society over the race question is not inevitable.[9]

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6 See e.g., Herman Belz, *A New Birth of Freedom* (Westport, CT: Greenwood Press, 1976).

7 Alfred W. Blumrosen, *Black Employment and the Law* (Rutgers, N.J.: Rutgers University Press, 1971) pp. 58–59.

8 Ibid., p. vii (emphasis added).

9 Ibid., pp. vii–viii. In noting this passage, Andrew Kull observes that "[t]his new conception of what should be held to constitute 'discrimination,' repudiating the traditional and very different view that informed the 1964 statute, was ratified by the Supreme Court when it decided Griggs v. Duke Power Co. in 1971." (*The Color-Blind Constitution*, Cambridge, MA: Harvard University Press, 1992, p. 204)

Thus Blumrosen had no confidence in the ability of America to deal with racial discrimination through "fundamental sociology" and substituted in its place "legal action." The affirmative action regime of rule by lawyers, courts, and bureaucrats substituted for the democratic standard of responsible lawmaking. Bureaucratic government was the price paid for effective civil rights.

Blumrosen's books are about promise. In his 1971 preface, he declares "In two years we could break the back of racial discrimination in this country. We have civilization within our grasp; but we have not reached for it in any systematic way."[10] Later, on the first page of his text, reflecting on the "civil unrest generated by these conditions" of racial inequality, he laments that "At the very moment when our affluent society appeared to be assimilating the proletariat, racial conflict revived and sharpened class distinction." Blumrosen contends the "laws have neither been enforced or obeyed. Thus the violence in the streets embraces the ancient demand that the laws be faithfully executed." To be civilized and to recognize the justice of a violent "proletariat" is our obligation. Blumrosen does not appear to make a principled distinction between the rule of law and the rule of violence, between ballots and bullets. Tellingly, this case for affirmative action rests on attributing legitimacy to lawlessness.[11]

To underscore the radical character of Blumrosen's project, let us provide our own brief overview of title VII of the Civil Rights Act of 1964. It is the longest and most detailed of the 11 titles of that act. It establishes the EEOC and adumbrates its then meek powers plus various restrictions on them. At least the rhetoric of other titles indicates a commitment to a colorblind principle: e.g., "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (Title VI, Sec. 601); "no person shall be compelled to disclose his race, color, national origin . . . " for the purpose of gathering statistical information (Title VIII, Sec. 801). Individual discrimination was clearly the focus on the act:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any *individual*, or otherwise to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment because of such *individual's* race, color, religion, sex, or national origin; or 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any *individual* of employment opportunities or to otherwise adversely affect his status as an employee, because of such *individual's* race, color, religion, sex, or national origin. [emphasis added, Title VII, 42 U.S.C. 2000e-2(a)(1988)].

Thus, a contemporary account of the act contends that it called for a limited scope to its enforcement:

> In a sense one discriminates because of race whenever one treats differently because of factor that is itself affected by race. In a southern school district, for example, training in metal trades may be available in the white, but not in the Negro vocational school; as a result, when a local metal-working shop advertises for high school seniors with metal-trades training, there is a sense in which it is discriminating against Negroes. But section 703(h) makes it clear that this is not the sense in which Title VII uses the word "discriminate." To violate Title VII, one must treat differently because of race itself and not merely because of an applicant's lack of a qualification which he was prevented from acquiring because of his race [footnote omitted].[12]

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10 Alfred W. Blumrosen, *Black Employment and the Law* (Rutgers, N.J.: Rutgers University Press, 1971) pp. 58-9.

11 Ibid., pp. ix, 3. In this connection, Jeremy Rabkin cites Roscoe Pound, "Administrative Law: Its Growth, Procedure, and Significance," *University of Pittsburgh Law Review*, 7 (1941) for "attacking administrative regulation as an expression of 'Marxist' thinking." See *Judicial Compulsions: How Public Law Distorts Public Policy* (New York: Basic Books, 1989, p. 272, footnote 20); see also Edward J. Erler, *The American Polity: Essays on the Theory and Practice of Constitutional Government* (New York: Crane Russak, 1991).

12 Michael Sovern, *Legal Restraints on Racial Discrimination in Employment* (New York: The Twentieth Century Fund, 1966), p. 71.

James Sharf succinctly describes the limited powers given EEOC:

> The civil rights lobby pressed Congress in 1964 to give EEOC "administrative hearing" and "cease-and-desist" authority modeled on the authority of the National Labor Relations Board. Congress decided otherwise, however, and gave the EEOC only the authority to investigate, to find reasonable cause, and to conciliate voluntary compliance. Failing attempts at voluntary compliance, the EEOC could not file suit in federal court although the plaintiff or the Attorney General could. The Commission was given authority to require reporting and record keeping and the authority to adopt procedural rules. Substantive rule making authority, however, was not given.[13]

Thus, distinguished historian Hugh Davis Graham variously refers to the EEOC as, first, "a fragile infant among regulatory boards," and then, much later in his tome, "a kind of bastard compromise between a quasi-judicial regulatory commission, an administrative agency, and an educational and conciliation bureau."[14]

The man most responsible for transforming the EEOC from "fragile infant" and bastard to a full-fledged part of the bureaucracy is Alfred Blumrosen. He rejected the notion that discrimination was limited to intentional acts against individuals. He would note the limitations in the civil rights act that scholars such as Sovern accepted, and move the EEOC far beyond them. Blumrosen provides ingenious alternatives to these interpretations. Behind all of his interpretations lies a firmness of purpose: *"All of the EEOC's early interpretations of Title VII emerged from a unified idea—that the statute should be read so as to maximize its impact on employer practices. From the perspective of effective government, it is better for an agency to have a coherent enforcement philosophy than to have none at all"* (italics added). This resolve informs seven "general suggestions which may be helpful to future administrators" with which he concludes his first chapter on title VII. For the most part, they read as though they could be easily placed on a poster:

> 1. Adopt a broad construction of your statute to achieve maximum impact. . . .
> 2. Utilize rule or guideline making as a process for setting your policies. . . .
> 3. Develop procedures to maximize the impact of the agency . . . .
> 4. Encourage informal settlements. . . .
> 5. Seek enforcement of the broadest interpretation of your statute using minimum evidence necessary.
> 6. Be aware of the likelihood that agency personnel will develop fragmented and incomplete understandings of policy unless they are involved in the overall decisionmaking process. . . .
> 7. Develop overall indicators which will signal degrees of success . . . by external realities. . . .

Throughout the chapter Blumrosen discusses how policy preferences fleshed out the ambiguities of the language of the law—though others would maintain that he contradicted their intention.[15]

Thus the loftiest aims of the civil rights act, to educate Americans, became a bureaucratic system. Naively, legislators may have felt that the force of shame would be sufficient to eliminate most discrimination. But when "creative administrators" sought to "convert[] a powerless agency operating under an apparently weak statute into

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13 James C. Sharf, "Litigating Personnel Measurement Policy," *Journal of Vocational Behavior*, 33, pp. 235–71, (December 1988). Sharf's work on psychometrics, especially testing and race-norming, is indispensable for the student of racial discrimination.

14 Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy* (New York: Oxford University Press, 1990), pp. 7 and 266. Un unstinting popular critique of the EEOC can be found in James Board, *Lost Rights: The Destruction of American Liberty*, (New York: St. Martins, 1994). His work continues The EEOC's War on Hooters," *Wall Street Journal*, Nov. 17, 1995, A14, col. 4. See also Masugi, "Hooters, Drawing Lessons After the Chuckling Stopped," *Cleveland Plain Dealer*, Dec. 2, 1995, 11-B.

15 Blumrosen, *Modern Law*, pp. 67, 77–78.

a major force the elimination of employment discrimination," such naivete had to go. "Administrative creativity" has no use for such sentiments.[16] This was amply demonstrated in the EEOC's fleshing out of the concept of discrimination, which culminates in the development of the "disparate impact" definition, a statistical racial or gender imbalance in hiring or promotion. Because the first cases the EEOC handled dealt with employers in the South, both public sentiment and legal force supported massive action. In this context, it hardly seemed to make sense to distinguish between individual blacks and their treatment as a group. With "discrimination" having been left undefined, the administrators were obliged to define it, which they did following Blumrosen's broad definition, which was at odds with the original understanding. Discrimination cases swamped the agency, producing a backlog which is still the major administrative problem this understaffed agency faces.

This brief glance at the revolutionary origins of affirmative action in employment does not even touch on such important elements as the development of disparate impact analysis, the difference between Title VII and Executive Order 11246, the alleged difference between quotas, and goals and timetables, and the recent attempts to distinguish between types of quotas. Books have been written on the subject, however, and an objective observer, as opposed to the committed partisan, should certainly know their arguments.[17] All this brief glance at the origins of employment discrimination policy is intended to do is to raise doubts about the course of action and analysis taken since then and to raise the question of whether, since 1965, this country has ever had a civil rights policy that produced justice for all America's citizens.

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16 Blumrosen, *Black Employment*, p. 53.

17 Besides Graham's *Civil Rights Era*, such books would include Herman Belz, *Equality Transformed: A Quarter Century of Affirmative Action* (New Brunswick: Transaction Publishers, 1991); Farrel Bloch, *Antidiscrimination Law and Minority Employment: Recruitment Practices and Regulatory Constraints* (Chicago: University of Chicago Press, 1994); Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge: Harvard University Press, 1992); Edward J. Erler, *The American Polity: Essays on the Theory and Practice of Constitutional Government* (New York: Crane Russak, 1991); and *Redefining Discrimination: Disparate Impact and the Institutionalization of Affirmative Action*, U.S. Department of Justice, Office of Legal Policy, 1987.

Time to Dismantle Affirmative Action

By Rebecca A. Thacker

I am here to tell you why I think it is time to dismantle preferential treatment and set-aside programs in this country. Affirmative action has created an entire generation of "victims"; young men and women, particularly black men and women, who have been brought up to believe that society owes them something because of their heritage. However, preferential treatment no longer makes sense, given the changing demographics of our country. The original civil rights legislation was designed to provide affirmative action to blacks, who constituted the great bulk of the eligible population. Yet, today, Hispanics and Asians are as numerous or even more numerous than blacks in some parts of the country, largely due to immigration patterns of the last 30 years. These immigrants are also protected categories and entitled to preferential treatment. Hence, preferences are extended to people who, if they experienced discrimination at all, experienced it in another country, at the hands of non-U.S. citizens.

In a similar vein, preferences often fail to benefit those in the least advantaged category, but rather, benefit minorities from the most advantaged families. This is often true with set-asides in institutions of higher learning. Ultimately, the effects of affirmative action are insidious, forcing minorities to think that they cannot make it on their own; that they need special treatment to get ahead. And here is where we subvert the natural instincts of the human spirit. Told that they can never make it on their own without the help of government intervention, minorities are handicapped at the outset.

In the final analysis, individual sense of responsibility is eroded, and the belief that the government is supposed to take care of the individual is strengthened. The "victim" becomes weaker and much less dependent on his own God-given skills, abilities, and talents, and much less capable of accumulating wealth in the manner common to those who have not adopted the role of victim; i.e., bettering oneself through education and working. In writing for the Supreme Court in the *Adarand* decision, Justice Clarence Thomas wrote that preferential treatment "teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete . . . without . . . patronizing indulgence. . . . These programs stamp minorities with a badge of inferiority."[1] Such affirmative action policies bring out the lowest and the least in people, not the best and the brightest.

Witness the effects of over 30 years of affirmative action programs, which have not worked:

- prisons are filled with young black men,
- the majority of black children are born to unwed mothers,
- the majority of these children will live in poverty,
- academically, blacks lag behind whites and Asians.
- absurdly drawn districts are sometimes necessary to elect black representatives to congress.

In addition, compliance with affirmative action regulations is incredibly burdensome, time-consuming, and unproductive for employers. For companies, there are direct administrative costs associated with compliance efforts. For example, some companies have to add to staff just to ensure that they are complying with affirmative action regulations, costs which are passed on to consumers of the company's goods and/or services, raising the price for everyone.

Because I spend much of my professional time working with the human resources community, I can tell you unequivocally that affirmative action has resulted in quota hiring and promotions for

1 115 S.Ct. at 2119.

minority groups. I have noticed this particularly since the passage of the 1991 Civil Rights Act when the penalty for being found guilty of discrimination became more expensive for employers with the introduction of monetary damages for "victims" of illegal discrimination. With monetary damage awards, it is now much more attractive financially for individuals to file a discrimination suit against their employer, a consequence which, not surprisingly, has contributed to an explosion of title VII claims. At the same time, the burden for proving that the employer was not discriminating became much more onerous so, as a result, many employers simply hire by the numbers in order to avoid prolonged and expensive legal defense.

"Diversity" has become the code word for counting bodies by race and sex. In fact, numerical disparities in an employer's numbers are automatically attributed to biased, prejudicial efforts on the part of the employer. Occupations or levels of the organization where whites dominate are automatically labelled "segregated," in the pejorative sense. Statistical disparities are assumed to be the result of biased and unfair discriminatory practices. Yet I hear no objections, no cries of discrimination, no lawsuits challenging the lack of diversity in the National Basketball Association's teams. Indeed, people pay lots of money to watch these "segregated" teams play basketball. If America was truly a racist society, would we be spending our hard-earned dollars to watch a team composed predominantly of a race against whom we are allegedly so prone to discriminate illegally?

Ultimately, affirmative action promotes separation and exclusion, not incorporation and inclusion. Diversity leads to division. Affirmative action policies force and encourage individuals to look at others and notice the color of their skin, rather than fostering the more worthwhile goals of inclusion and equal opportunity.

Defenders of affirmative action respond that white America has never been subjected to slavery, so could not possibly understand the plight of blacks, but an understanding of history shows that almost every race has at one time or another been enslaved or in some way subjugated. My Irish ancestors were certainly no exception, and as immigrants to this country, the Irish suffered discrimination in employment, without the benefit of federal legislation to protect them. Furthermore, it should not be forgotten that many whites lost their lives on Civil War battlefields fighting to free blacks from slavery, which begs the question: Who really owes whom?

Finally, let me say that we are using affirmative action policies to solve problems that had their origins long before minorities ever entered the work force or the university. If public policymakers were truly interested in bettering the opportunities of all minorities, they would begin by addressing the incentives of the welfare system, wresting power away from the teachers' unions who are destroying our educational system and handicapping children at an early age, and backing school choice. These actions would do more to improve the economic lot, the emotional and spiritual well-being of individuals than any government affirmative action/preferential treatment program could ever hope to do.

It is time to return to the intent of the 1964 Civil Rights Act, which emphasized equal employment opportunity for all, a goal of Congressman Charles Canady's equal opportunity act. Congressman Canady's bill is the first necessary step towards returning us to a society that fosters the broader challenge of outreach and inclusion, rather than division, segregation, and exclusion.

III. Community Perspectives Regarding Affirmative Action

Affirmative Action, What Is Our Future? What Is Best for America? A Case for Affirmative Action

By Samuel Gresham, Jr.

The concept of and need for affirmative action is embedded inextricably in the history of the United States; it is meaningless outside of the context of that history. To understand the current strident controversies over affirmative action it is necessary to understand the issues. The fundamental issues are: (1) is affirmative action necessary to secure a racially inclusive society, and (2) is such a racially inclusive society in the national interest.

To begin this discussion, we must define the subject. My working definition of affirmative action is:

> A process by which public and private employers take aggressive steps to correct and undo past discriminatory practices that have kept ethnic minorities and women out of the mainstream of American life. The goal of affirmative action is not to force employers to hire incompetent or unqualified persons; the goal is to motivate them to seek out, train, educate, and hire persons who are qualified and qualified in areas they have been denied access to because of discriminatory practices.

The opponents of affirmative action are mounting assaults on every front. There are court challenges to contract set-asides, minority scholarships, and legislative redistricting. This frenzy is fed by the incessant ranting on radio talk shows about angry white males, whose anxiety about job security and declining incomes drives the thrust to scapegoat minorities, women, and affirmative action as the cause of their woes. The approach denies the fact right in front of their faces. The facts are that more than 800 million human beings are now unemployed or underemployed in the world. That figure is likely is rise sharply between now and the turn of the century as millions of new entrants into the work force find themselves without jobs, many victims of a technology revolution that is in fact replacing human beings with machines in virtually every sector and industry of the global economy. After years of wishful forecasts and false starts, the new computer and communications technologies are finally making their long-anticipated impact on the workplace and the economy, throwing the world community into the grip of a third great industrial revolution. Already, millions of workers have been permanently eliminated from the economic process, and whole job categories have shrunk, been restructured, or disappeared. The Information Age has arrived.

Affirmative action is the political wedge that is being used to camouflage the wholesale substitution of machines for workers. The national debate over affirmative action thus far has not focused on the fundamental, core issues, it has been about peripheral issues and the anecdotal conclusions. There is no empirical data that supports the need to discontinue affirmative action efforts.

The facts are these: (1) overall Americans are poorer today, blue-collar wages have lagged behind inflation for more then 20 years, and now even median wages for men with college degrees are falling too; (2) as the shrinking economy reduces opportunities for the middle-class, African Americans will be harder hit; despite substantially closing the gaps in educational attainment and achievement, African Americans face wage gap that continues to widen; (3) blue-collar jobs now are only 17 percent of the labor force, compared with 35 percent 30 years ago; (4) African Americans who would have held blue-collar jobs in the 1960s now frequently are in lower paying service jobs; (5) African Americans also have less

access to a network of people who can provide contacts for jobs advancement: as newcomers to the pecking order, they may have less chance to win the shrinking number of middle-management positions and government jobs; (6) increased wage inequality between higher income workers means greater inequality between African Americans and whites and it's getting worse; (7) the people benefiting from the changes in the economy are people with education or capital in the form of education or money; (8) decline in the manufacturing sectors will continue; the number of temporary employees and home workers will grow; large firms will continue to reduce the work force; (9) the labor force of the future will be more increasingly multicultural; (10) there will be greater international competition for markets today and more in the future.

These are the facts that we are not addressing in this whole debate, the changes that are happening to the economy. There are social consequences to these economic figures. For a better understanding of the facts regarding affirmative action, lets turn to the history of affirmative action in this country. The struggle for racial equality began with the Emancipation Proclamation issued by President Abraham Lincoln on January 1, 1863. It was a wartime proclamation, reluctantly issued, to sabotage the Confederates secession by freeing their slaves from under them. However, its ancillary effect was to begin the long and arduous journey of African Americans to equality. With the ending of the Civil War in 1865, the proclamation gave impetus to the subsequent passage of the 13th, 14th, and 15th amendments to the Constitution guaranteeing other rights to African Americans. Then, the difficult task of integrating blacks into American society began. The Freedmans Bureau was created by Congress in 1867 to establish schools, develop jobs and training, and attempt to reunite former slave families. The exercise of the franchise was assured by Federal troops guarding polling places, resulting in African Americans being elected to various offices throughout the South including Congressmen.

The first period of affirmative action achieved its denouement in less than a decade when Northern white Congressmen, wearied of protecting the rights of freedmen, compromised with southern white politicians and declared the southern States to be "redeemed." In exchange for that declaration, President Rutherford B. Hayes withdrew Federal troops from the South in 1877. The dismantling of Reconstruction ensued with the driving of African American politicians from office, the rise of the Ku Klux Klan and wholesale lynching, and the reduction of African Americans from free laborers to virtual peonage. Justice Joseph P. Bradley of the U.S. Supreme Court delivered the death blow to Reconstruction by striking down the 1875 Civil Rights Act with these words:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of the state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite by the law.[1]

When Justice Bradley was rendering the opinion that "Beneficent legislation" had made African Americans "mere citizen(s)," white riots throughout the South were killing scores of African Americans attempting to vote, and African American militia who refused to surrender their arms were arrested and some killed.

Just 13 years later the Supreme Court in *Plessy v. Ferguson*[2] gave constitutional sanction to "separate but equal" and legalized discrimination became the law of the land and remained so for over 50 years. The nadir of post-Civil War race relations had been reached.

The second period of affirmative action began, not in the 1960s as is usually supposed, but in 1941 with two simultaneous but geographically separate events. The first was the discovery by

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1 109 U.S. at 25.

2 163 U.S. 537 (1896).

the Julius Rosenwald Fund that in all of America's predominantly white colleges and universities there were but *two* tenured African American professors. The Fund wrote to the presidents of these institutions asking them to consider hiring black faculty. Those who replied indicated they "could not find any qualified Negroes" with the appropriate credentials. The Fund then supplied these institutions with the names of 200 blacks with Ph.D's and 300 with master's degrees. None was hired. The fund then offered to pay the salaries of prospective black faculty if the institutions would hire them. It was by this means that Allison Davis, the distinguished African American sociologist, was hired by the University of Chicago, and Cornelius Golightly, a philosopher, was hired by Olivet College in Michigan.

The second event in 1941, more successful, was a meeting held by A. Phillip Randolph (the only African American president of a labor union at the time) and several other civil rights leaders with President Franklin D. Roosevelt, threatening to stage a "March on Washington" by thousands of African Americans to protest discriminatory hiring practices in defense plants gearing up for production for World War II. In response to that threat, President Roosevelt issued Executive Order 8802 on June 25, 1941, barring discrimination on the basis of "race, color, creed or national origin" in industries receiving Federal contracts. Tens of thousands of African Americans went north to work in the defense plants with this opening of opportunity.

No further government action on affirmative action took place until President John F. Kennedy issued Executive Order 10925, in 1961, requiring "affirmative action" (the first time the phrase was officially used) with specific guidelines and sanctions. Kennedy's order was expanded in 1965 by Lyndon B. Johnson's Executive Order 11246, which established the Office of Federal Contract Compliance Programs (OFCCP) in the Labor Department requiring "any entity, public or private, with 50 or more employees or receiving $50,000 or more in federal contracts, to file an affirmative action plan." The Secretary of labor was authorized to make regulations and impose sanctions on noncomplying institutions.

The 1964 Civil Rights Act had been passed the year before, the first civil rights act since the Civil War. Title VII of that act forbade all forms of discrimination in public and private institutions and in State and local governments as well. The sanctions applied to discrimination in hiring, promotions, layoffs, wages, apprenticeships and in union membership. This most comprehensive act grew directly out of the pressures of African American activism in the civil rights movement of the 1960s on Congress, the courts, and the President.

In 1967, President Johnson added "sex" to the categories of protected classes of people. And in 1970, President Richard M. Nixon, in Revised Order No. 4, more specifically defined affirmative action as "a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The objective of these procedures plus such efforts is equal employment opportunity."[3] In 1968, the Architectural Barriers Act required the modification of buildings to accommodate the handicapped. Later, in 1975, the Age Discrimination Act was passed prohibiting employment discrimination on the basis of age.

While employment opportunity was being broadened by legislation, a series of court decisions was being rendered that had an equally dramatic impact on educational opportunity. Primary school education had been segregated by race throughout American history, whether by law as in the South, or by custom and practice in the North. Basing their attack, not on the racial separation itself, but on the "separate but equal" requirements that African American schools be equal to white, lawyers of the National Association for the Advancement of Colored People (NAACP) were able to destroy the weakest foundation of the *Plessy* decision. African American schools throughout the country were patently unequal to white schools in financing, physical plant, and quality of teaching staffs. The landmark decision of *Brown v. Board of Education*[4]

3 41 C.F.R. § 60-2.10 (1995).

not only found such schools "inherently unequal" but ordered the desegregation of separate schools "with all deliberate speed." It was only a matter of time before institutions of higher education would come under the same scrutiny.

Inevitably, in 1973, District Judge John H. Pratt, ruled in *Adams v Richardson*[5] that dual systems of higher education must be dismantled as well. Nineteen States, containing over 50 percent of African American population, were ultimately found to maintain segregated public higher education systems, and were ordered to file plans for their desegregation. Later, Hispanics were also added to some protections of the *Adams* decision.

It is obvious that what began with the freeing of African American slaves by one war and the demand of African Americans for jobs in another war, has evolved into a complex set of laws, executive orders and sanctions intended to diminish historic practices of discrimination and segregation of African Americans, and to end the discriminatory employment and restricted educational access of racial minorities, women, the disabled and older persons. Specialized agencies and systems of monitoring were created to document the progress of compliance with these laws. Dozens of detailed documents were required to be filled out periodically by institutions which complained grievously that filling out numerous forms and complying with countless rules was, indeed, preventing them from truly carrying out the intent of equal opportunity and access. Admittedly some of the requirements of affirmative action were intrusive and some of the early monitoring may have been unnecessarily accusatory. Nevertheless, it must be remembered that no institution ever lost Federal funds due to lack of compliance with affirmative action laws and no institution could demonstrate a vigorous and measurable commitment to affirmative action before these laws were passed.

An appropriate question is, were these complex and burdensome executive orders, laws and court decisions worth the effort? Did they result in any significant diminution of historic segregation and restricted access? An equally important question is, did these efforts result in institutionalized practices which would perpetuate and maintain equal opportunity, not as a "special" program, but as the regular way in which institutions do business? The answer to the first question is, unequivocally, yes. The answer to the second question is, tragically, no.

The number of African Americans students in higher education doubled between 1960 and 1980 from 600,000 to 1.2 million. Dramatic gains were also registered for Hispanics, Asians, Native Americans, and women. African American professors increased to a high of 4.4 percent of the faculty in 1978. Other civil rights laws served to increase the number of African American voters and elected officials as well. Without affirmative action the pace of progress toward inclusion of all our citizens would not have been as brisk.

However, that progress began to slow in the late 1970s and proceeded to precipitously decline during the decade of the 1980s. The election of Ronald Reagan as President of the United States and the decline of civil rights and affirmative action are not accidentally correlated but are causal interrelationship. Reagan ran for president on a platform of opposition to desegregation and affirmative action. Once elected, his administration proceeded to either dismantle or neglect initiatives intended to empower minorities and women with more ideological consistency and measurable effect than any president in the 20th century. Examples of that impact abound. Indeed, the Reagan Justice Department opposed the court's jurisdiction of higher education desegregation altogether, and filed a brief asking the Federal District Court to dismiss the Adams case.

During the Reagan administration, the staff and budget of the Education Department's Office of Civil Rights (OCR) was reduced by one-fourth, and even then the Office underspent its budget and *returned* funds to the Treasury! The Reagan

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4 347 U.S. 483 (1954).

5 356 F.Supp. 92 (1973).

Justice Department considered intervening in 51 local affirmative action plans, seeking to overturn them even though they had been voluntarily entered into. The administration opposed Federal intervention to assure State compliance with desegregation requirements and ignored States, like Virginia, where the disparity in college-attendance rates between African American and white high school graduates jumped from 9 percent in 1978 to 21 percent in 1985. OCR reduced its collection of statistical data which would have documented the consequences of Reagan administration policies, and agency staff did not provide such information to inquirers even when requested through the Freedom of Information Act.

The Reagan administration attempted to seek tax-exempt status for segregated schools, opposed busing to achieve school desegregation, and decreased the amount of student financial aid available in grants while increasing the onerous burden of student loans. It cannot be said that the intent and consequences of these actions was serendipitous. These policies were deliberate, consistent, and devastating in their impact.

Both African American and Hispanic higher education enrollments peaked in 1980 and declined thereafter as a proportion of the 18-to-24 year-old cohort despite increasing high school graduation rates for both groups. Native American enrollments plateau and recent Asian immigrants suffered from cutbacks in the funding of English as Second Language programs. African American graduate school enrollments also declined drastically and the number of African American faculty declined from 4.4 percent to 4.1 percent of the total. In 1975, African Americans received 1,213 doctoral degrees; in 1987, 765 doctorates were awarded to African Americans. The pipeline for the production of minority scholars has been severely damaged and will require substantial efforts on the part of the States and collegiate institutions to repair. Although the educational rhetoric of President George Bush and his education secretary, Dr. Lauro Cavazos, is much improved from that of their predecessors, whether actual substantive changes will occur in educational funding or programs remains to be seen.

It is, perhaps, in the Federal courts that Ronald Reagan's efforts to reverse civil rights will have their most devastating consequences. That may be his most enduring legacy. Half of the currently sitting Federal judges are Reagan appointees and, with the appointment of Anthony Kennedy to the highest bench, the Supreme Court has a solid 5 to 4 conservative majority whose negative civil rights rulings in the current term have already had a stunning impact. Several recent cases are of particular importance in this regard.

In *Wards Cove Packing Co. v. Atonio*,[6] where minority workers proved that most unskilled jobs were held by minorities and most skilled jobs were held by whites, the court ruled 5 to 4 that evidence of statistical disparity was insufficient. The minority workers must in addition prove that the employer's specific policies led directly to negative impact.

In *Patterson v. McLean Credit Union*,[7] despite proving, under a Reconstruction-era civil rights law, that she had been racially harassed and denied promotion, the Court held that the African American female plaintiff could only challenge biased hiring under that law, post-hiring actions being now outside it jurisdiction.

The combined effect of these four rulings (in addition to demonstrating the solid conservative Court majority) is to severely limit minority challenges to bias and to demand prohibitive burdens of proof of discrimination, while considerably easing the ability of white males to challenge affirmative action plans which they allege have caused them harm. The rulings will undoubtedly created a chilling effect on institutions considering implementation of affirmative action plans and make them more cautious due to the likelihood of numerous challenges to policies adopted voluntarily and in good faith. Moreover, the rulings are essentially historical. They are com-

6 490 U.S. 642 (1989).

7 491 U.S. 164 (1989).

pletely devoid of any recognition of the over 200 year history of legal and societal discrimination and segregation that have protected minorities and women from enjoying equal opportunity and equal access to the benefits of society such as employment, higher education, and faculty status.

It is interesting that in the *Price Waterhouse v. Hopkins* case,[8] Justice Sandra Day O'Connor could recognize the discrimination against a white woman being denied partnership in a prestigious accounting firm. Justice O'Connor suffered the same fate when she graduated from Stanford Law School. However, she has been unable to recognize discrimination against racial minorities in any case that has come before her. So much for understanding one's own oppression helping one to sympathize with the oppression of others.

It is ironic that in the 1960s and 1970s minorities and women looked primarily to the President and the Supreme Court for vigorous leadership and aggressive action in securing their rights, and for redressing historic wrongs that had kept them underrepresented in significant areas of American life through discriminatory and segregative practices. In the 1980s, it has been the President and the Supreme Court who have been the principal agents attacking those hard-won rights and attempting to close the doors of opportunity. This turn-around classically illustrates how fragile freedoms are in American society, and reinforce Jefferson's warning that the tree of liberty must be frequently watered with the blood of patriots. Although legal scholars frequently claim that we are a nation of laws, not of men, the reality is that men (and women) make laws, and a different set of men with different philosophies can make different laws. The precedents hard-won over two decades, from *Brown* in 1954 to *Adams* in 1973, have been seriously eroded in a single Court term.

Nevertheless, the higher education community need not throw up its hands in despair and proclaim there is nothing they can do. In concert with the leadership of the States and, hopefully, Congress, collegiate institutions should be in the forefront of the struggle for new laws to diminish the restrictions of the Supreme Court rulings, and for new affirmative action plans that can meet the tests of the adjudicated requirements. As our leading intellectual institutions, colleges and universities must have the moral courage to do what is right, and must as well face the realities of stark demographic facts.

By the year 2000, minorities will be one-third of the American populace and an even greater proportion of the college-age cohort. Moreover, a significant number of college faculty will be retiring in the decade of the 1990s, offering a unique opportunity to increase minority faculty. The American business and industrial community is clamoring for a highly trained work force and our international competitiveness is dependent on the maximum education and full employment of our populace if we expect to continue as the leading Western nation. It is both in America's self-interest and morally right that it recognize the considerable harm done by the executive policies and Court rulings of the recent past, and move to overcome their most egregious effects.

Conclusion

Affirmative action is the political wedge issue of the year. Politicians who are unwilling to address the economic vulnerability of ordinary Americans seem determined to distract them from their insecurities by pitting financially put-upon white males against equally put-upon women and minorities.

This socially divisive and explosive tactic must not be allowed to work. The hopes of millions of minorities and women, the vitality of our nation's economy, which must rely on their talent, and the very future of our society as a cohesive and inclusive enterprise—all are at stake.

Detractors say affirmative action doesn't work. That's simply not so. The proof is found every day in the dramatically changed composition of college campuses and corporate workplaces. Back in 1961, 134,000 African American students attended predominantly white colleges and universities around the country. Today the number is a

8 490 U.S. 228 (1989).

stunning 1.2 million African American undergraduates in such schools.

Much the same is true of the white collar labor market. The work force of virtually every Fortune 500 corporation is vastly more integrated today. Think back to what it looked like in 1954, the year of the landmark *Brown v. Board of Education* decision that outlawed school segregation. Women and minorities in big corporations back then seldom rose above secretary or messenger. Think, even, of the complexion of local police and fire departments in those days. Contract set-asides, have spurred the growth of female and minority-owned firms operating in the mainstream economy.

These gains help explain the welcome growth in the African American middle class. To those who say that the poor haven't benefited from inclusion, think again of that tenfold increase in African American students at majority colleges. These ambitious young people did not arrive on campus with silver spoons in their suitcases. They are largely the offspring of working class and low-income families.

The same is true of the growing African American middle class. These families didn't descend there from the minuscule African American upper class. They rose up from more modest circumstances due to individual drive and higher educational attainment. But thanks, also, to the determination of universities and employers to include them, and of corporations and government agencies to do business with minority firms.

Since poverty persists in minority communities, I concede that the job of including poor folk in the educational and economic mainstream is hardly done. Improved K-12 education obviously is key. That's precisely why the top priority of the National Urban League is developing our children, academically and socially, for the 21st century.

But if inner-city youngsters are to run the race at our behest and with our help they must know that when they cross the finish line, the opportunity structure on the other side really will be open to them. If it is not, then as distinguished scholars like William Julius Wilson and Elijah Anderson warn us, these young people will remain cynical and isolated if they see no return on their investment in education. That is why it is so important for universities and employers to keep the doors of opportunity wide open for them.

Let us be absolutely clear. Affirmative action is about inclusion, not about quotas. It is about giving qualified women and minorities, who have long been shut out, a genuine shot at performing, It is not about recruiting or promoting those who are not qualified.

Of course people should be selected solely on merit. The crucial questions is what we mean by merit and how we go about judging who is meritorious.

The fact of the matter is that grades and gatekeeping tests like the Scholastic Aptitude Test may help spot who will do well in the short term, but they do not predict the successful performers later in life. Indeed, a study of Harvard graduates who had been out 30 years found that the most successful grads had lower S.A.T. scores and came from blue collar backgrounds. In other words, they were ambitious.

I believe universities and employers should set the qualifications bar at a point which reliably predicts that all those above it can do the work. That way everyone in the candidate pool will be qualified without question.

This would then enable those doing the admitting and hiring to select candidates of all ethnic and socioeconomic groups based on demonstrated ability, but based also on potential, ambition and perseverance. These attributes are not easily detected on standardized tests, but they certainly are relevant to whether people perform successfully.

Critics also say affirmative action stigmatizes its beneficiaries and undermines their self-esteem, even though they may be performing satisfactorily or better. Why is it always African Americans who are said not to belong, who are deemed undeserving of admission or selection? Why isn't the same said of whites in the identical situation?

Institutions and contracting authorities routinely use a wide array of ostensibly race neutral preferences to tilt selection decisions favorably toward whites. Examples include alumni legacy, fraternity and country club membership, family and social connection, seniority, social class, white ethnic groups membership, even outright nepotism. The beneficiaries of these preferences do not suffer any demeaning loss of self esteem. Why should African Americans?

If our multiethnic society is to work and our economy is to hum at peak productivity, inclusion must become standard operating procedure in America's opportunity structure. Far sighted employers see the bottom line benefits of inclusion. Their diverse work forces enable them to spot, analyze, and penetrate new markets here and abroad, and to develop new products for America's growing minority population. When they succeed, all of their employers, shareholders, and suppliers prosper as well.

Inclusion matters enormously in higher education as well. The baby boom generation has a deep stake in ensuring that women and minorities are as prepared as possible so that they earn as much money as possible. After all, it's precisely these workers who will inherit the burden of supporting the Social Security, medicare and pension benefits of those baby boomers when they retire 20 years from now.

How, for instance, can California possibly compete if its universities are prevented by Governor Pete Wilson's ban on affirmative action from educating academically qualified Latinos, who will soon comprise 50 percent of the State's labor force? Just imagine how fast and how far household incomes will fall if the employment and earnings potential of women is once again stunted.

Yet if race and gender are ruled out entirely as considerations in college admissions, then the enrollment of qualified minority youngsters who can do the work because they have got that grit and determination, will drop precipitously.

The bottom line for me is that no urbanized and multi-ethnic society like ours can be competitive and cohesive if it is not compassionate and inclusive as well. Focusing solely on the first two characteristics will ultimately be an exercise in futility if the other two attributes of a sustainable society are not operative as well.

With the end of the millennium upon us, it is time for America to get on with its future. Instead of prolonging the war of sound bytes, I hereby propose Five Commandments for an inclusive America that I believe Americans who care about our country's future can embrace:

1. The goal is genuine inclusion. We do not condone quotas, but neither will we tolerate tokenism or total exclusion of any segments of American society from the opportunity structure.
2. Only the qualified should be included. Candidates who are not qualified ought not be in the applicant pool. For those with potential who lack the requisite skills, let there be intensive remediation programs to help them quickly get up to speed so that they too can qualify some day soon.
3. Selection should be based on a broad understanding of what "qualified" and "merit" mean in the real world. Those who do the picking should be free to weigh traditional indicators, such as test scores and grades, along with intangible attributes like grit and determination.
4. Inclusion is morally virtuous, economically advantageous and demographically inevitable. Our population is diverse, by definition it is 50 percent female, and more and more multiethnic by the day. Americans must accept this reality and incorporate it into the allocation of opportunities to learn, work, and do business in our society.
5. To achieve inclusion, those who allocate opportunity should take many factors into account, among them geography, gender, ethnicity, economic status, and cultural diversity. Gender or race need not be the deciding factors, but they definitely should be among the criteria used to overcome exclusion and promote inclusion of all those who are qualified.

Let us all keep our eyes squarely on the prize. For women and minorities, it is full inclusion in a prosperous economy. For all Americans, it is a prosperous economy which includes everyone.

The Importance of Affirmative Action for the Hispanic/Latino Community in Ohio

By Joseph L. Mas

More than ever before, Hispanics form a significant presence in the United States. This is one group that is rapidly growing throughout Ohio, and as one considers the present status of Latinos, it is important to remember that Hispanics/Latinos form an integral part of America, and the future of this nation.[1] Latino well-being is interwoven with the future of this State.

Demographically, socially, and politically, Latinos and other minority groups are changing the face of American society. Several public policy groups, including the Hudson Institute (Indianapolis, IN) and the Hispanic Policy Development Project (Washington, D.C.), estimate that women, people of color, and recent newcomers to this country will represent nearly 3 of every 4 new entering labor force workers by the year 2000.

Present Conditions

"The plight of U.S. Hispanics did not improve over the widely heralded 'Decade of the Hispanic,'" declares a recent publication.[2] In fact, only two major metropolitan areas, Miami and San Diego, showed that the overall conditions of Hispanics relative to the overall condition of non-Hispanic whites improved or remained fairly stable. The three large Ohio cities of Cleveland, Columbus, and Cincinnati are among them. The Hispanic condition has worsened and the gap between Hispanics and non-Hispanics has widened.

Today, 5 years into the decade of the 1990s, the trend continues as one of disparity among Hispanics relative to all other Americans. While the rich got richer and the poor got poorer, did Hispanics get poorer than non-Hispanics? National demographers say that they did.[3] What about Ohio? The data gathered by the Spanish-speaking Commission (hereafter referred to as the Commission), albeit limited, certainly indicates that Ohio trends are similar. The gap is increasing in Ohio, though more slowly.

It is imperative that the gap between Hispanic and Anglo americans be closed; otherwise, the competitive position of the State becomes at risk. Strong leadership cannot by sustained if a sharp division is maintained between stable, isolated suburbs (or outlying areas) juxtaposed against poor workers and an underclass isolated in deteriorating inner cities. Extremes of any kind undermine our collective potential, more so if the extremes are the contract between wealth and poverty in our communities. These promote illiteracy, racism, crime, fear, and alienation.

Size and Composition of Ohio's Hispanic/Latino Community

In the United States, the Latino population has increased by about 4 percent each year from 1980 to the present. By the most conservative estimates, Latinos now constitute about 10 percent of the entire United States populationabout 25 million persons. This rapid growth occurred as a result of both higher-than-average family growth and sustained immigration from Latin America. Hispanics are a significant and integral part of America's future.

While across the United States the Hispanic net population growth rate is nearly triple that of the rest of the population, it is somewhat less among Ohioans. In the state of Ohio, the ratio of live births to deaths, by origin and by race, indicates that the family growth rate of Hispanics is

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1 "Spanish-speaking" and "Hispanic" are terms that have been arbitrarily applied to identify our minority group. While they are basically governmental terms, and not objected to by most members of our community, "Latino" is the common term of self-reference.

2 *The Hispanic Almanac*, 2nd ed. (New York, N.Y.: Hispanic Policy Development Project, 1990).

3 Ibid.

nearly double that for non-Hispanics and increasing while the death rate is less than one-fourth. Today, the Spanish-speaking population of Ohio is estimated at about 150,000 to 200,000. Ohio Hispanics reside in every county of the State.

The Hispanic population, which began to settle in Ohio around the turn of the century, has made numerous cultural, social, and economic contributions to the State which have remained largely unacknowledged. Such contributions have been made through their own initiative and without the benefit and support of basic government services. The absence of such basic support and benefit, however, has hindered the integration of Hispanics into the mainstream of the life and work of Ohio. In fact, the Spanish-speaking population is probably the most segregated ethnic/racial group in the State. By all indications, for instance, Hispanic students are more segregated today than they were 20 years ago.[4]

Though Hispanics comprise an important part of the State population, and predominantly reside in the most populous counties of the State, they account for just under 2 percent of the entire State population of over 10 million. They represent the largest ethnic/racial minority group after African Americans, by U.S. census count. Nonetheless, Hispanics have lacked access to the decisionmaking process within governmental entities at all levels have lacked access to and participation in the policymaking process within the governmental entities at all levels and have been a historically underutilized segment of the labor force in State government. All this has served to effectively hinder Hispanics from becoming fair and equal partners in the democratic process. As an example, among the thousands of elections in Ohio's history, the *first* State representative of Hispanic origin, John Garcia, was elected in 1994.

In the 1990 census, 139,696 Ohioans indicated that they were of Hispanic origin. This represents 1.3 percent of the State's population. Hispanics were nearly equally divided between the sexes, females outnumbered males by only 14 individuals.

The vast majority (76.5 percent) of Hispanics indicate two sources of origin: Mexico (41.7 percent) or Puerto Rico (34.8 percent), The rest come primarily from Cuba and South America. Total Hispanic numbers by country of origin may have a sizable undercount. It is believed that the census undercount for Ohio may be as high as 10 percent. Hispanics are highly concentrated in the Northern and Northeastern areas of the State. Four counties, Cuyahoga, Lucas, Lorain, and Franklin, contain over half (55 percent) of all Hispanics in the State.

Based on available data, the average Hispanic is:

1. More likely to receive two-thirds the yearly income of a non-Hispanic white worker ($9,248 versus $14,049 per year);
2. Two and a half times more likely to be below the poverty level (24.9 percent versus. 10 percent). On average, one out of four Latinos in Ohio lives below the poverty line;
3. Less likely to be working (1 out of 3 times versus. 1 out of 2);
4. Twice as likely to be unemployed (11.4 percent versus. 5.7 percent);
5. Three times more likely to come from or be part of a female-headed household with children (42.3 percent versus. 17.8 percent).
6. Three times more likely to not have a high school diploma (36.7 percent versus. 16.2 percent);
7. Less likely to own a home (155 percent of Latinos own a home versus. 72.1 percent among non-Hispanic whites);
8. Ten years younger (24.5 years versus 34 years of age).[5]

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4 A.S. Stuart *Hispanic Education in America: Separate and Unequal* (ERIC Clearinghouse on Urban Education: New York, NY, 1990). G. Orfield "The Growth and Concentration of Hispanic Enrollment and the Future of American Education," paper presented at council of La Raza Conference, Albuquerque, NM, July 1988. A.I. Noboa "Hispanics and Desegregation: Summary of Aspira's Study on Hispanic Segregation Trends in U.S. School Districts," *METAS*, vol. 1, no. 3, Fall 1980, pp. 1–24.

5 Ohio Commission on Spanish-speaking Affairs Biennial Report FY 1994–1995.

Education

High School Completion: In 1994, 86 percent of all 25 to 29-year-olds had a high school diploma or an equivalency certificate, up from 78 percent in 1971.[6] However, the completion rate varied among racial/ethnic groups. In 1994, 91 percent of whites had a high school diploma or equivalent, compared to 84 percent of blacks and only 60 percent of Hispanics, nationwide.

For Ohio, similar statistics were drawn from two data files of the 1990 census. The computed completion rates for Hispanics of different age ranges were nearly identical. The high school noncompletion rate was 24 percent for the younger age (20 to 24-year-old) and 23.8 percent for the 25 to 29-year-olds. High school completion rates for Hispanics were 76 percent. However, due to the reporting standards and stereotypical manipulation, these figures are in conflict with anecdotal reports from high school principals and other school officials, which suggest that the completion rate may be as high as 80 percent! School officials may be identifying dropouts as "having moved from the area" applying expectations related to migrant labor patterns to a permanent population segment.

While Ohio as a whole fared better than the Nation, the statistics kept at the Ohio Department of Education were vastly different. What is more important is the Hispanic completion rates have not improved appreciably in the past decade as compared to those for other ethnic/racial groups, regardless of how it is measured. In Ohio, the gap in educational achievement for Hispanics has widened this past decade.

Higher Education: Critical Hispanic retention data was not readily available from either the Ohio Board of Regents (for the public sector) or the Association of Independent Colleges and Universities of Ohio (the private sector). After tedious calculations of all higher education data from numerous sources, several general conclusions surface.[7]

1. Of every ten Hispanic high school graduates in Ohio, only three enroll in a college or university.
2. The bulk of Latino students attend public institutions. The likelihood of a Latino student attending a public university versus a private college is nearly 4:1.
3. While Hispanic enrollment figures are not high, they are further masked by the fact that these include: (a) *part-time* students (nearly one-fourth of all attendees), (b) *out-of-State* Hispanics, especially among the private institutions of higher education, (c) noncitizens, i.e., students from Mexico or from Latin America, and (d) students who do not obtain a degree, including many two-year students.
4. Most Hispanic high school students (more than 90 percent) attend a university within their same county and few (less than 5 percent) attend an out-of-state campus.
5. Some ten public institutions account for nearly the majority of all Hispanics enrolled in an institution of higher education. The six universities with the highest Latino enrollment are Ohio State University, University of Toledo, Bowling Green State University, University of Cincinnati, Youngstown State, and Cleveland State, respectively.
6. One out of five Hispanics attending a public university is enrolled part-time.
7. The higher the college level attained, especially post-baccalaureate, the more likely the Spanish-speaking student is from Latin America, a nonresident of Ohio, and not a citizen of the United States.
8. On a per capita basis, Mexican Americans and Puerto Ricans are the least likely of all Latino groups to obtain a higher education degree from Ohio.
9. Higher education attainment has not appreciably increased for Hispanics the past 5 years. Enrollment numbers and degree certificates among Latino students has temporarily leveled

6 National Commission on Education, *Condition of Education: 1994*, 1995.

7 Ibid.

10. The retention rate of Latino students is under 60 percent within a 5 year period. Barely one out of every two Latino students who enrolls at a university in Ohio obtains a bachelor's degree.
11. The number of Hispanic students who are Ohio residents and who obtain a graduate degree from an Ohio institution of higher education are very low.
12. Not surprisingly, Latino students enrolled in private universities have a higher likelihood of receiving a degree as compared to those enrolled in public institutions.
13. Hispanic students in Ohio have lower enrollment and retention rates in higher education than other racial/ethnic groups in the State.

Poverty, Income, and Employment

In Ohio, as well as the rest of the country, data show an increase in the Hispanic middle class. But the majority of Hispanics (nearly 65 percent) continue to lack the skills required for stable employment that pays a reasonable wage, provides reasonable benefits, and offers reasonable opportunity for advancement. The skills of the majority of Hispanics and African Americans are drastically out of sync with the skills required by growing sectors of local labor markets. As a result, significant numbers of local Hispanic workers are falling into the ranks of the unemployed or working poor. Many Hispanic males in Ohio, for instance, hold one or more part-time jobs that offer no benefits. Contrary to the myth of the "lazy" Latino, it is interesting to note that, among all enrolled high schoolers, Hispanic Ohioan students are the ones who work the greatest number of hours in an average week, regardless of grade point average.

While a list of reasons may be advanced as to why this is occurring, some barriers are self-evident and include:

1. majority attitudes, behaviors, perceptions, practices, policies, and media stereotypes,
2. regional, State, or national social policy,
3. limited education and skills of Hispanics,
4. limited English language proficiency,
5. Hispanic cultural attitudes and expectations which may differ markedly from those of majority Ohioans, e.g., the attitude toward race and the negative effects of being labeled a "minority" a foreign concept to Latino newcomers to this country.

As compelling as these challenges are, they represent a long-term condition. Hispanics are the only Ohio racial/ethnic group to have experienced virtually no improvement in socioeconomic status between 1980 and 1990, when other groups experienced at least moderate gain.

Housing: Housing unit census information indicates that there was an average of 3.04 Hispanics per unit. This is the highest ratio of any minority group in the State. The Ohio figure is 2.59 persons per housing unit. Among Hispanics, just over half (55 percent) owned their own homes, as compared to nearly three out of four white majority owners.

Employment: Employment figures for Hispanics 16 years and older provide quite different pictures when males and females are compared. Although there were nearly equal numbers of men and women in this group, 43.7 percent of the women are not in the labor force, while only 25.7 percent of the men were not. Military personnel were predominantly male, outnumbering women by almost eight to one.[8]

In a survey undertaken by the Commission in the mid-1980s, Hispanic unemployment was about 60 percent higher than that of non-Hispanic whites. Looking at the employment-to-population rates among Puerto Ricans, only about 40 percent of all mainland Puerto Ricans older than 16 are working, compared to half of the African American population and close to 60 percent of the white non-Hispanic population. According to the same survey, more than one-third of Puerto Ricans families sampled reported no workers, compared to 9 percent of Mexican American families, a fact that continues to explain the difference in poverty rates and family income between the two groups.

8 State of Ohio, Department of Demographics, *Ohio Social and Economic Characteristics*, 1992.

Income: Closely related to the employment status of Hispanic groups is Hispanic income. Official statistics on the Spanish-speaking population show that its economic position relative to the general population is, and has always been, markedly low. In 1990, for example, the peer capita median income for a white American was $14,049, while the median individual income for the Hispanic was $9,248.1

UnderEmployment: According to various reports by the National Council of La Raza, the Hispanic Policy Development Group, and the United States Commission on Civil Rights report, *Unemployment and Underemployment Among Blacks, Hispanics, and Women* (1982), Hispanics are more likely to be intermittently employed, to accept part-time work, to hold marginal jobs, and to accept jobs in the lower levels of both blue-collar and white-collar employment than non-Hispanic groups.

Impact of Affirmative Action on Hispanic/Latino Community

On August 1, 1995, the Ohio Commission on Spanish-speaking Affairs unanimously approved an affirmative action position letter which states:

The Commission on Spanish-Speaking Affairs supports the principle of Affirmative Action, as representing private and public initiatives designed to help minorities and women become full participants in the economic life of our state and of our nation.

Affirmative Action gives disadvantaged groups and individuals an opportunity for entry into the job market, the commercial environment, and educational institutions, when such groups and individuals have been historically excluded therefrom. Affirmative Action represents opportunity, not advantage, and when such opportunities have been absent, an initiative to correct this exclusion is just, fair, and of great benefit to society.

The Commission on Spanish-speaking Affairs notes that the Hispanic/Latino community in the State of Ohio has not equitably benefitted from those affirmative action initiatives available in our state. While we are unquestionably in favor of such initiatives and are in clear support of those who have benefitted from them, we must continue with our efforts to ensure that the Hispanic/Latino community shares in those opportunities, and that such initiative continue to be made available without dilution or misapplication.

It should be noted that the commission's support of affirmative action initiatives is given with the knowledge that in spite of the experiences and data cited in the preceding pages, Hispanics have been routinely, and perhaps systematically, excluded from consideration by affirmative action programs. In at least two cases, Hispanic Ohioans have been omitted from consideration as having suffered historic discrimination. The 1992 Predicate Study commissioned by the city of Columbus candidly admitted:

> Insufficient evidence of discrimination was collected as part of this study to provide a strong basis in evidence or remedial action for Hispanic, Asian and Native-American-owned firms. Black owned firms comprise about three-quarters of the MBS's in the Columbus MSA, and only a small proportion of firms are Hispanic, Asian, or Native American . . . Also, insufficient anecdotal evidence of discrimination was collected for Hispanics, Asians and Native Americans in the columbus MSA that would support the quantitative evidence of discrimination found for minority-owned firms overall. Despite study team efforts to obtain interviews with a broad cross-section of MBEs, almost all of the interviews to collect qualitative evidence of discrimination were with blacks and with women.[9]

In fact, the authors of the study attempted to divest themselves of the ultimate responsibility for inclusion or divestment of these other minority groups, adding:

> In fact, the research was intentionally designed to remain independent of previous studies of quantitative and qualitative evidence of discrimination. We recommend that the City examine these other sources of information in addition to the Predicate Study in

9 Minority Business Enterprise Legal Defense and Education Fund and BBC, Inc., *Predicate Study, City of Columbus*, August 1992, p. I-39.

weighing the quantum of evidence necessary to proceed with remedial action. Specifically, the City may have or may be able to collect additional qualitative evidence of discrimination that would definitely determine whether remedial action for Hispanic, Asian, and Native American-owned firms is also appropriate.[10]

The findings of the Columbus Predicate study effectively excluded the Central Ohio Hispanic business community from participation in the city's affirmative action initiatives. The city of Columbus did not search for, nor did it offer the "... additional qualitative evidence of discrimination that would definitely determine whether remedial action for Hispanics ..." and other groups was appropriate. Verification of this unfortunate state of affairs, carried out by the commission in April 1996, yielded a response from the Equal Business Opportunity Office of the city of Columbus that "... we don't know how many Hispanic enterprises are doing business with the City, since we don't track them, due to the fact that they were not included in the Predicate Study."[11]

In another case, the city of Cincinnati became bound by the terms of a consent decree regarding policies and procedures for the hiring of police officers.[12] *United States of America v. City of Cincinnati, Ohio* et al., established terms through its consent decree, as in the case of the Columbus Predicate Study, which are exclusive. The decree clearly states:

> It is the purpose and intent of this Decree to insure that blacks and women are not disadvantaged by the hiring, promotion, assignment, and other employment policies and practices of the CPD and that any disadvantage to blacks and women which may have resulted from past discrimination is remedied so that equal employment opportunity is provided to all.[13]

The consent decree further elaborates as to hiring and promotion goals for blacks and women, establishing percentages tied to the 1980 police recruit list—34 percent black and 23 percent female. As in the Columbus case, Hispanics are omitted from the goals, and are perceived as a minority of convenience, being included when the entity in control of the identification chooses to do so.

Such experiences suggest to the Hispanic community that notwithstanding its recognition as a bona fide minority within the national consciousness, and the Federal system, that at the State level, the disadvantages of discrimination are ours to accept as a consequence of being a proportionately smaller minority than within the national arena. As the Columbus City Council stated last year when approached for additional funds for court Spanish language interpreters, "Hispanics? We don't have any Hispanics here. This is central Ohio!"

The impact of this selective identification of Hispanics as a minority for purposes of affirmative action programs is critical for the development of our business community. While the number of Hispanic-owned businesses in the United States has tripled over the last decade, it is doubtful this has occurred in Ohio. It is certainly not the case among Hispanic Minority Business Enterprises (MBEs). The number of Hispanic MBEs in the State as of July 1995 has only increased by 48 percent in the past decade, while the total number of MBEs has appreciatively increased. As of August 1995, there were 113 Hispanic firms now listed in the MBE roster of over 1,420 minority firms. However, a recent analysis by the Commission in July 1995, indicated that only 92 hispanic MBEs, once errors and businesses which have defaulted were disallowed and the list corrected.

Based on the 1990 census, Hispanics comprise 9.3 percent of the minority population of Ohio. The 6.4 percent that Hispanic companies represent of all certified MBEs shows a disparity of 3.1

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10 Ibid., p. I-47.

11 Ohio Commission on Spanish Speaking Affairs, telephone interview with City of Columbus officials, April 1996.

12 The Commission has also been informed by the city of Cincinnati's public safety office that a separate, but similar, consent decree including both police officers as well as firefighters has expired, but its terms are still observed.

13 Consent decree, United States of America v. City of Columbus, Ohio, et al, p. 3.

percent. The figure 6.4 percent should be 9.3 percent. This means that there should be a total of 132 Hispanic companies now registered and certified by the Equal Employment Office (EEO) of ODAS instead of the 92 valid Hispanic companies now registered. For parity to exist for Hispanics, an outreach effort must be brought into being which will attract more Hispanic companies into the MBE program and increase the share of those actively doing business with the State.

The Commission conducted a brief telephone survey among Hispanic MBEs in June 1995. Relying almost exclusively on the results of the Hispanic MBE survey (number surveyed was 92), it was learned that nearly three-fourths (71 percent) are 100 percent Hispanic-owned. The rest are over half Hispanic-owned. Among this group, the bulk were clustered at about the 51 to 69 percent range of ownership.

The Commission was surprised that almost half (45 percent) of the surveyed respondents did not believe they had derived *any* benefit from the MBE certification process. Another group of respondents (21 percent) was not sure about any positive gain from the MBE status. Only one of three respondents (34 percent) could say that "yes," they had benefited from the program. Ironically, more than half of this group had never received a referral for a contract from the MBE Office.

When asked if the business had any major contact with the MBE Office over the past year, most (55 percent) companies said, "no." No company could recall receiving an on-site visit from a representative of the MBE Office. Only one of five business (20 percent) had received a call from ODAS/EEO regrading questions about their application or the need to verify or update their file.

A large number (34 percent) of MBEs were already large, established firms which had also obtained SBA-8(A) certification. This complemented the information on company size as measured by number of employees and/or gross annual revenue. Some 11 percent of the companies had revenues which exceeded $1 million and 24 percent had revenues of about $550,000. Most firms were small. Fifty-two percent operated with an annual gross revenue below $100,000 per year.

As to the geographic area served by the Hispanic MBEs, most firms (59 percent) responded that they were local in focus. At the other extreme, 16 percent of the companies were either national or international in scope. Geographically, most were located in the northeast quadrant of the State. The majority of businesses were either Puerto Rican-owned (25 percent) or Mexican American-owned (35 percent).

Nearly every business was inclined to say "yes" to technical assistance. Many felt they could greatly profit from the expertise. Limited resources did not allow for followup calls to obtain a better idea about suggested topics for technical assistance as well as some of the special needs and concerns of the population. Jose F. Nino, president of the United States Hispanic Chamber of Commerce, has made public statements about Hispanic-owned businesses.

> Hispanic entrepreneurship is not about set-asides. It's about savings, sacrifice, investment, planning, and risk-taking. It's a lot harder to go it alone, then to accept a cushy job as a professional worker. . . . Eliminating affirmative action programs would have a debilitating effect on the Hispanic business community. Without affirmative action programs, there would be no mechanism to monitor the progress or failure of voluntary inclusion; and no methods of accountability or tracking would be in place. Affirmative action, directly or indirectly, has helped Hispanics in America. We don't live in a color-blind society. We still have a long way to go.[14]

The statistics reported by the United States Bureau of the Census and the United States Department of Commerce prove that Hispanics have not come far enough to eliminate affirmative action for historically oppressed groups, nor to eliminate set-aside funding for fledgling businesses. America's past and future has always depended upon successful entrepreneurship. It is a matter of who we are as a Nation and who we become as a business community in the larger global marketplace.

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14 Statement of Jose Nino as reported to the Ohio Spanish-Speaking Commission.

The position of the Commission, based on its August 1, 1995, letter, is not in favor of the elimination of affirmative action initiatives per se, as a response to lower participation by Hispanics, or inappropriate support of Hispanic businesses by the managers of a given plan. The fact that other minorities might have benefited to a greater extent than Hispanics, does not support the argument for elimination of affirmative action as long as this greater benefit was not enjoyed at the expense of Hispanic participation. A better alternative would be the promotion of Hispanic businesses, and the encouragement of their participation in affirmative action initiatives. This includes vigilance, particularly in affirmative action plans in the areas of employment and education, where more assertive representation by Hispanic leadership is essential, lest Hispanics be buried in the forest of "minorities."

Affirmative Action: "Mend It—But Don't End It"

By Sam Thomas, III

I. Introduction

I commend the Ohio Advisory Committee to the United States Commission on Civil Rights for holding this Ohio Consultation: Focus on Affirmative Action. Affirmative action programs, constructed the right way, can constitutionally create equal employment opportunities and an improved quality of life for everyone. Unfortunately, sometimes the disenfranchised people are not even considered in the pool of applicants, and made victims by affirmative action plans that adhere to rigid quotas, have no time lines for ending the program, and sacrifice quality hiring standards. Yes, on occasion, negligent or ill-intentioned and underinformed employers have abandoned meritorious qualities and good faith in giving preference to numerical straightjackets. These isolated abuses of the fundamental principles of fair play and equal protection this country was founded upon have unfortunately become prevailing myths leaving us to believe that all affirmative action programs should be ended.

President Clinton is a strong advocate of affirmative action programs. Last year in a White House Rotunda address, he said affirmative action, which has been around 25 years, should be mended, but not ended.

Today, intentional denial of equal opportunity for employment for minorities and women is a reality despite lawmakers' attempts to remedy the situation. We are faced with an "unemployment rate for African Americans that remains twice that of Whites in our nation. The unemployment rate for Hispanics is still much higher than that of Whites. Women have narrowed the earning gap, but sill earn only 72 percent as much as White men do for comparable jobs," President Clinton said.

Cleveland, Ohio, my home town, is no stranger to this national malady that regulates minorities and women to second class citizenship and a diminished quality of life. I believe that there is a cyclical and interdependent relationship with a person's job, a person's education, a person's place of residence and crime. Because a person's job is perhaps the most important factor in determining his/her access or vulnerability to the other factors that determine that person's quality of life, the struggle for equal employment opportunity has been, and continues to be, a hard-fought civil rights battle.

Prejudicial attitudes of certain white individuals in this country which relegated minorities and women to second-class status formed the underlying assumption for discrimination. Protection from the harmful effects of these unjust and unfounded presumptions has been engendered for victims from the 1866 Civil Rights Act to title VII passed in 1964 to some of the President's current economic initiatives.

There is a significant disparity between how majority and minority groups view employment opportunities. For instance, 90 percent of African Americans and Hispanics rate Cleveland poor on job availability.[1] Six out of ten African Americans believe increasing their employment opportunity is the most important step to improve the quality of life in Cleveland, while only 3 of 10 Whites agree with this statement.[2] Cleveland area residents and leaders support efforts to develop jobs though the nature of their support varies. African American leaders show a high level of support for virtually any type of job creation program. White leaders are supportive of private efforts to develop

1 Greater Cleveland Roundtable, "Race and Ethnic Relations in Greater Cleveland," 1982, p. 99. This was a comprehensive study sponsored by the Greater Cleveland Roundtable as an early step to develop coordinated community strategies to improve the quality of life for all Clevelanders. "Employment is the top concern of Clevelanders, and there is strong support for any job development program." Ibid., at 20.

2 Ibid., at 101.

jobs, but are substantially less enthusiastic about government-oriented job programs, especially actions such as stricter EEO enforcement.[3] The unemployment rate, household income level, and poverty status for Clevelanders reflect even more than the national figures, the effects of the international denial of equal employment opportunity for minorities and women.[4]

II. The Problem

My hometown statistics reflect the kind of living conditions and social environment that encourage criminal activity and the criminals who commit the crimes. Poor living conditions contribute to vulnerable young men and women being pulled into criminal activities at earlier and earlier ages.

A. Poverty

High-poverty areas tend to be made up predominantly of poorly maintained rental housing owned by "absentee landlords" who are not stakeholders in the urban Cleveland community. The families who live in this type of housing are often highly transitory, sometimes moving from one dilapidated housing unit to another every few months. These residential patterns destabilize neighborhoods and socialize residents to a norm of distressed urban living, which includes making them more prone to criminal activity. The children growing up under such conditions of poverty are rightly labeled as "at-risk."

I am not saying that poverty is the only cause of crime. However, I am strongly stating that the hopelessness and despair in our poverty-ridden communities are fundamental factors in the growth of crime and the increase in the number of younger offenders.

The discussion of the relationship between poverty and crime is, of course, hardly new. Over the last two decades, many notable authorities have studied and written on this subject, including Dr. Robert Green in his book, *The Urban Challenge—Poverty and Race* (1995). These experts have concluded that continuing unemployment and poverty pave a direct route to criminal behavior. Dr. Green has also analyzed a similar link between the high rates of unemployment among African American males and the high incidence of crime and imprisonment among this population.

It is my belief that if we do not come up with strategies to improve economic development and employment opportunities for our poorer residents, we will be battling only half the problem. If crime reduction efforts focus only on arrests and prosecutions, we will likely continue to see an increasing number of broken and single-parent homes. We would in effect be fighting against ourselves since such homes, as we know, are one of the main reasons for our rising crime rates.

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3 Ibid., at 171.

4 Unemployment Status for Males
Whites 0.0%
African American 23.5%
Hispanic 18.4%
Average Household Income by Race
White $25,610.00
African American $19,711.00
Hispanic $20,149.00
Poverty Status: Men & Women Below Poverty Line
Male 25.6%
Female 31.3%
Poverty Status Below Poverty Line
White 18.2%
African American 39.1%
Hispanic 40.0%

Source: The Urban Center/College of Urban Affairs, Cleveland State University, from 1990 Census of Population and Housing.

B. Crime

Why is there an increase in violent crime in Cleveland and the State of Ohio? Is it because there has been a considerable decline in income for a large majority of the population, and a decline as well in the opportunity for constructive work? I would suggest the answer is yes. Over the past 20 or 30 years, there has been a considerable increase in inequality. This trend accelerated during the Reagan years (Noam Chomsky, 1994).

The result is an increasing crime rate as well as other signs of social disintegration. Most of the crime is committed by the poor people attacking each other, but it spills over to more privileged sectors as well. People are very worried—and quite properly, because our society is already very dangerous and becoming more so. As violence becomes more prevalent, we are locking up more and more of our citizens. The increase in incarceration is very notable among our young people in Ohio.

The Ohio Department of Youth Services (ODYS) has the second highest institutionalization rate of juveniles in the country, behind California. Fifty-eight percent of the 2,300 youth institutionalized in ODYS facilities are African Americans, while only 16 percent of Ohio's youth population belongs to this racial group. This phenomenon of overinclusion of minority youth in the criminal justice system is not isolated to Ohio, but there is evidence that, nationally, African American youth are four times as likely to be committed to secure facilities as whites (Krisberg, 1990), making it a civil rights issue in need of remedies that the civil rights community can help tailor.

III. Affirmative Action: Search for Equalization

The description of affirmative action as "wholesale disenfranchisement of the opportunities of other presumably deserving Americans occurring simply because they are not minorities or women" is not in fact justified, according to Deval Patrick, Assistant Attorney General for Civil Rights. According to Patrick: "There is no apparent trend of reverse discrimination preferring less-qualified minority or women candidates over more deserving white males. Of all claims of employment discrimination filed in the U.S. Federal court in the last 4 years, only a tiny fraction are claims of discrimination against white men. The Equal Employment Opportunity Commission (EEOC) also reported that fewer than 2 percent of the claims pending in 1995 were claims by white men. They found an even tinier portion of these claims to be meritorious."

Therefore, the prevailing issue concerning affirmative action is not reverse discrimination. The struggle remains how to constitutionally construct equal employment opportunities for everyone that provide a remedy to the problem without alienating *any* of our American citizens.

A. Divided Support

The struggle for equal opportunity in the employment arena has led us to the age of affirmative action as a remedial measure, an age filled with contention and strife. The United States Supreme Court last June rejected the *wholesale disenfranchisement* myth. In a plurality decision, seven justices in *Adarand Construction, Inc. v. Pena*[5] rejected the position of Justices Scalia and Thomas that all affirmative action plans are unconstitutional. Contrary to widespread media reports that *Adarand* was a death knell to affirmative action, the Court in *Adarand* did not strike down affirmative action. Instead, it remanded the case back to the district court for application of the "strict scrutiny" standard to the affirmative action program at issue, thereby reinstating the reverse discrimination challenge filed by a white-owned contractor whose bid was denied despite being lowest bidder. The strict scrutiny standard in this context means that any programs which use race or ethnicity as a basis for decisionmaking must be strictly scrutinized to ensure that they promote a compelling governmental interest and remedies must be narrowly tailored to serve that interest.

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5 115 S. Ct. 2097 (1995).

B. Constitutional Standard

In other words, if the government finds it has a compelling interest in correcting the effects of past and/or present discriminatory practices, it must design a program which is specifically designed to remedy the particular harmful effect. In *Adarand*, this means the lower court was given the opportunity to apply the strict scrutiny standard to the congressional remedial program to examine the rebuttable presumption that Hispanics have been discriminated against in being awarded Federal highway contracts. The compelling interest prong of the strict scrutiny standard focuses on the classifications (race and ethnicity); the narrow tailoring program focuses on the method by which the government goes about achieving the objective of equal opportunity.

The following cases further outline the parameters under which permissible affirmative programs must operate.

C. Case Histories

1. Race as a Factor, Not the Factor

In *Regents of the University of California v. Bakke*[6] the U.S. Supreme Court held that colleges and universities could permissibly consider race as a factor in the admissions process. Nevertheless, Justice Powell said that racial and ethnic distinction of any type are inherently suspect and call for the most exacting judicial examination.

This was the Supreme Court's first significant ruling on a challenge to an affirmative action plan. Allan Bakke challenged a medical school admissions plan that guaranteed a certain number of seats to minority applicants. The university had not argued that the reserved spaces were needed to remedy past discrimination on its part. In a plurality opinion, the Court said that racial classifications are inherently suspect and must be subject to strict scrutiny. With Justice Powell casting the deciding vote, the Court said that attainment of a diverse student body was a permissible goal for an institution of higher learning. The Court found that colleges and universities could legitimately consider race as one factor among others in the admissions process. But the Court said the scheme of allotting seats by race was not narrowly tailored to meet the university's goal and ran afoul of the equal protection clause.

2. Voluntary, Private, Race-Conscious Plan Permissible

In *United Steelworkers of America v. Weber*[7] the U.S. Supreme Court held that title VII of the 1964 Civil Rights Act allows for voluntary, private, race-conscious plans aimed at eliminating racial imbalance in traditionally segregated job category. *Weber* remains the standard by which voluntary, private affirmative action programs are evaluated.

This is the lead case in a private employment setting. It involved an affirmative action plan set up in 1974 under a collective bargaining agreement between Kaiser Aluminum & Chemical Corp. and the United Steelworkers. Craft jobs were almost exclusively white, and the plan reserved half the openings in a newly created on-the-job training program for black employees until the percentage in the plant equaled the percentage of blacks in the local labor force. In the 1979 decision, Justice William Brennan wrote that such a plan is allowable provided it is temporary and does not absolutely bar job opportunities for whites. He stressed the narrowness of the inquiry, because the affirmative action plan did not involve State action, or an alleged constitutional violation, and because the case did not present the issue of what a court might order to remedy a past proven violation of the act. According to Brennan, "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action."[8] He explained that although Title VII

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6 438 U.S. 265 (1978).

7 443 U.S. 193 (1979).

8 443 U.S. at 207.

does not require an employer to adopt an affirmative action plan, it also does not prohibit voluntary plans to give preferences on the basis of race. But qualifications, he said, must remain the controlling factor in making employment decisions.

3. Congressional Deference

In *Fullilove v. Klutznick*[9] the U.S. Supreme Court upheld a 10 percent set-aside program for minority-owned businesses in the Public Works Employment Act of 1977. Congress' authority to eliminate barriers to equal employment opportunities and contracting opportunities was given deference.

This was a challenge to a remedial race-based action undertaken by the Federal Government. The plurality opinion said that any preference based on race "must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." However, it did not explicitly adopt the strict scrutiny test set forth in *Bakke*. Instead, it focused on whether the objectives of the program were within Congress' power and whether the program, in the context presented, was a constitutionally permissible means for achieving Congress' objectives.[10]

4. Race-Based Layoffs and Societal Discrimination

In *Wygant v. Jackson Board of Education*[11] the U.S. Supreme Court, in a plurality decision, held that a school board's interest in providing minority role models for minority students is not compelling enough to justify use of race-based layoffs. The Court reasoned that a laid off white schoolteacher, who had greater seniority than another minority teacher who had been kept on, had a vested interest in maintaining her job which was not overcome by the school board's interest in promoting racial diversity among its teachers.

The court was faced with the actions of a school board that gave minorities preferential treatment in layoffs. The plurality opinion reasoned that layoffs are different from hiring and promotion decisions because the effect of the policy is felt by particular individuals rather than unknown persons dispersed among the general population as a whole. The court suggested that affirmative action by State and local governments will not be sufficiently compelling if its purpose is to remedy "societal" discrimination. In so doing, however, the court reaffirmed its position that an affirmative action plan need not be limited to remedying specific instances of identified discrimination.

5. Race-Based Promotions and State Discrimination

In *U.S. v. Paradise*[12] the U.S. Supreme Court upheld the district court order that reserved for blacks 50 percent of promotions in Alabama State police force based on evidence showing that the State had never hired black troopers until being sued in the early 1970s. The court reasoned that this remedial program was narrowly tailored to meet and correct past government discrimination, a compelling State interest.

This case is used as an example of the type of ongoing racism that justifies an affirmative action program that will survive the current strict scrutiny standard. In this ruling, "every justice of this court agreed that the Alabama Department of Public Safety's 'pervasive, systematic, and obstinate discriminatory conduct' justified a narrowly tailored raced-based remedy."[13]

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9 448 U.S. (1980).

10 *Ed. note.* This opinion was criticized by Adarand Constructors, Inc. v. Pena, U.S. 115 S. Ct. 2097 (1995).

11 476 U.S. 267 (1986).

12 480 U.S. 616 (1987).

13 Adarand Constructors, Inc. v. Pena, 115 S. Ct. at 2117.

6. Gender as a Factor in Promotions

In *Johnson v. Transportation Agency of Santa Clara County*[14] the U.S. Supreme Court held that the standards proffered in *Weber* were applicable to challenges of affirmative action policies directed at women. A county agency was allowed to use gender as factor in promotions. Policies directed towards reserving some higher level positions for women were deemed to be permissible.

This was a voluntary affirmative action plan implemented by a State agency, which had found that women were represented in five out of seven job categories in percentages far less than their proportion in the county labor force. The plan was designed to remedy the underrepresentation of women in jobs where they had not been traditionally employed and where they had not been strongly motivated to seek training or employment because of limited opportunities. The Court, in allowing gender to be used as a factor in promotions, said that the plan directed that numerous factors be taken into account, including the qualifications of female applicants for particular jobs, and found that the plan was designed to eliminate work force imbalances in traditionally segregated job categories. The Court held that there were at least two permissible reasons for employers to adopt such plans: as in *Weber*, to remedy a clear and convincing history of past discrimination, and as Santa Clara County did, to cure a manifest imbalance in the work force. The Court found that the plan resembled the one in *Bakke* to the extent that sex was one factor among other criteria, and because no person was automatically excluded from consideration. It stressed that Johnson, as a male employee, had no absolute entitlement to the job he sought, and that (although he had scored 2 points higher during an oral interview) denial of the promotion did not unsettle any "legitimate, firmly rooted expectation."[15] The plan, it said, was designed to "attain a balanced workforce, not maintain one."

7. Strict Scrutiny Standard of Review Established

In *City of Richmond v. J.A. Croson Co.*[16] the U.S. Supreme Court struck down a city program requiring 30 percent of its contracting work to go to minority-owned businesses. This was the Court's first application of the strict scrutiny standard of review to race-conscious State and local remedial programs.

The Court displayed a new measure of cohesiveness in issuing a majority opinion to strike down the program based on Justice Sandra Day O'Connor's ruling that all race-based actions must survive strict scrutiny. Justice O'Connor's ruling also stated, however, that States and localities do have the authority to eradicate the effects of private discrimination within their own boundaries.

8. Intermediate Standard of Review Established

In *Metro Broadcasting, Inc. v. Federal Communication Commission*[17] the U.S. Supreme Court upheld two Federal race-based policies against a fifth amendment challenge by holding the congressionally mandated "benign" racial classifications need only satisfy intermediate scrutiny. It upheld FCC regulations that gave preferential treatment to minority broadcasters.

The Court surprised onlookers by applying a more lenient standard to a minority set-aside program instituted by the Federal Government. The majority opinion found that benign Federal racial classifications, even those not specifically aimed at redressing past discrimination, are constitutionally permissible if they serve important governmental objectives and are substantially related to the achievement of those objectives. The aim of the regulation—broadcast diversity—rises

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14 480 U.S. 616 (1987).

15 480 U.S. at 638.

16 488 U.S. 469; 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

17 490 U.S. 547 (1990).

to the level of an important governmental objective.[18]

9. Return to Strict Scrutiny

In *Adarand Constructors, Inc. v. Pena*[19] the U.S. Supreme Court applied strict scrutiny to an affirmative action program and reinstated a reverse discrimination challenge filed by a white-owned contractor despite being lowest bidder. *Adarand* was remanded to the lower court for application of the strict scrutiny standard to the congressional remedial program to examine the rebuttable assumption that Hispanics have been discriminated against in awarding Federal highway contracts. Contrary to prevailing myths, this decision did not unequivocally end affirmative action.

Adarand Constructors, Inc. lost a Colorado highway construction project bid from the prime contractor even though it had submitted the low bid. The job was awarded to a company that qualified as a minority-owned disadvantaged business enterprise (DBE) under Federal laws governing the project. While the prime contractor was not compelled to subcontract any work to minority-owned DBEs, it received "compensation" of about $10,000 from the Federal Government for doing so.

Adarand claimed that the provisions authorizing the bonus violated the equal protection component of the fifth amendment. After Adarand's requests for injunctive relief were denied in the lower courts, the contractor successfully petitioned for Supreme Court review. In determining that strict scrutiny should govern all racial classifications, including those authorized by Congress, the majority rejected the rationale for giving more leeway to benign racial classifications. Justice O'Connor, claiming that so-called preferences may not be benign, but may be motivated by illegitimate notions of racial inferiority or racial politics, found that Federal and State racial classifications must be judged by the same standards. All racial classifications must be viewed with skepticism, and consistent treatment is required regardless of the race of the burdened or benefitted group—the fifth and 14th Amendments "protect persons, not groups," she said.

IV. Reverse Discrimination

Justice O'Connor, however, took pains in *Adarand* to suggest that a carefully crafted affirmative action program aimed at pervasive continuing discrimination may withstand a reverse discrimination challenge and stated that the persistence of "both the practice and lingering effects of racial discrimination" in this country will in some cases justify a narrowly tailored race-based remedy. In contrast to *Croson*, the court did not strike down the minority contractor program at issue in *Adarand*. Rather, Justice O'Connor ordered the lower court to consider the program under strict scrutiny. Thus, she gave the government the opportunity to argue that the subcontractor compensation clauses were motivated by a compelling governmental interest and that they are limited enough to satisfy the narrow tailoring requirement.

V. Application of Strict Scrutiny Not Fatal in Fact

Outside of the Federal contracting arena, *Adarand*'s most important impact may be in its reiteration that even so-called "benign" discrimination to right past wrongs must be viewed with deep suspicion. While lower courts have been applying strict scrutiny to State and local programs since 1989, in the wake of the *Croson* decision, courts considering such programs after *Adarand* are likely to focus on the Supreme Court's refusal to make any exception to strict scrutiny. Nevertheless, the new blow to affirmative action may be tempered by Justice O'Connor's rejection of the notion that strict scrutiny is always fatal. Despite its breadth, the court's ruling in *Adarand* provides little new guidance on what must be shown to establish a compelling governmental interest. *Adarand* leaves open the possibility that the goal of racial diversity may be compelling enough to

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18 *Ed. Note*, this case was overruled, in part, by Adarand Constructors, Inc. v. Pena, _U.S._, 115 S. Ct. 2097 (1995).

19 115 S.Ct. 2097 (1995).

survive strict scrutiny where there has been a history of long term, systemic discrimination as I noted in *Paradise*.

VI. Conclusion

Historic discrimination that has the current effect of lower employment and wage levels among minorities and women as compared to white men, and the resultant decrease in the quality of life for the individual victims, their families and society in general should always create a compelling government interest. Nonetheless, supporters of affirmative action should be the first to decry those programs and remedial orders that disenfranchise nonminorities and men by using quotas, other rigid hiring guidelines, and no timelines to end programs.

I suggest that the use of these ill-intentioned or uninformed approaches decrease the moral support given affirmative action. If we exclude some citizens from the pool of candidates being considered for employment opportunities, such acts do not diminish in the long run the magnitude of the harmful effects minorities and women have experienced, but unlawfully discriminate against yet another group, and further distance would be supporters from seeing the insidious results of discrimination such as poverty and crime.

Support for a countrywide moral force that values diversity in the workplace, without the need for external laws and programs, is the desired goal. But this can only occur in an environment where all of our citizens feel they are equally protected. Affirmative action programs do not provide the cure America requires. They deal only with the symptoms and not the attitudes that manifest themselves into the denial of equal employment opportunities for minorities and women. America needs to live up to its goal to achieve equality of employment opportunities and remove barriers to the same. *Adarand* makes it necessary to evaluate Federal programs that use race or ethnicity as a basis for decisionmaking to determine if they comport with the strict scrutiny standard. No affirmative action program should be suspended prior to such an evaluation.

Affirmative Action and Misconceptions in the National Debate

By Marvin A. McMickle

The national debate about affirmative action, especially among those who urge that such programs be abandoned, misses the point in two specific ways. First, opponents fail to recognize that affirmative action is not being proposed because black Americans have not and will not show any initiative in making their own way in our society. Quite the opposite is the case.

The history of blacks in America is replete with the accounts of remarkable achievement in education, business development, personal achievement, and group collaboration. Black people, by and large, are not waiting around for either a "government handout" or for a lowering of standards that allows them access to institutions and resources they would otherwise be unqualified to obtain.

The second misconception about affirmative action programs and guidelines is that without them, black- and female-owned firms in America would remain locked-out of pursuing contracts and providing services of every type. But because of affirmative action guidelines, most notably in terms of providing goods and services to companies and agencies that are tied to public sector funding, minority firms have been allowed to demonstrate their abilities, have been enabled to grow and expand in ways that allow for job creation, and have strengthened those minority firms to the point where they can compete without any further need of affirmative action assistance. But if the policies had not first been in place, those results would never have been able to occur.

Affirmative action programs have called attention to several problems within American society that some persons may not want to address. Affirmative action programs exist because racial bias in hiring and job advancement still exists. Here in Cleveland, even on those construction projects where public sector funds were used and where minority hiring and the use of minority-owned firms was strongly urged, it required daily monitoring and constant pressure to get labor union halls to send black members to job sites on a fair and equitable basis. Persuading majority-owned firms to enter into joint ventures with smaller, but highly competent minority-owned firms required no less effort

Without the pressure that affirmative action guidelines provide, most attempts to bring black and female workers to a job site and to bring minority-owned firms into the construction management trailers would have met with considerable less success. This is not, moreover, simply private opinion. The difference in the numbers of minority workers and minority-owned firms on the Gateway Economic Development project in Cleveland compared to all of the major construction projects that have occurred since that time show startlingly different numbers. Without some policy guidelines and some sense of outward pressure, racial and gender bias will continue to block the door to equal opportunity for many Americans.

Affirmative action opponents give the impression that the fault with underrepresentation of minorities at various points in America lies with the minorities themselves. This has been especially hinted at where black people are concerned. The code words and slogans abound.

"If they would only get off of welfare and go out and look for a job." This, of course, ignores the fact that the majority of Americans on welfare are white.

"They only got this job or this promotion or this enrollment in a school because of affirmative action." This, of course, fails to acknowledge that black people have been steadily advancing in this country since the end of slavery in 1865. Affirmative action guidelines are less than 20 years old. So persons above the age of 35 made their way though college and into the work force long before any such guidelines ever existed.

There was no affirmative action in 1787 when Richard Allen and Absalom Jones and other free blacks, many of whom worked extra hours as slaves to buy their own freedom, organized the Free African Society in Philadelphia, Pennsylvania. This mutual aid society, an early type of insurance company, served a host of financial needs for free blacks at that time, and spun off many similar groups throughout the region.

There was no affirmative action for C.C. Spaulding who turned North Carolina Mutual Life Insurance Company into the nation's largest black-owned business between 1905 and 1950. There was no affirmative action for Madame C.J. Walker and her line of cosmetics for black women, or for Maggie Walker who started a newspaper and an insurance company in 1924. There was no affirmative action for John H. Johnson when he began publishing magazines. There was no affirmative action for Berry Gordy and Motown records.

It is a great disservice to the courage and competence of black entrepreneurs and an intentional distortion of history to let stand the notion that black achievement has not occurred without recent government-mandated programs of affirmative action.

What affirmative action programs have done for black people is not initiate their ambitions or their achievement. Rather these programs have helped unlock doors long kept shut by blatant and subtle forms of racial bias. Behind those shut doors were resources and opportunities available to white Americans, but denied to black Americans largely on the basis of race. Not competence. Race. Not lack of initiative. Race. Not lack of qualifications or credentials. RACE!

The problems that black people in America have faced need to be clearly stated. They begin with a lack of equal access to lending institutions for purposes of adequate capitalization. They extend to a measurable reluctance on the part of white owned firms to do business with firms owned by black entrepreneurs.

No handouts are being requested. What is being requested is only an opportunity to compete for contracts, to be given ample notice about request for proposal and request for qualifications announcements. None of this has one thing to do with the ability or the existence of black-owned firms. This has to do with the way in which, and the people with which, white-owned firms choose to do business. Affirmative action programs seek to widen the circle of participants in the workplace. Such programs are as needed today as ever.

Another area where affirmative action has resulted in a howl of protest is in the field of education, especially as it concerns admission to graduate schools. Recently, the University of California Board of Regents and the trustees of the University of Texas have been at the center of this debate.

It needs to be plainly stated as a point of departure, that no amount of affirmative action in the 1990s will ever compensate for the inadequacies and inequities and injustices heaped upon black people in the field of equal access to quality education. This is not an issue of still asking white people in the 1990s to bear responsibility for the sins of their great, great grandparents before 1865. Racial bias and the exclusion of black people from almost every benefit of American citizenship did not come to a screeching halt with the 13th, 14th, and 15th Amendments. It was not until the Civil Rights Act of 1964 and the Voting Rights Act of 1965 that America began to take baby steps toward ending its policies of bias and discrimination based solely upon race. The national habit of bias that have been in place since 1619 have not been, probably cannot be erased in 30 years. What erasure has occurred has been a result of national policies that were forged out of the crucible of the civil rights movement. Even then there was great resistance, sometimes bloody resistance to change.

It is baseless to argue that American society will, of its own free will and volition, choose to be more inclusive in the way it admits persons to classrooms and worksites. It is mind-boggling to believe that any persons in this country could now believe that three centuries of repressive discrimination built upon the tripartite system of poverty, segregation, and political powerlessness, has been ameliorated in the last 30 years. We are where we are in this country not at all because of the changing sentiment of public opinion, but because of social policies adopted at the Federal level—from the abolition of slavery, to the segregation of public schools, to the forced ending of segregation in public transportation, to equal access to and opportunities within the American workplace and classrooms.

The 1965 Voting Rights Act had to be extended for another 20 years in 1985 because instances of racial bias still existed. Another review will be held of that act in 2005. Perhaps at that time the practices that necessitated its existence will have passed away. Until then, the Federal Government must continue to monitor and mandate in this area.

Similarly, programs of affirmative action in classrooms and workplaces should regularly be reviewed to see if they are still needed. However, what should indicate the need to end those programs is not the discomfort or displeasure they produce for those who oppose them, but the elimination of the instances of bias based upon race or gender that made such policies and programs necessary in the first place.

Ohioans Oppose Preference Programs Based on Race or Gender

The Ohio Poll*

Ohioans are firmly opposed to preferences for women and for minorities in hiring and promotion. Opposition to preference in hiring and promotion has increased over the past year. These findings are based on the latest Ohio Poll, conducted by the Institute for Policy Research at the University of Cincinnati.

In the past year the issues of preference programs, set-asides, and quotas have risen to the forefront of the political debate across the country. Two recent events illustrate that the concept of preferences for minorities and women is under attack—in California, an anti-preference initiative will be on the November ballot and looks likely to pass. Also, the U.S. Court of Appeals for the Fifth District recently barred the University of Texas law school from using race as a consideration when admitting students. Closer to home, the Ohio Legislature and Governor Voinovich are currently debating changes in Ohio's affirmative action programs.

Opposition to preferences in hiring and promotion of minorities among Ohioans is strong. In the most recent Ohio Poll, 16 percent of Ohioans say they favor preferential hiring and promotion of African Americans, 75 percent oppose, and 9 percent are not sure. Opposition to preferences in hiring and promotion of African Americans has increased from 69 percent in June 1995. Even among African Americans, support for preferential hiring of African Americans has declined from 65 percent in June 1995 to 49 percent today.

Ohioans are similarly opposed to preferences in hiring and promotion of women. Twenty-four percent of Ohioans favor preferential hiring and promotion of women, 69 percent oppose, and 7 percent are not sure. Opposition to preferences in the hiring of women also increased significantly from 62 percent in June 1995.

Affirmative action may become an issue Republicans push in the 1996 campaign because it is a "wedge" issue that divides Democrats. White Democrats oppose preferences for African Americans (72 percent to 20 percent) and for women (66 percent to 28 percent). African Americans support them for African Americans (49 percent to 41 percent) and for women (51 percent to 45 percent).

Republicans are much more unified in their position on preference programs—86 percent oppose programs that give preference to African Americans and 79 percent oppose programs that give preference to women.

White women as well as white men are strongly opposed to preference programs for African Americans. Eighty-three percent of white male Ohioans are opposed to preference programs for African Americans while 75 percent of white women oppose these programs.

White women are also opposed to preference programs designed to help women—69 percent of white women oppose preference programs for women while 77 percent of white men oppose these programs.

In short, the most important group of Ohioans that support preference programs are African Americans. Because the African American vote is crucial to the election chances of Democrats, the party must find a way to avoid alienating either African Americans or white Democrats on this issue, and that is no easy task.

These findings are based on the most recent Ohio Poll conducted by the Institute for Policy Research at the University of Cincinnati from March 18 through March 27, 1996. A random sample of 860 adults from throughout the State was interviewed by telephone. In 95 of 100 cases, the statewide estimates will be accurate to plus or minus 3.3 percent. Results reported for subgroups

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* The Ohio Poll is sponsored by the *Cincinnati Enquirer*, WLW-TV, and the University of Cincinnati. The poll was conducted by, and provided to the Ohio Advisory Committee, by Alfred J. Tuchfarber and Andrew E. Smith, Institute for Policy Research, University of Cincinnati. The name *"Ohio Poll"* is registered with the Ohio Secretary of State. The *Ohio Poll* on affirmative action was released on Apr. 7, 1996.

have potential for somewhat larger variation than those for the entire population.

Respondents to the Ohio Poll were asked:

> Next, some people say that because of past discrimination, *African Americans* should be given preference in hiring and promotion. Others say that such preference in hiring and promotion of *African Americans* is wrong because it discriminates against whites. What is your opinion—do you FAVOR of OPPOSE preferential hiring and promotion of *African Americans*? (IF FAVOR): "Do you favor preference in the hiring and promotion of *African Americans* STRONGLY or NOT STRONGLY" (IF OPPOSE): "Do you oppose preference in the hiring and promotion of *African Americans* STRONGLY or NOT STRONGLY" (IF NEITHER, NOT SURE, DK): "Would you say that you *lean* a little more toward FAVORING or OPPOSING preferences in the hiring and promotion of *African Americans*?"
>
> Next, some people say that because of past discrimination, *women* should be given preference in hiring and promotion. Others say that such preference in hiring and promotion of *women* is wrong because it discriminates against men. What is your opinion—do you FAVOR of OPPOSE preferential hiring and promotion of *women*? (IF FAVOR): "Do you favor preference in the hiring and promotion of *women* STRONGLY or NOT STRONGLY" (IF OPPOSE): "Do you oppose preference in the hiring and promotion of women STRONGLY or NOT STRONGLY" (IF NEITHER, NOT SURE, DK): "Would you say that you *lean* a little more toward FAVORING or OPPOSING preferences in the hiring and promotion of *women*?"

Support for Preference Programs for African Americans

	Favor	Neither/Not Sure	Oppose
Statewide	16%	9%	75%
Democrat	26	8	66
Independent	8	22	70
Republican	9	5	86
Registered voter	14	8	78
Not registered	23	11	65
Republican core voters	5	4	91
Swing voters	10	11	79
Democratic core voters	25	10	65
Liberal	25	9	66
Moderate	16	9	74
Conservative	12	5	83
Union household	15	5	80
Non union household	17	10	73
Male	14	8	78
Female	18	10	72
White male	10	7	83
White female	15	10	75
African American	49	10	41
18 to 29	23	8	69
30 to 45	17	5	78
46 to 64	11	8	80
65 and over	14	18	68
Less than high school	29	18	52
High school graduate	14	8	78
Some college	15	6	79
College graduate	12	5	83
Less than $20,000	27	14	60
$20,000 to $39,999	15	7	77
$40,000 to $59,999	12	3	85
$60,000 or more	14	1	86
Protestant	17	10	74
Catholic	14	7	79
Cincinnati area	18	12	70
Cleveland area	20	8	71
Columbus area	14	10	77
Dayton area	12	6	82
Other area	13	8	78

Support for Preference Programs for Women

	Favor	Neither/Not Sure	Oppose
Statewide	24%	7%	69%
Democrat	33	6	61
Independent	15	16	69
Republican	16	4	79
Registered voter	22	6	72
Not registered	30	10	60
Republican core voters	12	3	85
Swing voters	16	9	75
Democratic core voters	35	6	59
Liberal	33	12	55
Moderate	25	5	70
Conservative	17	4	79
Union household	20	5	75
Non union household	25	8	67
Male	19	7	74
Female	28	7	65
White male	16	7	77
White female	24	7	69
African American	51	4	45
18 to 29	27	9	64
30 to 45	22	3	75
46 to 64	22	6	72
65 and over	26	12	62
Less than high school	39	14	48
High school graduate	22	7	720
Some college	22	5	73
College graduate	17	3	80
Less than $20,000	44	9	47
$20,000 to $39,999	22	6	72
$40,000 to $59,999	15	1	83
$60,000 or more	17	2	80
Protestant	24	7	69
Catholic	19	6	75
Cincinnati area	23	8	69
Cleveland area	27	6	67
Columbus area	25	7	68
Dayton area	22	5	73
Other area	20	9	72

Support for Preference Programs for African Americans (All Ohioans)

	June 1995	March 1996
Favor	24%	16%
Neither/Not Sure	7	9
Oppose	69	75
	(N = 869)	(N = 841)

Support for Preference Programs for Women (All Ohioans)

	June 1995	March 1996
Favor	32%	24%
Neither/Not Sure	7	7
Oppose	62	69
	(N = 869)	(N = 840)

City of Columbus Predicate Study Summary—Construction, Goods, and Services

By Melinda Carter and Gwendolyn Rogers

Historical Perspective

The city of Columbus, Ohio, has a long history of enacting and implementing affirmative action policies and legislation with the goal of creating a nondiscriminatory community for all citizens. From the Equal Employment Opportunity code to the Equal Business Opportunity Code, the city has been at the forefront of assuring fair equity in its official, administrative, and operational actions.

In 1975 the city commenced formal affirmative action efforts relative to city contractors and vendors via ordinance number 810-75, which created title 39 of the city of Columbus code. Initially the goal to title 39 was to promote the utilization of minorities in each job classification based upon the minority population within the standard metropolitan statistical area. Additionally title 39 prohibited discrimination by contractors doing business with the city in their internal hiring practices.

In November 1981, the city of Columbus enacted ordinance 2337-81, which was designed to thoroughly overhaul the city's affirmative action program. The ordinance amended the city's program by expanding it to include a requirement for female participation and by enumerating specific minority work force participation goals. For example, construction contractors doing business with the city were required to maintain a work force of a minimum of 10.6 percent minority and 6.9 percent female participation. Nonconstruction contractors were to maintain a work force with employment levels at least 50 percent minority and 20 percent female levels. Further, dollar expenditures in construction and nonconstruction contracts in subcontracting were established by ordinance 2337-81 at 10 percent minority and 2 percent female. In response to this legislative expansion of the city's code, the division of minority and female business development was created in May 1983.

In January 1989, ordinance number 29-89 was enacted by the city council to increase the city's contracting employment percentage goals to 21 percent for minorities and females in nonconstruction contracts such as goods and services. However, on the same day of January 1989, the United States Supreme Court struck down the city of Richmond, Virginia's minority utilization plan in the case of *J.A.Croson v. Richmond, Virginia*[1] on the basis that the program was a violation of the equal protection clause of the 14th amendment. The Court's ruling emphasized that Richmond had failed to demonstrate a rational basis for its minority set-aside program enacted by the city of Richmond because no factual predicate had been established to justify the program. In *Croson* a majority of the Supreme Court justices agreed on a "strict scrutiny" standard of review for affirmative action plans adopted by State and local government entities.

Impact of the Croson Decision

The city of Columbus understood the *Croson* decision to have a widespread impact on affirmative action efforts nationwide, since it presented a new standard by which to develop and implement these programs. The city of Columbus took the strict scrutiny standard adopted by the Court to mean that such programs had to be predicated upon a finding of ongoing effects of past and/or present discrimination which then formed a compelling basis for governmental intervention to remedy the discrimination. i.e., the Court ruled that for affirmative action programs to pass constitutional muster, the enacting entity had to first document whether a pattern or practice of discriminatory conduct existed in its contracting his-

1 488 U.S. 469 (1989).

tory prior to instituting such a program since the purpose of the program had to be corrective.

Previously, an actual "finding" of discrimination had not been necessary since Congress had long since entered into its official records not only the directly debilitating effects of the institution of slavery but had documented the adverse and negative impact of racist "Jim Crow" segregationist laws that had historically been the "law of the land" both officially and unofficially for so long. The negative and oppressive effects of these institutions on the opportunities of its victims, specifically, African Americans, throughout the systems of commerce and trade and especially in the contracting industry had been thoroughly and unquestionably documented and accepted.

The *Croson* case and subsequent rulings of the Court further refined the condition under which affirmative action programs were to be established. Those refinements included that such programs be narrowly tailored to address specific identified findings of discrimination and that they should include a sunset provision so that the remediation efforts were not indefinite.

Accordingly, as a result of the Supreme Court *Croson* ruling in September of 1989, the city of Columbus suspended its affirmative action program by deleting the contracting percentage goals via Ordinance number 2322-89. This action was not only taken in order to bring the program in compliance with the *Croson* standard, but also in response to a legal challenge on the issue in the case *AGC v. City of Columbus*. Like the *Croson* case, the primary issue in the *AGC* case was whether title 39 violated the equal protection clause of the 14th amendment to the Constitution of the United States.

Thus, in compliance with the Croson ruling, in 1990 the city of Columbus hired consultants to perform exhaustive research and analysis of its contracting and vendor payment records to ascertain whether the city had a history or pattern of discrimination in its contracting practices. The principals of the predicate study team were attorney Franklin Lee of the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF), attorney Keith Wiener of Holland and Knight (formerly Webb and Daniel), and David Keen of BBC Research and Consulting (formerly Brown, Bortz, and Coddington, Inc.)

Results of the Predicate Study

In August 1992, the city of Columbus predicate study was formally presented to the members of city council and the administration. Based upon the consultants analyses of both anecdotal and statistical evidence, which included public hearings, surveys, and testimonies, the conclusion was that the city had participated in discriminatory practices and that, as well, marketplace discrimination was still prevalent in the area. Therefore, to remedy the findings of discrimination and on the basis of the predicate study and other evidence, the Columbus City Council sponsored legislation revising title 39 of the Columbus City Code by enacting Ordinance Numbers 2346-93 through 2305-93 on January 5, 1994.

The legislation was historic for several reasons. First, because it was one of the first in the Nation that was based on a "predicate study" (actually a series of predicate studies including employment, management, and supplemental studies). Second, because of the body of evidence not only conclusively indicated that African Americans and females had been discriminated against, but also that they had been adversely impacted by the discrimination found within the city's contracting patterns and practices. Further, the findings and evidence of the predicate study demonstrated that these two classes were overwhelmingly victimized by discrimination in the contracting arenas due to the fact that less than 1 percent of the contracts had been awarded to minority and female vendors within the approximate 10-year purview of the study.

While the predicate study team originally sought to include all segments of the contracting community in its various reviews, the response from the Asian American and Hispanic communities was negligible, which precluded their inclusion in the findings, and thus, title 39. These communities have protested their exclusion and negotiated for consideration of inclusion in the program by agreeing to submit to the predicate study process via the same analysis of anecdotal, statistical, and analytical evidence as did the other participants. The results of this study were recently released, but the city has yet to reach a conclusion on the data.

Present Status

Currently, the Equal Business Opportunity Commission Office (EBOCO) is in the process of organizing, prioritizing, and implementing certain provisions of title 39, under the leadership of its executive director. Specifically, because the goods and services section of the contracting program was not challenged as part of the *AGC* case, the city is responsible for its immediate implementation. At this time the office is awaiting the court's ruling on the construction portion of title 39, article 3 (CCC. section 3920-3928). Once an order is issued regarding these provisions and their compliance with the Supreme Court's "strict scrutiny" standard, EBOCO will be able to move forward with implementation of this section of the Columbus City Code. While the consultants recommended that the EBOCO be structured as independently as possible to "depoliticalize" the agency and increase its chances for effectiveness, it was originally structured as a "division" under the direction of an "administrator" in the department of administrative services. Effective May 1995, the office was reorganized as an independent commission office under the mayor's office.

In addition, the code empowers an Equal Business Opportunity Commission (EBOC) with functions of overseeing, advising, and insuring the enactment of title 39. The majority of the commissioners were appointed and approved by the mayor and members of city council and have been meeting regularly since organizing and appointing officers. The EBOC assists the city in meeting its minority and female contract goals by providing outreach efforts, acting as a technical resource clearinghouse, offering financial bonding assistance, contract resolution, and dispute resolution. When a contract for goods and services is to be let, the equal business opportunity commission examines the contract noting whether the contract recipient is a minority- or female-owned firm, and whether such firms are available in the area. Further, if the contract is let to a nonminority-nonfemale-owned firm, the commission can set specific minority- or female-owned subcontract goals on the contract, given the availability of such firms. Contracting firms failing to either meet their minority and female subcontracting goals or provide good faith reasons why such goals were not met, can have their contracts disallowed.[2]

Participant Firms

To become a participant firm in the city's affirmative action set-aside program, the business must undergo a strict certification process. Staff of the equal business opportunity commission check tax records, ownership, employment, and general financial stability. Qualifying firms must have been in business at least 3 months. A report on the firm and its eligibility is sent to a certification committee, which votes on program certification for the business.

Race and gender based goals and timetables by a municipality are necessary and essential for justice to be achieved. Often minority- and female-owned firms may not have the resources to defend themselves with respect to unfair business practices that preclude them from equal business participation opportunity in the community. Moreover, even for those firms with the resources to engage in such legal battles, as a protracted legal battle may continues for years, a firm may be out of business by the time there is a resolution. A more appropriate tactic is to encourage and execute an inclusive policy of government contracting, which is a much more immediate and just solution.[3]

Conclusion

While the city's affirmative action process has been a laborious and continuing one, it has steadfastly pursued fairness and equity in its contracting practices consistent with the legal precedent and guidelines as interpreted by legal counsel in this matter. The cost of the predicate study process has reached approximately $1 million to

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2 The statements in this paragraph are not part of the predicate study, but are from Melinda Carter to the Advisory Committee.

3 The statements in this section are not part of the predicate study, but are from Melinda Carter to the Advisory Committee.

date, yet the city council has appropriated the necessary funds and not wavered in its commitment to ensure an unbiased and equitable contracting system open to all its citizens.

Note: Melinda Carter presented this paper to the Advisory Committee at the consultation. A predicate study is an analysis of patterns and practices of discrimination in order to justify local government affirmative action programs. The complete study is on file with the Equal Business Opportunity Commission Office, Columbus, Ohio.

IV. Position Statements on Affirmative Action from National Organizations

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

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* This paper was solicited through Robert C. Harrod, executive director of the Greater Cincinnati Region of The National Conference. This article was researched and edited by Juan F. Otero, public policy fellow of the 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 Greater Cincinnati or national offices of The National Conference.

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 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 discrimination. 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.

Position Statement of the Anti-Defamation League on Affirmative Action to the United States Commission on Civil Rights

Provided by Clifford Savren*

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, retraining, 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, govern-

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* Clifford Savren is the director of the Northern Ohio Regional Office of the Anti-Defamation League and provided this paper to the Advisory Committee. 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.

mentally 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 conviction 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
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 this 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 Office of 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.

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. 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.

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-

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1 Ibid., p. 146.

2 *1991 Journal of General Convention*, pp. 90 and 540.

3 Ibid., p. 382

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]

In 1988, the standing commission on the Church in metropolitan areas, in its report to the

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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.

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.
(8) Request a pastoral letter on the sin of racism from the House of Bishops.[10]

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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.

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.

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10 Ibid., p. 146.

11 *1991 Journal of General Convention*, pp. 90 and 540.

12 Ibid., p. 382

National Association of Manufacturers Position Statement on Affirmative Action

The National Association of Manufacturers*

Subject: Affirmative Action

The National Association of Manufacturers 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.

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* 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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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).
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"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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Loeb, Harlan A., *see* "Position Statement on Affirmative Action to the United States Commission on Civil Rights" (Illinois, Indiana, Michigan, Ohio, Wisconsin).
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Kreiter, Nancy, "Affirmative Action: A Critically Important Policy" (Illinois).
LaGrone, Jacqueline H., "Affirmative Action Controversy" (Indiana).
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LeBlanc, H. Paul III, "Plurality and Affirmative Action: The Social Requirement of Diversity" (Illinois).
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Lunn, John, "Affirmative Action Versus Markets as a Remedy for Discrimination" (Michigan).
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Malayang, Ann E.Y., "Affirmative Action and the Asian Pacific American Community" (Michigan).
Manion, Maureen, "Affirmative Action: Pushing Equal Opportunity" (Wisconsin).
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Ratner, Hedy M., "An Economic View of Affirmative Action" (Illinois).
Reeves, Thomas C., "Affirmative Action as Discrimination: An Historian's View" (Wisconsin).
Rouls, Charles and Winifred K. Avery, "Michigan Department of Civil Rights Review of State Affirmative Action Programs" (Michigan).
Robinson, Larry, "Affirmative Action Set Asides: Bad Programs" (Ohio).
Rogers, Gwendolyn and Melinda Rogers, "City of Columbus Predicate Study Summary" (Ohio).
Rosenberg, Samuel, "Affirmative Action: Still Needed After All These Years" (Illinois).

Rushbrook, Dereka, "Affirmative Action: Equity and Efficiency" (Wisconsin).
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Scott, Dulce Maria and Marvin B. Scott, "Affirmative Action into the Twenty First Century: Revision and Survival" (Indiana).
Simmons, Brent T., "Reconsidering Strict Scrutiny of Affirmative Action" (Michigan).
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).
Ssempijja, Sebastian, "The Relevancy of Affirmative Action for a Recent Immigrant Among the Minority Population" (Wisconsin).
Starks, Robert T., "Affirmative Action: Equality of Opportunity and the Politics of Change" (Illinois).
Taylor, Bron, "Affirmative Action at Work: Battleground of Competing Values" (Wisconsin)
Thacker, Rebecca A., "Time To Dismantle Affirmative Action" (Ohio).
Thomas, III., Sam, "Affirmative Action: Mend It - But Don't End It" (Ohio).
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).
Vlantis, Michael, "Affirmative Action Plans or Government Investigations: Which Serves Us Best?" (Indiana).
Voinovich, Governor George V., "Reforming Affirmative Action in Ohio" (Ohio).
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