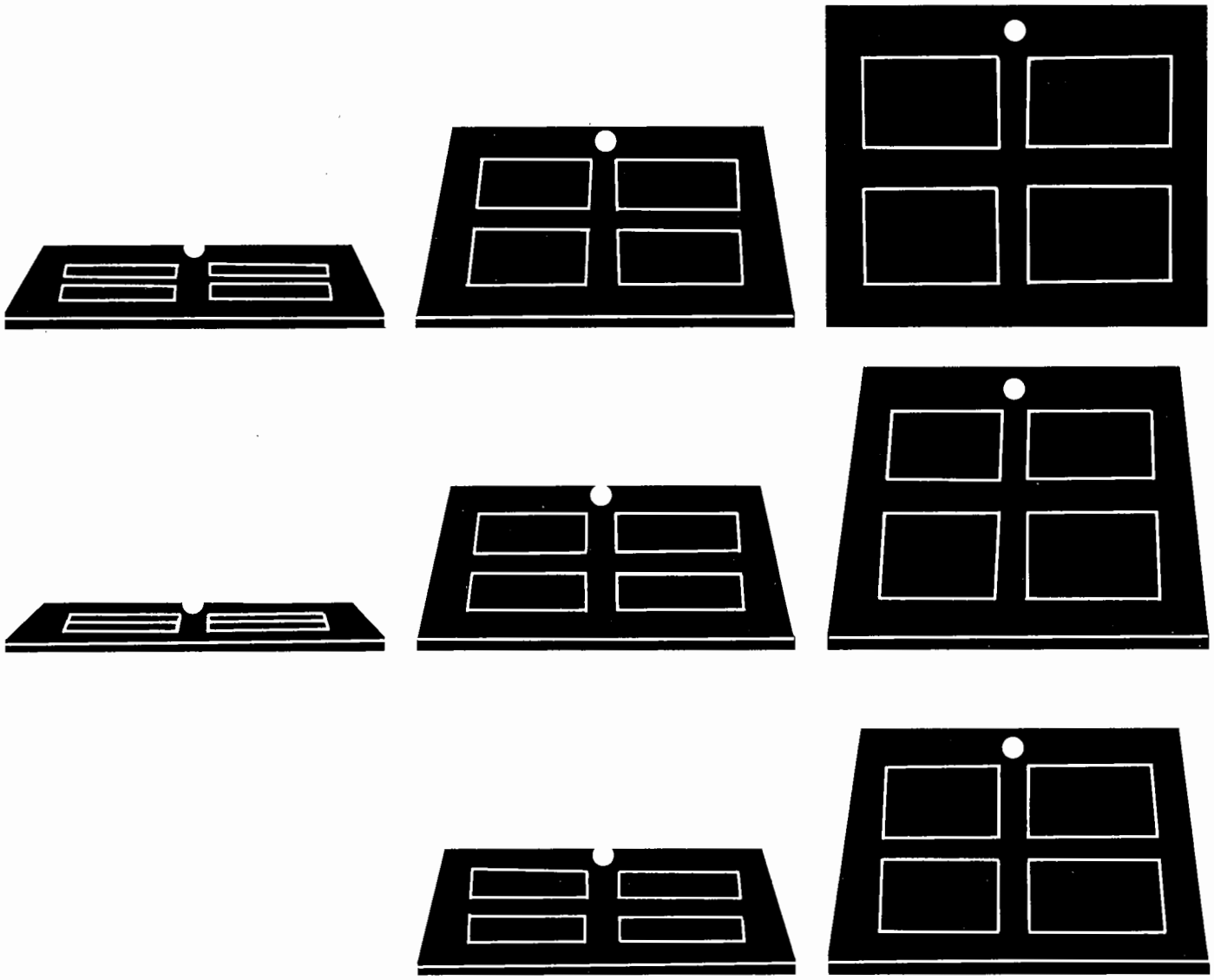

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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Selected Affirmative Action Topics in Employment and Business Set-Asides

A Consultation/Hearing
of the United States
Commission on Civil Rights
March 6–7, 1985

Volume 1

PREFACE

The debate regarding the merits and present forms of affirmative action has reached new levels in the past several years. Where once affirmative action, in any form, was most frequently viewed as justifiable, now many question its effectiveness and appropriateness as a remedy.

The U.S. Commission on Civil Rights remains committed to affirmative action, but sees it as a remedy that should be limited in scope. It favors what it considers to be nondiscriminatory affirmative action such as training and additional recruiting. Although the Commission had previously stated its opposition to quotas as a means for achieving equal employment opportunity, there were other affirmative action issues that the Commission had not addressed. In considering the possible formulation of specific policy on some of these issues, the Commission held a consultation and hearing on selected affirmative action topics and business set-asides on March 6–7, 1985, in Washington, D.C. The panelists and witnesses for these proceedings reflected a broad array of expertise and points of view.

This publication compiles all papers submitted by the participants in the consultation segment of the proceedings. (Professor William Van Alstyne, whose paper is included in this compilation, was unable to attend owing to a previous commitment.) Included in this volume are papers submitted by organizations that were invited and agreed to participate in the proceedings but, subsequently, withdrew from the consultation and hearing because of differences with the Commission. The transcript of the proceedings, including the testimony of the witnesses in the hearing segment of the consultation and hearing, will be published as a second volume.

Preparations for the consultation/hearing were made in the Office of the General Counsel under the overall supervision of Mark R. Disler,* General Counsel.

* No longer a member of the Commission staff.

CONTENTS

UNDERREPRESENTATION AND UNDERUTILIZATION: DO THEY REFLECT DISCRIMINATION?

Underutilization and Discrimination: Do They Have a Meaningful Relationship?

By Charles R. Mann*

"The question is," said Alice, "whether you can make words mean so many different things."
"The question is," said Humpty Dumpty, "which is to be master—that's all."

–Lewis Carroll, *Through the Looking Glass*

Discrimination, as it is relevant to this presentation, is a legal term. Its existence and extent are defined by laws and regulations as well as by court decisions, past and present. Underutilization is, by the nature of its origin, also a legal term, the meaning of which will ultimately be decided by the courts. In attempting to arrive at a working definition, however, the concept of quantification has arisen and statistical methodology has been brought to bear on the problem.

This is a natural outgrowth of the fact that in recent years there has been an increased use of statistics and statistical methodology in legal applications, particularly in the area of equal opportunity analysis in which quantification of concepts plays an important role because of the frequency with which large amounts of relevant but unstructured data are encountered. Utilization analysis, which refers to analysis of the number of individuals in specific classes whose employment rights are legally protected, is one such area.

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The issue of interest here arises because after passage of the Civil Rights Act of 1964, of which Title VII dealt with equal employment opportunity, the United States Department of Labor implemented regulations requiring government contractors of sufficient size to develop affirmative action programs. It specifically calls upon them to perform utilization analyses for minorities and women. For the purpose of this discussion, we are concerned with the definition of underutilization provided in section 60–2.11(b).

"Underutilization" is defined as having fewer minorities or women in a particular job classification than would reasonably be expected by their availability.

Prior to examining utilization analysis in detail, it should be noted that the purpose of this paper is to address the issue with regard to its statistical content. For this reason, it is important to understand the concept of causality before proceeding.

Causality

A statistical relationship, however strong and however suggestive, can never establish a causal connection: our ideas on causation must come from outside statistics, ultimately from some theory or other. We need not enter into the philosophical implications of this; we need only

reiterate that statistical relationship, of whatever kind, cannot logically imply causation.[1]

An inference of discrimination based solely on statistical disparity in general or in the form of underutilization (as will be discussed below) in particular is not possible. Knowledge of the circumstances and alternative explanatory variables, quantified or otherwise, must be incorporated, and this is not statistical in nature. It is emphasized that it is not the statistician alone who is prevented from making an inference of discrimination based solely on statistics but also the various users of statistics—the economists, sociologists, and psychologists—who apply statistical tools. Without nonstatistical evidence no conclusion to the effect that discrimination is the cause of a statistical disparity is possible. How then can we proceed? How then have we seen as much use of statistics as has already taken place?

The answers to these questions lie in the fact that although statisticians and social scientists are free to conclude that they do not know a cause, the courts and regulatory agencies, to some extent, are not. The proper statistical conclusion in testing a hypothesis that a difference exists is either of the form "there is reason to believe a difference exists" or "there is not reason to believe a difference exists." It is not statistically proper to conclude that there is reason to believe that no difference exists.[2]

These conclusions correspond in a criminal court to permissible decisions of guilty or not guilty as opposed to a finding of innocent. The courts arrived at the procedure of having these two acceptable decisions by introducing the concept of burden of proof. This same idea, when carried over to the civil question as to whether discrimination exists, permits the courts to reach decisions based on statistical and anecdotal data or even on statistical data alone. In essence, the courts have resolved the issue by deciding, in this legal layman's terminology, that the burden is on the defendant to produce nondiscriminatory explanations when the plaintiff has made a prima facie showing of the existence of a disparity. The various court decisions serve to define the requirements for the showing of such a prima facie case and for the extent to which appropriate rebuttal must respond.

In summary on this issue, statistics can identify the existence of disparity but not its cause(s). The courts have, by developing appropriate definitions, bridged the gap between the statistical conclusion of disparity and the legal conclusion of discrimination.

Determination of Underutilization

One reason that the analysis of underutilization is of special interest to statisticians is that the development of its treatment involves matters that appear clear from a statistical point of view, but the partial resolution of which has required years of debate, explanation, and, ultimately, judicial process. Even after extensive consideration, there remain basic, unresolved legal issues.

Once these regulations went into effect, it became the responsibility of government contractors to implement them as written. It, therefore, became necessary to interpret the components of this definition.

The definition of underutilization is complex and requires other than legal expertise to be interpreted in an accurate and useful manner. Specifically, there are three aspects of the definition that themselves require definition and interpretation. These are: job classification; availability; and "fewer. . .than would reasonably be expected."

It should be noted that although these concepts may be considered independently, the actual implementation of any reasonable procedure finds them to be related. In the following, both their definitions and their interrelationships are considered.

Job Classification

The regulations themselves provide the basic definition: "job classification herein meaning one or a group of jobs having similar content, wage rates and opportunities." The measurement of, and judgments concerning, such similarities are clearly a subjective matter, and no further guidelines are provided. In practice, two characteristics that frequently affect such decisionmaking are the existence of information that will permit reasonable estimation of availability rates, the proportions by class of individuals with the necessary knowledge, skills, and/or abilities to successfully perform the jobs (as

[1] M.G. Kendall and A. Stuart, *The Advanced Theory of Statistics, Volume 2, Inference and Relationship* (London: Charles Griffin and Co., 1961).

[2] These statements should properly carry quantification of confidence—such as stated levels of significance—but, for the sake of clarity they are omitted here.

well as the financial incentive to do so), and the numbers of incumbents in the positions.

If a job classification is too small, it may turn out that, with a reasonable availability rate, there is no circumstance in which underutilization would be declared. On the other hand, if a job classification is made larger by adding job titles then the underutilization decision applies to the totality of titles included, and remedial actions may not properly be demanded on a more limited set.

Job classifications may be determined by applying the definition above in conjunction with specific information about the individual jobs. It is common for there to be more than one acceptable alternative, but classification definition is in no sense arbitrary.

Availability

The Department of Labor provides substantial direction in terms of "obtaining" or, as statisticians would prefer, "estimating" availability rates. In fact, they must be looked at as going beyond the Supreme Court statement in *International Brotherhood of Teamsters* v. *United States* (431 U.S. 324, 340 n.20 (1977))—

> [A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the population in the community from which employees are hired. . . .

—both in that they consider "the community" from which employees are hired as defined by skills and abilities as well as by geography, and in that they consider determining the community from which the company can and should recruit, not just the one "from which employees are hired."

If one considers availability from a strictly geographic interpretation of "the community" in the Court's statement, then the phrase "will in time" may make it reasonable to ignore current skills and abilities for at least some occupations. This depends on whether minorities and women "will in time" achieve equal opportunity in education and training and also on whether they will develop the same interests and desires. (It appears, however, that for women versus men for some occupations, the Court would be incorrect under the narrow interpretation of "the community." For example, interest and skills aside, men with their greater upper body strength would disproportionally qualify for strength-related positions. Of course, it is also possible that increased use of technology could eventually result in the elimination of such occupations.)

If the Supreme Court's phrase "will in time" is meant to allow time for social and technological change, it may eventually prove correct. In the context of current utilization analyses, however, such long term change is of little interest. As a practical matter, one must consider the work force as it currently exists. It is in this context that we next consider estimation of availability.

The Labor Department regulations state:

> (1) In determining whether minorities are being underutilized in any job classification the contractor will consider at least all of the following factors: (i) The minority population of the labor area surrounding the facility; (ii) The size of the minority unemployment force in the labor area surrounding the facility; (iii) The percentage of the minority workforce as compared with the total workforce in the immediate labor area; (iv) The general availability of minorities having requisite skills in the immediate labor area; (v) The availability of minorities having requisite skills in the area in which the contractor can reasonably recruit; (vi) The availability of promotable and transferable minorities within the contractor's organization; (vii) The existence of training institutions capable of training persons in the requisite skills; and (viii) The degree of training that the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

A parallel equivalent set of factors is also provided for females.

There have been attempts to further quantify this concept by several government monitoring agencies. The most common approach, known generally as the eight-factor rule, consists of determination of a weighted average of numbers corresponding to the items for which consideration is required. Unfortunately, many such approaches either mix incommensurate quantities or add unrealistic requirements. In fact, the relevance of some of the factors themselves has been questioned—e.g., unemployment data that do not relate to specific job classifications.

Quantification of availability may reasonably include weighting estimate availability from several sources, but in order to be interpretable this must be done in a rational way. For many job classifications, it appears to be sufficient to consider only an appropriate external labor force rate. The other factors may be considered in selecting that rate, thereby satisfying the regulations that do not themselves require a weighted average of the eight factors to be computed. Clearly, there is room for legal argument as well as statistical. Most common-

ly, at least two factors are taken into account—representing internal and external availability. To the extent that mutually exclusive sources are available, additional factors are generally considered to be justified, but with the additional complications of determining the weights to be used. To the extent the appropriate personnel history data are available, they may be used towards this end.

Determination of an appropriate estimated availability rate may be accomplished by use of data from the Census Bureau, Bureau of Labor Statistics, Labor Department, Education Department, Equal Employment Opportunity Commission, or such other sources as trade and professional associations. The most commonly used of these are census data because of both their detail and large sample size. The 1980 census will be a primary source of data for the construction of availability estimates for the next decade.

From a practical point of view, a major change in data availability took place when, in the spring of 1983, the Bureau of the Census released its EEO "special file," permitting consideration of the detailed occupation information collected in the 1980 decennial census. Although it is distributing these data only in the form of magnetic tape or microfiche, tabulations are available from the private sector.

These commercially available reports can include the same level of detail for each of females, Hispanics, blacks, Asian Americans, American Indians, other minorites, nonwhites, and whites as for the total population. Further, that level of detail can include all 514 lines of detailed occupations at the State, SMSA, county, or city (population 50,000 or more) level.

It is of interest that the Bureau of the Census (BOC) data tapes are organized by BOC job groups and not by the commonly used EEO–1 categories of the Equal Employment Opportunity Commission (EEOC). A crosswalk has, however, been agreed upon by the BOC and the EEOC that permits reorganization of the data on an EEO–1 category basis. Since individual codes are reassigned to determine the correspondence, it is, in a practical sense, virtually impossible to adjust the raw census data to an EEO–1 category basis without the use of a computer.

It should be noted that regardless of data source, it may be possible to estimate availability as a proportion without estimating corresponding counts. For example, external availability rates for managing civil engineers may be estimated by the corresponding rates among all civil engineers—thereby assuming that possession of the required management skills is independent of race and sex. Alternatively, one might consider using rates based on all managers assuming that for them possession of civil engineering skills is independent of race and sex. This type of subjectivity cannot be eliminated but may be made more acceptable by combining multiple estimates or making use of conservative worst-case results.

"Fewer. . .than would reasonably be expected"

The final component of the analysis and, from the statistician's point of view, the most interesting, is selection of an appropriate statistical methodology to determine whether there are "fewer. . .than would reasonably be expected" of the group under consideration. The emphases for the purpose of this discussion are on the words "expectation" and "reasonably."

The term expectation has an intuitive meaning to most people that coincides with the statistician's well-defined term "expected value." This is particularly true when dealing with proportions and percentages as we are here. When asked how many times a fair coin is expected to come up heads if tossed 100 times, virtually every serious response is 50. One would expect, therefore, little difficulty with using the two terms interchangeably. Such turns out to be the case. In practice, lawyers and statisticians, regardless of their other positions, appear to have no problem with this concept.

This brings us to the last and most crucial aspect of utilization analysis—quantification of the term "reasonable." In February 1974 the Office of Federal Contract Compliance issued technical guidance memorandum no. 1 on Revised Order 4 in an attempt to resolve this matter. It concluded that underutilization existed whenever an observed number was less than its corresponding expected value. Ignoring small sample situations, this would occur, on the average, approximately half the time. A company with 100 underutilization analyses (job classifications) could expect to be underutilized in approximately 50 cases for each class analyzed. The proposed interpretation meant that in order to avoid declarations of underutilization, all contractors had to be "at least average" in all job classifications for

all groups considered. Although this could be termed an unreasonable expectation, various attempts at justification were made. Generally, they came down to a government position that it would not hurt a company to make such declarations. There were contractors and attorneys who did not agree. The corporate attorneys did not want to face their companies' own declarations of underutilization in future discrimination suits, nor did they want to run the risk of being charged with (reverse) discrimination as a result of implementing a technically incorrect analysis.

As a formal matter, some small leeway was provided to avoid such problems by not requiring an underutilization declaration when observed and expected numbers differed by only a fraction of a person. For example, when a company had two mechanical engineers, of whom none was black, and an estimated availability rate for black mechanical engineers of 2 percent, it would not have to declare itself underutilized in the employment of black mechanical engineers.

The government was, in fact, ignoring the word "reasonably" rather than defining it. Its interpretation could reasonably have been argued to be correct without that word but, with it, some latitude appeared necessary.

Not that interpreting the meaning of "fewer. . .than would reasonably be expected" corresponds to interpreting "more or less representative" in the excerpt from the Supreme Court's *Teamsters* decision cited above. In both instances, the question is how to allow for random variation or chance. To see this in the Court's statement, consider a parallel statement on a more mundane matter: "It is ordinarily to be expected that tossing a fair coin will, in time, result in *a proportion of heads approximately equal to one half.* . . ." the italicized phrase corresponding to the description of the expected work force in the Court's statement. This alternative statement avoids such issues as defining "the community" from which employees are hired and whether determination of that community may have incorporated a discriminatory intent. These matters were discussed above. The second statement retains, however, the element of "more or less representative."

Even though, as pointed out above, people generally say they expect 50 heads in 100 tosses of a fair coin, they also admit to not being surprised at results of, say 47 or 53 heads. Our intuition correctly suggests that provision for random variation must be made.

At this point the statistician, as an analyst, became involved. Under the assumptions of independent, identically distributed (common availability rate) hires, the sex and (dichotomized) race composition of the incumbents of a job classification may be considered as the results of Bernoulli processes. This permits computation of probabilities by use of the binomial distribution. The statistician is able to compute the probability of an event at least as extreme as the one observed, i.e., the occurrence of as few or fewer of the group under consideration in the job classification under consideration as was actually observed.

The independence assumption may reasonably be questioned under real world considerations such as successive applicants being friends or relatives, but it also appears reasonable to assume that a lack of independence strong enough to have a substantial effect on the computed probabilities would manifest itself in recognizable situations. In such cases adjustments may be made through defining the accessions to be considered. An example of this is the absorption by one firm of the employees of a second firm from a geographic area different in characteristics from that of the first—such as a large metropolitan firm taking over a rural firm. As with any other modeling scheme, the statistician must be alert to situations that depart sufficiently from the assumptions so as to make the model inappropriate.

In the mechanical engineer example above, the probability of there being as few or fewer black mechanical engineers as was observed (zero) is the probability of there being exactly zero of them. Using the values assumed this may be computed to be 0.98 x 0.98 or 0.96. It appears somewhat unreasonable to consider an event with probability so close to certainty as unreasonable. In fact, even had there been 32 mechanical engineers, the chance of seeing no blacks would be 0.52.

As with other applications of statistics in the courts, determination of the level at which a result may be called unreasonable or a probability may be called too low or a result may be called statistically significant is properly up to the court. The statistician may compute the probability, but the court is the arbiter of its meaning.

The government's concept of reasonably was rejected in a Federal court involving two corporations using the binomial approach. *(Firestone Syn-*

thetic Rubber & Latex Co. v. *Marshall,* (507 F. Supp 1330 (E.D. Tex. 1981)).

Underrepresentation

The EEOC has implemented a somewhat different use of the term underutilization. This agency, responsible for monitoring the work force of Federal agencies, has defined work force utilization analysis to be a two-step analysis. The first step is development of a work force profile, and the second step is an assessment of underrepresentation. (Although not referred to as part of utilization analysis, a work force profile is also required by Revised Order 4 from private sector employees.)

Underrepresentation, in EEOC terms, has undergone a succession of changes in definition. Currently, it is a comparison versus the corresponding civilian labor force (adjusted for Federal occupations) for nonprofessional positions and versus the differentiated (corresponding) portion of the civilian labor force (adjusted for Federal occupations) for professional positions. The major difference between underutilization and underrepresentation is that the former is a dichotomy (i.e., underutilization for a specific job group and class either exists or does not, and that determination of whether it exists must allow for reasonable deviation from expectation), whereas underrepresentation is measured by an index (agency rate ratio to appropriate civilian labor force rate) and makes no allowance for chance deviation.

Discrimination and Public Policy

By Walter E. Williams*

Inequality before the law has been a feature of the American historical landscape faced by several ethnic groups. Black Americans were enslaved.[1] Emancipation meant only a modified form of slavery in many parts of the Nation. Jim Crow laws, lynchings, and systematic denial of rudimentary constitutional protections are all too familiar. Although blacks were the only group to be enslaved, other ethnic groups encountered unequal treatment before the law. The Oriental Exclusion Act of 1882 prohibited citizenship. By 1900, 10 Western States had enacted laws that prohibited Japanese from land ownership. The U.S. Supreme Court upheld the constitutionality of State anti-Japanese laws. Eventually, Japanese Americans were interned and their property confiscated during Word War II. The U.S. Supreme Court gave its constitutional blessing to this act of injustice.

Unequal treatment has been experienced by other ethnic groups in America. Jews, Italians, Poles, Puerto Ricans, American Indians, and Mexican Americans have faced unequal treatment in varying degrees. Unequal and brutal treatment of people is neither new nor unique to America.[2] What is unique to America is the historic efforts that have been made towards a pluralistic society. Interracial tensions have lessened and in some instances all but disappeared.

The landmark *Brown* v. *Board of Education* decision, the 1964 Civil Rights Act, and the 1965 Voting Rights Act have played an important role towards the development of our pluralistic society. But just as important were changes in public opinion and heroic efforts of blacks to argue the illegitimacy of racial inequality before the law that led to elimination of gross forms of racial inequality such as denial of public accommodation and denial of access to publicly financed facilities such as libraries, water fountains, and schools.

In a very real sense the civil rights struggle, envisaged by its founders and millions of American supporters, is over and *won.* Black people are no longer lynched, no longer denied access to the judicial process of impartial hearings, speedy trials, and jury service. Black people are no longer denied access to public schools and colleges because of

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[1] See, A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (New York: Oxford University Press, 1978).

[2] See, Thomas Sowell, *The Economics and Politics of Race: An International Perspective* (New York: William Morrow & Co., 1983).

race. Black people are no longer denied access to the political arena. Blacks now serve as chief administrative officers in the largest U.S. cities like Chicago, Los Angeles, Philadelphia, and Detroit. And of considerable significance, mayors of these cities won their offices with the support of the white electorate.

The New Civil Rights

Today's new civil rights movement is not a push for the kind of legal equality firmly expressed by the plaintiffs in *Brown* who said, "That the Constitution is color-blind is our dedicated belief." In regard to school assignment, plaintiffs said, "If you have some other basis. . .any other basis, we have no objection. But just do not put in race or color as a factor."[3]

By contrast, the new civil rights vision holds that the Constitution is color conscious. The position of the High Court is that racial discrimination in order to achieve certain social objectives is a form of compensatory justice. This sentiment is expressed not only by rulings of the Supreme Court, but by one of its members, Justice Thurgood Marshall, who said, "You guys have been practicing discrimination for years. Now it is our turn."[4] Race-consciousness policy is a solid part of the agenda of civil rights organizations such as the National Urban League, which in a 1981 press statement written by Maudine R. Cooper said, "We believe that race-conscious inequities demand race-conscious remedies in order to facilitate the equitable participation of blacks in the mainstream of society."[5]

The evolution of the new civil rights movement is an effort by some to impose greater government control as a means to acquire more personal political power and wealth. But another important thrust to the new civil rights results from honest, but incorrect, views of how the world operates. Information and knowledge can change erroneous views, but it cannot change the stance of those who have a financial and political stake in the status quo. Therefore, the thrust of this paper is directed to those long on good will and honesty, but short on understanding.

Representation, Proportionality, and Discrimination

The basic creed of the new civil rights movement is that statistical imbalance, underrepresentation, or underutilization reflect racial discrimination in housing, schools, colleges, and employment. Their hypothesis is that racial discrimination is the *cause* of statistical disproportionality amongst people over classes of activities. The corollary to this hypothesis is: Were it not for racial discrimination, ethnic groups would be represented amongst activities as they are numerically represented in the population.

These concepts of disproportionality, imbalance, underrepresentedness, and underutilization imply that there exists a theory on the numbers of people by race or sex that would be in a given occupation, school, or income group. Such a theory forms an *a priori* basis for establishing the "right" percentage of blacks in occupations, income groups, or jail, but for the fact of racial discrimination.

Theories do exist on the expectations of events. If we were to toss a fair die, the probability of a particular side is one-sixth. This means that as the number of tosses of the die approaches infinity, the one spot will show one-sixth of the time, the two spot will show one-sixth of the time, and as well the three, four, five, and six spot will show one-sixth of the time. If the three spot shows half the time, in a large number of tosses, one safe conclusion is the die is not fair. It may be improperly weighted or an imperfect cube. On the other hand, the die may be fair, but we have not tossed it enough. But it makes sense to talk about the three spot being *over*represented and the other spots being *under*represented because there is a solid body of probability theory that yields testable hypotheses about the expectation of events. Theory on the probability of a particular spot on a die toss is independent of the die itself in the sense that a fair die made of glass and tossed in Europe would yield the identical probabilities of a fair die made of ivory and tossed in the United States. Probability theory is general.

[3] Cited in Raymond Wolters, *The Burden of Brown: Thirty Years of School Desegregation* (Knoxville: University of Tennessee Press, 1984), p. 4.

[4] William Douglas, *The Court Years 1938–1975: The Autobiography of William O. Douglas* (New York: Random House, 1980), p. 149.

[5] National Urban League, "Affirmative Action 1981" (Office of the Vice President for Washington Operations, July 21, 1981).

Are Ethnic Groups the Same?

No such logic can be applied to individuals and their distribution along socioeconomic variables. First, individuals differ in many dimensions; i.e., there is no individual equivalence to the mathematical concept of fair. Individuals differ in ways economically relevant. There is the matter of individual preferences. Some individuals prefer long hours of solitary study and concentration, while others prefer endeavors more demanding in the physical or interpersonal sense. Other individuals are willing to make large immediate sacrifices for a given future gain, while others are willing to make a much smaller sacrifice.[6]

Individuals also differ by personal traits that may be socioeconomically relevant. People differ in tonal discrimination; people differ in height; some people are left lobe oriented, while others are right lobe oriented. Some personal differences carry over to group differences. There have been significant average differences in I.Q. between some groups, and the differences have changed over time. Thomas Sowell found:

> As of about World War I, Jews scored sufficiently low on mental tests to cause a leading "expert" of that era to claim that the test score results "disprove the popular belief that the Jew is highly intelligent." At that time, I.Q. scores for many of the other more recently arrived groups—Italians, Greeks, Poles, Portuguese, and Slovaks—were virtually identical to those found today among blacks, Hispanics and other disadvantaged groups.[7]

> By the 1920s Jewish I.Q.s were higher than the national average, and by the post-World War II era Italian and Polish I.Q.s reached or passed the national average. "Polish I.Q.'s, which averaged eighty-five in the earlier studies—the same as blacks today—had risen to 109 by the 1970s. This twenty-four point increase in two generations is greater than the current black-white difference (fifteen points)."[8]

Although there is much dispute over the cause of group differences in I.Q., there is little dispute that I.Q. is correlated with educational attainment. Educational attainment, in turn, is correlated with occupational status and income.

Ethnic groups differ in age. Mexican Americans have a median age of 18; Puerto Ricans, 20; blacks, 23; and Indians, 20; while that of Japanese is 32; Poles, 40; Germans, 35. Group age differences influence a host of group differences such as income, occupation, fertility, and crime. No one would be surprised to find that the median income of adults is greater than that of teenagers. Similarly, one should not be surprised to find the median income of Mexicans, most of whose members are teenagers, less than that of Poles, most of whose members are mid-career adults.

Ethnic groups differ in their geographical location. Blacks are most heavily represented in the South, Mexican Americans in the Southwest, Indians on reservations, and Jews and Japanese heavily concentrated in cities. To the extent that there are regional differences in income, we should expect some of it to show up in the median incomes of ethnic groups who are concentrated in different regions.

People also differ in economically relevant ways according to sex:

> Eleanor Maccoby and Carol Jacklin, after a comprehensive review of the relevant literature, consider sex differences in the following traits to be fairly well established: verbal ability (females superior by 0.25 standard deviations), visual-spatial ability (males superior by about 0.4 standard deviations), math ability (males better but by probably less than 0.4 standard deviations), and aggressiveness (males substantially more so).[9]

There can be different economic payoffs associated with verbal, visual-spatial, mathematical, and aggressive abilities. Systematic sex differences in these abilities can yield systematic sex outcomes in the social, economic, and political spheres.[10]

The above discussion by no means exhausts the list of individual, sex, and ethnic-group differences. It is an attempt to show that policy assumptions based on individual, sex, and ethnic identity rest on very shaky foundations. Moreover, there are current differences among ethnic groups that might be called environmental differences that have a heavy impact on parameters like occupational status, income, and education. Many blacks attend public

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[6] Economists recognize this as a low time preference versus a high time preference. Individuals with low time preferences tend to invest more at a given interest rate.

[7] Thomas Sowell, *Ethnic America* (New York: Basic Books, 1981), p. 8.

[8] Ibid., p. 9.

[9] Cited in William R. Havender, "On the Parity of Groups," *Journal of Libertarian Studies,* vol. 2, no. 2 (April 1978), pp. 171–72.

[10] This is not to deny the existence of, and the role played by, sex discrimination.

schools distinguished by lawlessness and poor quality teaching, which results in poor quality education. They live in neighborhoods rife with crime, drugs, prostitution, and other forms of social pathology.

Why the "Underrepresentation"?

Environmental factors may play an important role in explaining what may appear to be racial discrimination or racial disproportionality in many fields. Throughout the seventies and eighties, there have been charges of racial discrimination in hiring practices by universities in hiring minority professors and by businesses in hiring minorities at high managerial levels. But racial discrimination by universities and businesses is not a satisfactory explanation for the relatively small number of blacks so employed. The statistics for minority educational preparation for high-level professional employment are dramatic.

Table 1 shows percentages of selected ethnic groups in the population who received doctorates from American universities in 1980. Most dramatic is minority concentration in specialties that may be characterized as "easy" or less demanding and, at the same time, relatively low paid compared to other professions. Of all blacks who obtained Ph.D.s in 1980, 55 percent were obtained in education. Fifty percent of Indian and 47 percent of Mexican American doctorates were obtained in education. By stark contrast, 25 percent of whites received doctorates in education and Asians, only 8 percent.

On the other hand, 12 percent of white doctorates and 22 percent of Asian doctorates were obtained in the physical sciences. But the percentages of black, Mexican American, and American Indian Ph.D.s in the physical sciences were miniscule, 0.03, 0.06, and 0.07 percent, respectively. Small concentrations among blacks, Mexican Americans, and American Indians were also seen in engineering and the life sciences. By contrast, Asians are highly concentrated in the hard science fields, where 23 percent of Asian doctorates were obtained in life sciences, 25 percent in engineering, and 22 percent in physical sciences.

The "underrepresentation" of blacks, Mexican Americans, and Indians in the hard sciences can hardly be said to be the result of race discrimination by universities. Universities do not have politics of disciplinary segregation whereby blacks, Mexican Americans, and Indians are, on the one hand, denied enrollment in physics, math, and engineering curricula and, on the other, welcomed in education and sociology. We have to look for the explanation elsewhere. One possibility is that blacks, Mexican Americans, and Indians have a systematic strong preference for and interest in education or the social sciences. A more likely explanation may be suggested by academic preparation. Poor academic preparation is suggested by the fact that within the social sciences, blacks take doctorates in the "softer" fields. Economics is a field within the social sciences that stresses mathematics. Nationally, there are a total of 234 black doctorates in economics against 1,165 Asians.[11] But there are 1,396 black doctorates in other fields in social sciences such as sociology and political science and 853 black doctorates in psychology.[12] (See appendix 1.)

Table 2, which shows the Scholastic Aptitude Test scores by ethnic groups for the years 1976 to 1983, provides us with some strong evidence. Quantitative test scores (SAT-M) for Asian Americans are consistently higher than those for any of the ethnic groups, though we should cautiously interpret white because it is not properly an ethnic group. White represents a collection of ethnics, e.g., Polish, German, Italian, Irish, Jew. Asian American mathematics SAT scores consistently average slightly more than 500. Whites average slightly less than 500. By contrast, American Indian and Mexican American scores in mathematics average slightly over 400, while black mathematics test scores on the SAT ranged between a low of 354 in 1976 to 369 in 1983, considerably lower than any other population group except Puerto Ricans.

Scholastic Aptitude Tests (SAT) are taken at the beginning of a student's college training. Graduate Record Examinations (GRE) are taken at the end in anticipation of entry to graduate and professional schools. Black performance on the GRE exhibits the same general pattern as black performance on the SAT. Table 3 shows the distribution of quantitative test scores by ethnic groups. During the 1982–83 GRE test period, the median test scores for all test

[11] U.S. National Science Foundation, Division of Science Resource Studies, *Characteristics of Doctoral Scientists and Engineers in the United States: 1981* (NSF 82-332), table B-4, Number of Doctoral Scientists and Engineers by Field, Sex, Race, and Employment Status: 1981, pp. 23–24.

[12] Ibid., p. 23.

TABLE 1

Percentage of Doctoral Recipients by Ethnic Group and Subfield, 1980

	Percentages of minority doctoral recipients, 1980				
	Black	**Asian**	**White**	**Mexican American**	**American Indian**
Education	.55	.08	.25	.47	.50
Physical sciences	.03	.22	.12	.06	.07
Social sciences	.20	.13	.21	.21	.16
Humanities	.09	.06	.14	.14	.08
Professions	.05	.04	.04	.04	.05
Engineering	.02	.25	.05	.009	.03
Life sciences	.06	.21	.17	.06	.10

Source: Adapted from the National Research Council, Commission on Human Resources, *Summary Report 1980 Doctorate Recipients from United States Universities* (Washington, D.C.: National Academy Press, 1981), pp. 26–29.

TABLE 2

SAT Averages by Ethnic Group, 1976–83

	SAT-V							
	76	**77**	**78**	**79**	**80**	**81**	**82**	**83**
American Indian	388	390	387	386	390	391	388	388
Asian American	414	405	401	396	396	397	398	395
Black	332	330	332	330	330	332	341	339
Mexican American	371	370	370	370	372	373	377	375
Puerto Rican	364	355	349	345	350	353	360	365
White	451	448	446	444	442	442	444	443
Other	410	402	399	393	394	388	392	386
Total population	431	429	429	427	424	424	426	425
	SAT-M							
	76	**77**	**78**	**79**	**80**	**81**	**82**	**83**
American Indian	420	421	419	421	426	425	424	425
Asian American	518	514	510	511	509	513	513	514
Black	354	357	354	358	360	362	366	369
Mexican American	410	408	402	410	413	415	416	417
Puerto Rican	401	397	388	388	394	398	403	397
White	493	489	485	483	482	483	483	484
Other	458	457	450	447	449	447	449	446
Total population	472	470	468	467	466	466	467	468

Source: The College Board.

TABLE 3

Distributions of GRE General Test Quantitative Scores by Ethnic Group
(U.S. citizens only)

	Percent of group below score									
Score	American Indian	Black/ Afro-Amer	Mexican American	Oriental or Asian	Puerto Rican	Oth Hisp Latin Am	White	Other	No Response	Total
800	100.0	100.0	99.8	98.8	99.9	99.8	99.4	99.5	99.2	99.4
750	98.4	99.7	99.1	89.2	99.6	98.4	95.1	94.7	94.4	95.4
700	94.3	99.0	95.9	74.5	97.8	94.1	86.9	85.2	86.6	87.7
650	87.7	97.6	91.4	59.3	94.3	86.1	76.8	75.1	76.7	78.2
600	79.7	95.2	84.0	44.6	88.2	78.0	65.0	63.4	65.5	67.0
550	70.0	91.4	76.3	32.0	80.4	67.5	51.6	51.2	52.3	54.4
500	56.8	84.8	66.6	21.4	70.2	55.0	36.7	36.1	38.9	40.3
450	44.8	76.3	54.0	13.6	56.7	41.0	23.6	24.7	26.9	27.7
400	30.2	63.7	39.7	8.1	42.7	29.3	13.3	15.2	17.5	17.2
350	18.1	48.4	26.8	4.4	28.6	18.2	6.4	7.5	10.3	9.6
300	8.6	31.1	13.9	1.9	16.6	9.2	2.3	3.9	4.8	4.5
250	3.3	15.3	5.8	8.6	6.0	4.0	0.6	1.3	2.0	1.7
200	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
N	992	8,370	1,714	2,715	1,359	1,288	117,686	2,205	5,206	141,465

Source: Henry Roy Smith III, *A Summary of Data Collected from Graduate Record Examination Test Takers During 1982–83* (New Jersey: Educational Testing Service, 1984), p. 83.

takers was about 550. Fifty-five percent of Asian Americans scored above 600.

Thirty-five percent of white test takers scored above 600, while only 5 percent of blacks scored above 600. The median test score for blacks was just over 350. The level of performance exhibited on the verbal portion of the GRE among blacks was similar to that exhibited on the SATs. (See table 4.)

Years of School Are Poor Estimators of Education

According to the 1960 census, median years of schooling for blacks was 8 years compared to 10.9 for whites, a gap of nearly 3 years. By 1980 blacks had closed the education gap to a half-year difference. Blacks completed 12 years and whites, 12.5.[13] Black performance on standardized tests shows that *years* of education is an inadequate standard of comparison and a poor tool for the assessment of the quality of education received. Poor performance, especially in quantitative areas, appears to seal off whole fields of endeavor like engineering and physical and life sciences. Furthermore, it is mostly likely to do so permanently.

Evidence on black academic performance gives us at least one clear policy conclusion: For private and public civil rights organizations to focus the bulk of their resources on racial discrimination by universities and businesses in their hiring, to the virtual complete neglect of what is being done to blacks by the public education establishment is counterproductive and harmful to the ostensible beneficiaries. Moreover, concepts and terms like disproportionality, underutilization, and underrepresentedness become utterly useless and a cruel joke in the presence of widespread destruction of young minds by the educational establishment.

The erroneous assumption that blacks and Hispanics have attained identical education to whites upon high school and college completion gives rise to completely absurd policy. One example is the 1981 consent decree in *Luevano* v. *Campbell* (U.S. District Court, D.C.), January 9, 1981.

The three individual plaintiffs—Angel Luevano, an Hispanic male; Melody Van and Vicky Chapman, two black females—all failed to achieve passing scores on the Professional and Administrative Career Examination (PACE). The plaintiffs brought charges that this Federal Government civil service examination was racially discriminatory because of its "adverse impact" on blacks and Hispanics.

Black and Hispanic performance on PACE is well below that of the white test takers. Data collected for the court (table 5) gave a sample of January 1978 test takers and all the test takers in April 1978. There were 45,539 whites, 6,488 blacks, and 2,694 Hispanics reported in the results. Forty-two percent (19,177) of whites, 5 percent (323) of blacks, and 13 percent (347) of Hispanics achieved a score of 70 on the examination. Eight and a half percent (3,861) of whites, one-third of 1 percent (17) of blacks, and 1.5 percent (40) of Hispanics received a score of 90 or higher. (See table 5.)

The court decree calls for the elimination of PACE because of its "adverse impact" on blacks and Hispanics. Given the fact of poor education, such a move differs little from medical doctors attempting to help patients by eliminating the use of thermometers. PACE results are merely an extension of the gruesome tales told by the Graduate Record Examination (GRE), the Scholastic Aptitude Test (SAT), and California Achievement Tests (CAT).

The Civil Rights Commission is fond of saying:

> The disparities in unemployment and underemployment, however, cannot be interpreted only as reflections of disparities in education, training, and age distribution. Substantial disparities remain even after these factors are controlled. At every educational level, and at every level of training, blacks and Hispanics generally experience higher levels of unemployment and underemployment than majority males. Moreover, in many instances, the disparities were greater among workers with more education. Increased education in other words, helps everyone, but it helps majority males the most.[14]

The Civil Rights Commission's equating years of schooling with education represents resolute ignorance in the face of test scores that reflect little comparability between education received by blacks and that received by whites.

Pitfalls of Number-Oriented Policy

Affirmative action is clearly a number-based policy. The Office of Federal Contract Programs Chapter 60 says:

[13] U.S Bureau of the Census, *Statistical Abstract of the United States: 1981* (Washington, D.C.: Government Printing Office, 1981), p. 142.

[14] U.S. Commission on Civil Rights, *Unemployment and Underemployment Among Blacks, Hispanics, and Women* (Washington, D.C.: Government Printing Office, 1982), p. 53.

TABLE 4

Distributions of GRE General Test Verbal Scores by Ethnic Group
(U.S. citizens only)

	Percent of group below score									
Score	American Indian	Black/ Afro-Amer	Mexican American	Oriental or Asian	Puerto Rican	Oth Hisp Latin Am	White	Other	No Response	Total
800	99.9	100.0	99.9	99.6	100.0	99.8	99.5	99.0	99.1	99.5
750	98.8	99.7	99.7	98.2	99.9	98.8	97.6	96.1	96.1	99.7
700	96.4	99.4	99.1	94.3	99.3	96.4	93.4	89.6	90.7	93.8
650	93.1	98.6	96.5	88.8	98.2	91.1	86.5	79.8	82.7	87.3
600	87.3	97.1	91.4	80.3	95.9	84.5	76.3	68.7	71.0	77.8
550	77.1	94.1	85.2	69.5	91.7	75.6	62.7	55.0	57.4	65.1
500	62.4	88.3	73.7	54.9	84.8	62.5	45.7	39.3	42.6	49.1
450	44.1	78.5	60.0	39.3	73.5	46.5	28.2	25.7	27.4	32.5
400	25.8	64.4	41.8	24.5	57.5	28.9	13.8	13.4	15.7	18.1
350	12.4	44.5	24.2	13.6	36.3	14.8	4.6	5.0	7.1	7.9
300	4.9	25.0	10.9	6.6	17.4	6.5	1.2	2.0	2.8	3.2
250	1.3	9.4	3.0	2.2	6.5	1.4	0.2	0.5	1.0	1.0
200	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
N	922	8,370	1,714	2,715	1,359	1,288	117,686	2,205	5,206	141,465

Source: Henry Roy Smith III, *A Summary of Data Collected from Graduate Record Examination Test Takers During 1982–83* (New Jersey: Educational Testing Service, 1984), p. 83.

TABLE 5
Professional and Administrative Career Examination

	Whites	Blacks	Hispanics
Total number taking the PACE	45,539	6,488	2,694
Number achieving unaugmented score of 70 or above	19,177	323	347
% of total	42.1%	5.0%	12.9%
Number achieving augmented score of 70 or above	21,343	940	518
% of total	46.9%	14.5%	19.2%
Number achieving unaugmented score of 90 or above	3,861	17	40
% of total	8.5%	0.3%	1.5%
Number achieving augmented score of 90 or above	6,030	42	69
% of total	13.2%	0.6%	2.6%

Source: Consent decree, *Luevano* v. *Campbell* (U.S. District Court, D.C.), Jan. 9, 1981.

An affirmative action program is a set of specific and *result-oriented* procedures to which a contractor commits itself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of its work force where deficiencies exist. . . ."Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. In making the utilization analysis, the contractor shall. . . .(1) In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors: (i) The minority population of the labor area surrounding the facility; (ii) The size of the minority unemployment force in the labor area surrounding the facility; (iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;. . .[15]

Numbers-based civil rights policy ignores individual differences in preferences, ambitions, and ability. The observation that Jews are disproportionately represented among American Nobel prize winners (30 percent) does not mean they have conducted an educational conspiracy against other Americans. The fact that blacks are 75 percent of U.S. professional basketball players, and earn the highest basketball wages, does not mean blacks conspire against white players. The fact that blacks are "overrepresented" in football, baseball, and boxing and "underrepresented" in ice hockey and tennis does not necessarily mean there are equal employment and nondiscriminatory practices in one area of the sports industry and the opposite in the other. The fact that black male college graduates earn a median wage less than white male college graduates and black female college graduates earn a median income considerably higher than their white counterparts does not mean a conspiracy exists between black female and white male college graduates against their black male and white female counterparts.[16]

Concepts like underrepresentation, underutilization, and disproportionality are used to deliver special privileges and benefits to people based on

[15] Department of Labor, Chapter 60—Office of Federal Contract Compliance Programs, *Equal Employment Opportunity*, pp. 465–66.

[16] See Walter E. Williams, *The State Against Blacks* (New York: McGraw-Hill, 1982), chap. 4.

race in order to undo a "heritage of slavery and racial discrimination." *Even if* one were to accept the notion that disadvantaged people ought to receive extra privileges and benefits, numbers-based policy based on race is not only inequitable, but inefficient as well.

First look at equity. Suppose there is a black who lives under slum conditions, in a female-headed household, with five siblings where there is inadequate income and dim prospects for the future. Then imagine an Armenian who lives under slum conditions, in a female-headed household, with five siblings where there is also inadequate income and dim prospects for the future. What theory of equity justifies special privileges and benefits in employment, admission to college, and other programs to the black that are denied to the Armenian?

Alternatively, suppose there is a black family that lives in Beverly Hills whose father is a dentist, whose family has been very well off for several generations with a tradition of college attendance, and has high income and bright prospects for the future. Similarly, there is a Jewish family who lives in Scottsdale, Arizona, whose father is a doctor, whose family has been well off for several generations with a tradition of college education, and like the black family, has high income and bright prospects for the future. What theory of justice says special benefits and privileges should be given to the black family and denied to the white family? More specifically, why should a special seat be set aside at the medical school at the University of California, at Davis, and the Jewish son be denied the privileges?

It is easy to answer that the black, in either case, should be given the special privilege or benefit to redress the injustices of the past. However, such an answer ignores injustices of the past suffered by Armenians at the hands of the Turks and Jews at the hands of the Nazis and others. Moreover, both groups suffered discrimination in the United States.

Even if some perverted theory of justice is advanced that holds blacks should be given the special privilege or benefit that is denied to other similarly situated people, but for the fact of race, numbers-based policy based on race is inefficient. Under numbers-based, result-oriented affirmative action policy, the black family who lives in Beverly Hills is eligible for special privileges and benefits as well as the black family who lives in the slums. Given that economic resources are limited, it is inefficient to spend them on people who do not need them to the sacrifice of people who do.[17]

If resources are expended on a group based solely or mostly on race, the predictable result is that those who are most able in the group will manage to get the lion's share. Such a prediction is corroborated by the increasing evidence that blacks are becoming two groups, very poor and very middle class.[18] Names of the poor blacks are evoked for the purposes of getting Congress to enact legislation for aid to higher education, to get the Equal Employment Opportunity Commission to press for quotas, to get the government to have set-asides in construction projects, and civil rights pressure for colleges to admit more blacks. All of these measures do little for the hardcore, functionally illiterate black slum resident.

Conclusion

The solutions to the socioeconomic problems of many blacks will not be found in numbers-based policy. They are immoral and as such provide much-needed fuel for hate groups like the Nazis and the Ku Klux Klan, who are finding success in gaining membership in once infertile areas and groups. A white fireman with 20 years' seniority laid off so that a black fireman keeps his job is an excellent potential recruit for the Ku Klux Klan.

The immorality of numbers-based privileges and benefits is readily realized when we recognize that government *cannot* give a special advantage to one person without simultaneously giving a special disadvantage to another. Thus, when under government pressure a university sets aside a certain number of seats for blacks, of necessity the policy reduces the number of seats open to other people. A white who was denied entry as a result did not own slaves, nor was he responsible for Reconstruction abuses suffered by blacks. By the same token, the policy does nothing for the blacks who *were* slaves *and* suffered the abuses of Reconstruction.

In effect, numbers-oriented policy says we should help individual *A* (a black of today) by punishing *B* (a white of today) for what individual *C* (a white of

[17] For an excellent brief discussion of what its author calls socioeconomic reverse discrimination versus affirmative action reverse discrimination, see, Steven Plaut, "Some Thoughts on Affirmative Action," *Midstream* (February 1980), pp. 46–49.

[18] William Julius Wilson, *The Declining Significance of Race: Blacks and Changing American Institutions* (Chicago: University of Chicago Press, 1978).

yesterday) did to individual *D* (a black of yesterday). That is a warped criterion for social justice, especially if we accept the principle of individual accountability.

This rejection of numbers-based racial policy on factual, equity, and efficiency grounds is not the same thing as saying there are no problems of race and there is nothing government can do about it, for there is an arena for constructive government policy. It lies in a principle that might be called *transitional equity.* Certain outcomes we observed may lie outside our *a priori* expectations such as tossing a die a number of times with the two spot showing one-half the time. We guess that such an outcome is not within the realm of predicted probability. One alternative is to weight the die in favor of the other numbers. A more useful alternative is to check to see whether the die is fair. If it is not fair, then make it fair. If it is fair, keep on tossing.

The socioeconomic game of life is not fair. The U.S. Civil Rights Commission would be wise in pressing government at all levels to make the game fair. There are numerous laws and regulations at every level of government that systematically rig the economic game against certain people according to their personal characteristics. Among them are: minimum wage laws, occupational licensure laws, business licensing laws, health and safety laws, and many others.[19] These laws adversely affect many Americans, but they exact a disproportional effect on blacks because of their special history in the United States, namely, that blacks were the last major ethnic group to become urbanized and receive the franchise. When they did, many of the traditional avenues to upward socioeconomic mobility had been closed by powerful vested interest groups using the coercive powers of government.

I propose that the U.S. Civil Rights Commission launch an attack on these and other laws that rig the economic game and we keep on playing the game—made fair.

[19] See, Williams, *The State Against Blacks.*

Appendix

Number of Doctoral Scientists and Engineers By Field, Race, and Employment Status, 1981

Field and race	Total	Unemp./seeking emp
All fields		
Total	363,866	2,646
Race		
White	322,853	2,260
Black	4,609	63
Asian/Pacific Islander	27,857	261
Physical scientists		
Total	67,693	499
Race		
White	59,740	357
Black	644	27
Asian/Pacific Islander	5,838	75
Chemists		
Total	45,376	337
Race		
White	40,150	255
Black	380	3
Asian/Pacific Islander	3,898	39
Mathematicians		
Total	13,819	92
Race		
White	12,258	70
Black	177	*
Asian/Pacific Islander	937	22
Statisticians		
Total	2,651	5
Race		
White	2,228	3
Asian/Pacific Islander	284	2
Computer specialists		
Total	9,066	5
Race		
White	7,942	5
Black	20	*
Asian/Pacific Islander	886	*

* No cases reported

(continued)

Number of Doctoral Scientists and Engineers by Field, Race, and Employment Status, 1981

Field and race	Total	Unempl./seeking em
Engineers		
Total	58,311	46
Race		
White	47,678	42
Black	270	*
Asian/Pacific Islander	9,055	4
Aero/astro engineers		
Total	2,536	*
Race		
White	2,250	*
Black	10	*
Asian/Pacific Islander	260	*
Materials sci. engineers		
Total	6,238	*
Race		
White	5,234	*
Black	5	*
Asian/Pacific Islander	818	*
Nuclear engineers		
Total	2,061	*
Race		
White	1,602	*
Black	3	*
Asian/Pacific Islander	376	*
Life scientists		
Total	93,848	1,007
Race		
White	84,329	942
Black	1,185	19
Asian/Pacific Islander	6,416	44
Agricultural scientists		
Total	17,270	64
Race		
White	15,998	56
Black	209	*
Asian/Pacific Islander	771	6
Medical scientists		
Total	22,136	77
Race		
White	19,668	69
Black	313	*
Asian/Pacific Islander	1,620	8

* No cases reported

(continued)

Number of Doctoral Scientists and Engineers by Field, Race, and Employment Status, 1981

Field and race	Total	Unempl./seeking em
Psychologists		
Total	45,416	488
Race		
White	42,666	460
Black	853	8
Asian/Pacific Islander	609	20
Social scientists		
Total	56,473	413
Race		
White	50,465	310
Black	1,396	9
Asian/Pacific Islander	3,083	76
Economists		
Total	14,294	47
Race		
White	12,574	*
Black	234	*
Asian/Pacific Islander	1,165	47

* No cases reported

Source: Adapted from U.S. National Science Foundation, Division of Science Resource Studies, *Characteristics of Doctoral Scientists and Engineers in the United States: 1981* (NSF 82–332), pp. 21–24.

The Common Sense of Affirmative Action

By Barbara R. Bergmann*

Introduction

In the American market for labor, we are very far today from a situation where a person's race or sex would not be useful in helping us to predict whether that person had relatively high or relatively low wages. A recent estimate based on 1981 data suggests that black men earn 15 percent less than white men with the same number of years of education and experience, while white women and black women earned 30 percent less.[1]

Occupational segregation by race and sex continues to be an important mechanism for keeping the earnings of blacks and women down. Most women have jobs in the small number of occupations that are identified in the public mind as "women's work," that have few men in them, and that pay a great deal less than the jobs that men typically hold. Black men have also been absent or had low representation in some of the better jobs to which white men have access, particularly in management and in the crafts.[2]

One's opinions on the desirability of affirmative action programs depends to some extent on one's diagnosis of the extent to which currently operating discrimination is responsible for the poor labor market position of blacks and women. If we accept the evidence, as I think we should, that discrimination is a common practice that has important detrimental effects, then affirmative action—the adoption by individual employers of numerical goals and timetables for employment and promotion by race and sex—is one possible remedy. If we need remedies for discrimination, then we face the question of whether affirmative action is, on balance, a helpful remedy whose benefits outweigh its bad effects. We also face the question of how widely and when affirmative action should be applied, and how administered and monitored.

I would argue that affirmative action is difficult to administer and full of flaws and dangers. It makes race and sex salient in personnel decisions just when we hoped to be going towards processes of selection that are sex blind and race blind. Despite all this, however, I will argue that affirmative action, flawed and difficult though it is, is a necessary tool for making progress against the forces of discrimination in many situations.

* Professor of Economics, University of Maryland.

[1] Francine Blau and Andrea Beller, "Trends in Earnings Differentials by Sex and Race: 1971-1981," presented at the American Economic Association Meeting, Dallas, Dec. 19, 1984. For a recent review of studies on black-white wage differentials, see Phyllis A. Wallace, "Title VII and the Economic Status of Blacks," Sloan School of Management WP 1578-84. For an extensive review of the empirical evidence on sex discrimination, see Donald Treiman and Heidi Hartmann, eds., *Women, Work, and Wages* (Washington, D.C.: National Academy Press, 1981).

[2] Employment by sex for detailed occupations is published annually in *Current Population Reports,* Consumer Income, Series P-60. Similar information by race by sex can be computed from the public use tapes underlying these publications.

There are those who favor affirmative action, not (or not necessarily) as a tool to correct discrimination, but as a way to achieve "equality of results." People who argue in this way tend to concede, almost by default, that currently operating discrimination is not a problem, or not the main problem, but that the problem is a "handicap" deriving from injustices in the past. I am not going to argue in this way, because I think that the evidence of pervasive discrimination in the American economy today is strong and convincing. The case for affirmative action can be rested on the need to overcome today's discrimination, not yesterday's.

Is the Problem Discrimination?

There are, broadly speaking, two competing explanations of why white men's position in the workplace and reward for work is so much superior to women's and black men's. One of the alternative explanations says that nothing bad or unjust is going on; that the system is fair; that it has not been rigged by white men to disadvantage women and black men. Employers, according to this explanation, are acting in a benign and nondiscriminatory way. If they don't hire more blacks and women for the good jobs, it is just that they couldn't do the job or wouldn't want to do it.

Those who think the labor market as it now stands is fair have one explanation for women's lack of success in the labor market and another explanation for black men's lack of success. They say that women themselves choose the low-level jobs with inferior pay and promotion prospects and are happy with them because such jobs are consonant with "their" family responsibilities. Further, they say, women want jobs that are considered "feminine" and that they tend to gravitate to traditional female jobs that, it is said, match their taste for light indoor work of low responsibility.

The argument used to explain away as innocuous women's low place in the labor market—namely, that women themselves like things the way they are—would not do for black men, at least not at the present in most circles. As late as the 1950s, white southerners who were apologists for racial segregation and the extreme economic and political subordination of blacks that was standard then in the States of the old Confederacy, used to argue that blacks were really happy the way things were, and that it was only outside agitators who were stirring up things. However, such a transparent fiction could not pass muster today. Thus, those arguing that today's labor market is not unfair to blacks must fall back on the argument that blacks are incompetent. The Shockleys, who are always with us, talk about bad genes. Others talk vaguely about family disruption and how that affects the labor market success of black males.

The alternative explanation of blacks' and women's lowly pay and position is that the labor market is shot through with discrimination and unfairness. In this version, it is employing organizations that choose which jobs blacks and women can have and exclude them from all others. Male workers (including males in management) use exclusionary tactics and harassment to keep women out of "men's jobs." Unions may negotiate contracts whose provisions have the effect of keeping blacks and women confined to certain low-level jobs, and keeping the pay of those jobs relatively low.

The two alternative ideas about why women fare so poorly in the labor market—women's voluntary accommodation to domesticity on the one hand and sex discrimination on the other hand—are not mutually exclusive. Many people would probably concede that there is truth to both of them. Moreover, beliefs concerning women's primary devotion to domesticity may motivate discrimination against women, while discrimination may discourage women from giving primary attention to their paid work.

With respect to blacks, although many would perform excellently in jobs that pay more than the ones they currently hold, there undoubtedly is an element of poor preparation for the job market on the part of some. At the same time, there are important elements of discrimination that are rationalized by reference to beliefs that all blacks are incompetent for all but a few jobs. And, of course, discrimination engenders despair and encourages poor preparation.

The real question is not whether discrimination is entirely absent; nobody with any experience and sense could have much doubt that some employers have and do exclude women and blacks from some jobs. At issue is the magnitude of the importance of discrimination in causing the sharp differences in status and pay between the sexes and the races we currently observe in the American economy. If we believe discrimination pervasive, and if we consider its effects to be a serious evil, then it makes sense to pursue programs, such as affirmative action, designed to reduce it. If, on the other hand, we were to

come to the conclusion that discrimination against women and blacks is only spotty and that the differences in pay and position come about because of women's indifference and blacks' incompetence, then we might be better off without such programs.

Evidence of Discrimination

This is not the place to review in any detail evidence that discrimination by race and by sex has been and continues to be an important phenomenon, and is at least in part responsible for the labor market problems of women and blacks. Recent statistical studies by Blau and Beller[3] show that there continue to be differences in earnings by race and sex that cannot be explained by differences in worker characteristics by race and sex and that point to discrimination. They find that the decade 1971–81 did show modest reductions in the race and sex differences in wages after accounting for changes in qualifications, but that differences have by no means disappeared and remain substantial.

A recent volume of the National Academy of Sciences[4] reviews sex differentials in wages and presents considerable evidence that at least a good part of the differential between men and women cannot be attributed to differences between the sexes in experience, education, training, commitment to work, turnover, attention to sick children, health, career interruptions, and so on.

Occupational segregation is studied by scholars in still another volume published recently by the National Academy of Sciences,[5] where the emphasis is on segregation by sex. Again the evidence is strong that sex segregation has more to do with the reluctance of males to accept women as peers and supervisors than of any productivity-related deficiencies in women or any reluctance on women's part to fill the better jobs. Occupational segregation by race clearly proceeds from similar causes.

It is not just statistical studies that support the idea that discrimination is important. The argument that blacks are, on average, less competent than whites does not really explain the almost complete absence of blacks in many job categories in many establishments. When one sees, for example, that a particular employer maintains a sales force, or a group of waiters or a police force, that is all or virtually all white, a person who remains skeptical about the practice of discrimination in such a situation (which common observation convinces us is common) must maintain, not merely that blacks are on average less competent than whites, but that there is not a single black on a level with the least competent of the whites hired by that particular employer. Similarly, the argument that women don't want a certain particular type of job (in the frequent situations where in a particular establishment they are totally absent from the crafts or managerial ranks) entails believing that there is not a single one who would want such a job.

We must also count as evidence concerning discrimination the fact that there have been hundreds of witnesses that judges have found credible in scores of cases, who have given detailed testimony of the discrimination they have suffered. There have also been statistical studies on particular establishments that have passed judicial scrutiny as evidence of discrimination.

If it is conceded that discrimination by race and sex does occur in some, although possibly not all, establishments in the American labor market, then the question then becomes the application of remedies—affirmative action among them—to particular establishments.

Regulations Guiding Affirmative Action Programs

Affirmative action programs are found in three contexts. In some cases, they have been set up on the order of Federal courts, after findings of discrimination. Some employers have instituted affirmative action programs voluntarily, as a defense against discrimination suits. The most common use, however, is on the part of firms who sell or wish to sell their products and services to the Federal Government. Federal contractors are mandated to formulate and implement affirmative action programs, and their compliance with this requirement is regulated and monitored by an agency in the U.S. Department of Labor, the Office of Federal Contract Compliance Programs (OFCCP).

OFCCP has set up a body of regulations that Federal contractors or would-be contractors are required to follow. The regulations mandate that each employer (with a contract exceeding $10,000 in value) write down and implement a plan of affirma-

[3] See note 1.

[4] See Treiman and Hartmann.

[5] Barbara F. Reskin, ed., *Sex Segregation in the Workplace* (Washington, D.C.: National Academy Press, 1984).

tive action, the purpose of which is "to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." (no. 60–1.4, p. 448) In justifying the need for highly specific plans and urging vigor in pursuing them, the regulations declare that, "Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate." (no. 60–2.10, p. 465)

The OFCCP regulations mandate a detailed set of procedures:

1. Each firm must identify "problem areas" where there is "underutilization" of minorities and women (no. 60–1.40, p. 461), defined as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability" (no. 60–2.11, p. 466). In determining whether minorities are being underutilized, the contractor is directed to consider the minority and female labor force in the area, the availability among them of skills, and "the degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities. . .[and] women" (no. 60–2.11, pp. 466–67).
2. The firm must formulate a detailed affirmative action plan with numerical goals and timetables for rectifying the "underutilization" (no. 60–2.12, p. 467).
3. The firm must engage in outreach and training activities to develop a flow of minority and female applicants of the appropriate skills as necessary to meet the goals and timetables (no. 60–2.24, pp. 471–73).
4. Periodic compliance reviews of each firm are to be conducted by OFCCP. Firms found in persistent noncompliance may, after set procedures, be declared ineligible to do business with the Federal Government. (In practice this power has been used very sparingly, despite considerable evidence that discrimination persists in the establishments of many contractors.)

The Importance of Enforcement Strategy

There are two notable features of the OFCCP guidelines that need to be emphasized. First, the mechanics of the determination of "underutilization" of those women and blacks who are "available" are not spelled out in detail. This leaves a great deal of discretion, initially in the hands of the employer, but ultimately in the hands of the enforcement agency. Secondly, the guidelines ask the employer to take a broad view of availability and to include in the ranks of the available some blacks and women who may not currently be "best" for the job, and even some who currently do not fulfill the requirements of the job, but who with some training and encouragement might be brought into such a condition.

Given that the regulations do allow for discretion, what is needed is a guideline as to what is to count as the degree of availability in the standard case. Departures from that guideline could then occur, but would require special justification. Let me propose as a standard guideline:

A particular race-sex group should ordinarily have a share in an occupational category equal to its share in the educational achievement shown by people in the occupational group. (Example: If an occupational group consists mainly of high school graduates, and if 8 percent of the high school graduates are black females, then black females should ordinarily have 8 percent of the jobs in that group. Where educational achievement of incumbents varies, weighted averages would be used.)

The extent to which an enforcement agency will have to get involved in "fine-tuning" this formula to match the realities of particular cases will depend on the agency's enforcement strategy. If, as I think should be the case, OFCCP were to concentrate its resources on highly visible employers of large numbers of workers who run shops in which the entry-level occupations are highly segregated, then the fine points of the definition of "underutilization" are not going to have much practical importance. In such egregious cases, whatever definition of the term is adopted, the agency will have little difficulty in showing that its standards are not met.

If the enforcement agency decided that it was going to make interventions and call on the carpet only large firms with a high degree of segregation by race and sex in entry-level occupations and absence of credible plans to remedy the situation, it would have a great deal to do. There are many establishments that would require intervention under these criteria, and attending to them would use up the agency's budget many times over. A sensible strategy of regulation would avoid close calls, and stick to egregious violations.

Enforcement strategy is really the key to a sensible response to a case proposed for our attention by Clarence Pendleton, Chairman of the U.S. Commission on Civil Rights. The Georgetown University basketball team is predominantly black, and the coach who chooses the players is black. On the other hand, the population of young people from whom Georgetown draws its students is predominantly white. Does that mean, Pendleton asks, that the basketball coach has been discriminating in favor of black players?

In posing this question, I think it fair to say that Mr. Pendleton is implicitly suggesting that any sensible person would take the following line in responding:

1. There is no discrimination in this case. The "availability" formula given above would not work here. Affirmative action should not be applied here.
2. Just as an inference of discrimination would be wrong and silly in the Georgetown basketball case, it would be wrong to make an inference of discrimination on like grounds anywhere in the economy. Affirmative action applied anywhere in the economy would be as unjust and ridiculous as it would be in the case of the Georgetown team.

Even if point 1 above were conceded, it is vital to understand that point 2 does not, of course, follow. This is crucially important, and we shall follow it up later. However, let us consider briefly the substance of point 1. Race discrimination in sports is not unknown. Although I would judge it unlikely to be operating in this case, I would not be willing to say that it is inconceivable. Coaches have been known to exclude people for reasons of race, and some may still do so.

The Supreme Court, in *International Brotherhood of Teamsters* v. *U.S.* tells us that (for employment) the law requires us not to make the assumption in any particular case that unrepresentativeness is of benign origin. The Court suggests that when we see what looks like unrepresentativeness, those excluded are entitled to ask that an explanation be given and adjudged adequate. In his case, Georgetown might have little trouble in demonstrating that the standard definition of availability given above should not apply. Its "explanation" would presumably not consist in generalities about blacks' superior genetics and lack of better alternatives. Rather, in this particular case a legally adequate explanation might consist of a study of the records of the selection process, which when examined might or might not show that objectivity had indeed been exercised.

But would asking for the explanation in this case be reasonable? Should a government agency be devoting resources to such a quest? Should Georgetown be forced to devote resources to answering questions about its basketball team selection processes?

In asking whether Georgetown should be asked to defend itself against the *Teamsters* presumption that it is discriminating, the agency would want to ask itself how important the case is and how likely that substantial infractions could be shown to exist.

Among the issues in making such a decision would be:

a. Does the purported exclusion involve more than just a few people?
b. Is there a consistent pattern through time suggesting long term exclusion?
c. Does the purported exclusion have high visibility, so that allowing it to continue would encourage other acts of exclusion?
d. Are the talents required by the position in question so common that it strains credibility to believe that, even with reasonable encouragement or training, no member of a protected group could "make the team" on merit?

Under these criteria, I don't think that the case of the Georgetown basketball team merits intervention, although we would be wise not to rule it out as a matter of principle even in this case. Having decided that the enforcement agency should not waste Georgetown's resources or its own on this case relieves us of the necessity of fine tuning the definition of "underutilization" for this special case.

Whatever our decision about intervention in the Georgetown case, we are certainly not justified in using the facts (or the presumed facts) of this case to rule out intervention in ALL cases, whether of basketball teams or of groups of employees.

Let us pass to the second point. If it were to be conceded that the Georgetown coach is running a highly meritocratic operation, can the same thing be presumed of any and all employing establishments? The Congress certainly did not think so when it enacted Title VII of the Civil Rights Act of 1964, under which the *Teamsters* decision referred to above was rendered. As we have seen, many statistical studies and much court evidence suggest that discrimination is important and widespread.

In the next section, I consider the case of establishments more typical of the American labor market than the Georgetown basketball team and ask whether it is reasonable to apply affirmative action remedies.

Why Enforced Affirmative Action Plans Are Needed

The best way to come to an understanding of the wisdom, justice, or lack thereof of the OFCCP regulations and of the enforcement strategy I have proposed is to ask what harm we reasonably think would occur and what good we think would occur if the regulations were enforced. As noted above, the answers in part depend on our judgment concerning the amount of discrimination going on. The answers I will give here will reflect my judgment that the evidence of considerable discrimination is strong. It also reflects my judgment that women and blacks in the absence of discrimination would appear, if not in all job categories, in proportions approximately equal to their proportions in the labor force with the requisite educational credentials.

The disadvantages of affirmative action plans have been discussed elsewhere at length. The most important is that a member of a protected group who is hired or promoted has to endure and contend with the feeling or belief or suspicion on the part of fellow employees that he or she lacks merit and would not have been appointed or promoted without the plan. This is indeed unfortunate, but it is not as unfortunate as the situation in which there is no representation or virtually no representation of protected classes in certain job categories, as is currently the case in many establishments. Moreover, the suspicions concerning the merit of a candidate hired under affirmative action may well arise from feelings deriving in part from racism or sexism, possibly due to lack of contact with blacks and women as peers on the job. Only when these peer relationships have a chance to get established (even if they have a rocky start), and the new employees become known as individual human beings, may feelings of racism and sexism diminish.

Another concern about affirmative action is that it leads to the hiring of people who are not the best that the employer might hire. Some commentators on this issue assume that business firms that sell to the Federal Government are like basketball teams, but this really makes little practical sense. Unlike a basketball coach, these firms are not in the business of finding for any particular function the team of the best five employees in the Nation, to compete against other companies' teams of five. Rather, they are in the business of assembling people to perform functions that we know from experience may be performed quite satisfactorily by many whites, many blacks, many men, and many women.

Affirmative action is probably most productive in large companies, where there is a great deal of segregation of entry-level occupations by race and sex. In some companies, the people who are in overall command of company policy have explicitly made decisions to restrict access to certain jobs by race or sex, although this is probably rare these days, at least in companies of any size. However, there may be an informal policy to that effect. In other cases, the intended policy of the upper officials may be that there be no discrimination, yet there may be little energy behind efforts to ensure that old patterns of exclusion are broken up. In such a case, sins of omission in the administration of hirings and promotion may have the effect of countenancing discrimination. Whatever the setup that has resulted in the perpetuation of segregation, it is unlikely to change without a very explicit change of the institutions, practices, rules, rewards, and punishments regulating hiring and promotion. Affirmative action forces this change.

In most sizable establishments, no one person makes all personnel decisions, and many persons may have vetoes over each decision. A candidate for a job or a promotion is typically interviewed by the person who would supervise that person should she or he be given the position, by supervisors further up in the hierarchy and by potential coworkers. Giving all or some of these people vetoes, or influential voices in the decision, ensures that the preferences of the person in on the decision who is most bigoted will rule.

If race and sex discrimination were not an issue, we might say that there are sound reasons why firms arrange things that way; after all it ordinarily makes no sense to appoint someone who cannot get along with those with whom he or she will be working with and for. Productivity would be bound to suffer, if such procedures were not followed. Nevertheless, such very common procedures may cause the rejection of people on account of race and/or sex, even if the officially enunciated policy of the company is equal opportunity for all. If the institu-

tional rules permit it, one low-level employee may well block the hiring or promotion of many persons for reasons of race or sex.

It may be said that in a company where the policy and intentions of the upper echelons are nondiscriminatory, the function of affirmative action is to force those in charge to uncover institutional arrangements that maintain traditional sex and racial occupational roles and to take moves to change them.

We have to face the fact that affirmative action may for some time force the disruption of personnel choice mechanisms that are functional in terms of assuring compatability and, thus, may temporarily lower productivity. Mistakes may be made in choosing people, because the new arrangements are bound to be less efficient in screening out incompatibles. Indeed, affirmative action requires that certain sources of social incompatibility, namely, race and sex, be ruled out as reasons for rejection. However, changes in selection procedures required by affirmative action may also make the screening out of people who are technically incompetent less efficient.

The extent of the loss of productivity due to affirmative action requirements and the time such losses might be expected to go on have not been documented, to my knowledge. On the other side, affirmative action may result in the hiring of people who are on the average more competent. As an example, all-male schools are now giving as a reason for shifting to coeducation a desire to improve the quality of their student body. The same might very well occur in the context of employment.

An Example of Slack Enforcement of Affirmative Action

In some of the public discussions of affirmative action, the assumption is sometimes made that stringent enforcement of affirmative action has gone on, and that great harm has thereby been done. In this section, I should like to present one piece of evidence that the enforcement of affirmative action has been remarkably slack, even in cases that have been in the public eye and where enforcement might have been expected.

One of the most publicized cases in the history of antidiscrimination efforts has been that of the Bell Telephone Company, and its constituent operating companies, which were accused by the EEOC of discriminating against blacks and women. A consent decree was entered; the company promised to undertake affirmative action, with respect to crafts occupations, as well as others.[6] In terms of enforcement priorities, this case is at the other end of the spectrum from the Georgetown basketball team. It is large, visible, and the underrepresentation in jobs in certain categories of members of protected groups was and is substantial. This is a case where we would not need to fine tune the definition of "underrepresentation" because this company recruited unskilled people for entry-level crafts jobs and did all its own training.

The data discussed here relate to employment in crafts and clerical jobs at the Michigan Bell Telephone Company, which the company was presumed to be desegregating by race and sex. The analysis shown here, which was done in another context, relates only to desegregation by sex. The figures clearly show that in actuality little desegregation by sex took place, although some figures given to the EEOC by the company for 1979, close to the end of the period covered by the consent decree, give the opposite impression.

In this section, an analysis is presented of the distribution by sex of clerical and crafts jobs at Michigan Bell. These are the two largest job groups in the company, and in 1983 together constituted 93.6 percent of all company employees other than officials, managers, and professionals. Both clerical and crafts jobs required no college education. Although some of the clerical jobs may have required typing, the knowledge of typing should not have been a disqualification from the crafts job. In the calculations, the employment data reported by the company to the EEOC on EEO-1 forms for the years 1970–83 were used. These forms report numbers of employees by major occupational group by sex and race.

In table 1, I have tabulated the numbers of men and women Michigan Bell reported as being in crafts and clerical jobs for the period of 1970 to 1983. In 1970 women had 502 of the 8,475 crafts jobs. In order to estimate the extent to which this occupational segregation has persisted at Michigan Bell, I have computed a "segregation index" for each of the years for which we have the EEO-1 data, which

[6] See Phyllis A. Wallace, *Equal Employment Opportunity and the AT&T Case* (Cambridge, Mass.: M.I.T. Press, 1976).

measures how far away the company is from full integration by sex of these two occupational groups.

The segregation index[7] shown in table 1 is computed to give a value of 100 for a perfectly segregated work force and a value of zero for a work force in which men and women are distributed across job titles in proportion to their representation in the work force. The computed segregation index understates the degree of occupational segregation at Michigan Bell, since there is considerable segregation by sex within the crafts category.

There was some modest improvement in the employment of women in crafts jobs between 1970 and 1978. In 1979 the EEO–1 forms for the company report a huge jump in the number of women in crafts. This might have resulted from a temporary reclassification of some jobs held by women from clerical to crafts, possibly rescinded in the following year. In any case, after 1979, the number of women in crafts retreated back to levels close to those in the early 1970s.

If we compare the situations in the first and last years for which we have data, it can be seen that the reduction in the segregation index was not achieved by any significant movement of women into crafts jobs, since there were only six more women in crafts in the last year than in the first. Rather, the reduction in the index resulted, for the most part, from the movement of men into clerical jobs, where they replaced women.

I have made a series of additional calculations to gauge the extent to which the Michigan Bell might have achieved a lowering of its segregation index had the company filled its entry-level vacancies on an integrated basis in every year from 1972 to 1981.

A firm that is in the process of reducing occupational segregation could not make sudden large-scale involuntary shifts of employees from job to job. Rather, it moves considerably more slowly, by filling whatever vacancies occur on a sex-blind basis. Vacancies are created when employees leave their jobs and when the number of jobs expands.

One source of information on the number of entry-level vacancies that occurred is the labor turnover rates published by the U.S. Bureau of Labor Statistics for the telecommunications industry. However, in these calculations I used the somewhat lower turnover rate of 8 percent per year, which is consistent with the appointment rate in crafts jobs in the company records to which I had access. I computed an index of segregation based on the staffing pattern that would have evolved had vacancies been filled by assigning new employees to each of the two occupational groups without regard to sex. It was assumed that the new employees would have the same composition by sex as those estimated to have been hired by Michigan Bell.

Table 2 compares the actual segregation indexes year by year with the segregation indexes that would have resulted from an assignment to vacancies in the two occupations without regard to sex. As can be seen in table 2, filling vacancies by assigning new entrants to occupation without regard to sex would have reduced the segregation index much faster than occurred in actuality. The segregation index could have been reduced to the neighborhood of 43 percent by 1981 had the company followed a policy of filling vacancies without regard to sex between 1970 and 1981. The policy it followed in actuality preserved the crafts jobs as a largely male bastion and left the segregation index at 78 percent.

Table 3 shows the numbers of women who actually occupied crafts jobs each year, and the proportion of women employed by the company (other than managers, administrators, and professionals) in crafts jobs. Table 3 also gives the estimated number and proportion of women in crafts had a nondiscriminatory pattern of hiring been followed. By 1981, 18.5 percent of the women would have been in crafts, as opposed to the 4.4 percent who were in crafts jobs in actuality in that year.

One interesting phenomenon that shows up in table 3 is that for 1979 the company reported a proportion of women in crafts just about in line with my estimate of what nondiscriminatory behavior would have produced in that year. Perhaps that is coincidence. Perhaps the company made the same kind of calculation as I made in preparing table 3 and constructed its report for the EEOC accordingly. Directions for making such calculations were avail-

[7] This index is sometimes called the weighted index of dissimilarity; see Paula England, "Assessing Trends in Occupational Sex Segregation, 1900–1976" in Ivar Berg, ed., *Sociological Perspectives on Labor Markets* (New York: Academic Press, 1981), p. 289.

TABLE 1

Employment Reported by Michigan Bell Telephone Company in Clerical and Crafts Occupations by Sex and Segregation Index, 1970–83

	Clerical		Crafts		Segregation
Year	Males	Females	Males	Females	index
70	484	13,581	7,973	502	91
71	455	13,222	7,977	502	91
72	584	12,845	7,818	525	89
73	806	12,574	7,979	607	86
74	988	11,797	8,104	806	83
75	1,273	11,028	7,892	799	79
76	1,385	10,270	7,669	734	78
77	1,467	10,239	7,399	726	77
78	1,503	10,171	7,073	784	75
79	1,425	10,343	7,022	2,048	67
80	1,565	11,639	5,595	553	74
81	1,410	11,612	6,725	535	78
82	1,233	10,649	6,311	571	79
83	883	7,540	4,806	508	78

TABLE 2

What Employment by Sex Would Have Been in Michigan Bell Under the Assumption of Sex-Blind Assignment of Employees in Crafts and Clerical Jobs, 1970–81

	Clerical		Crafts		Segregation
Year	Males	Females	Males	Females	index
70	484	13,581	7,973	502	91
71	784	12,893	7,648	831	85
72	1,114	12,315	7,288	1,055	79
73	1,584	11,796	7,201	1,385	71
74	1,780	11,005	7,312	1,598	68
75	2,055	10,246	7,110	1,581	64
76	2,173	9,482	6,881	1,522	62
77	2,382	9,324	6,484	1,641	58
78	2,486	9,188	6,090	1,767	55
79					
80					
81	3,124	9,898	5,011	2,249	43

TABLE 3

Female Craft Workers in Michigan Bell, Reported Employment and Estimated Employment Under Nondiscriminatory Assignment, 1970–83

	Female craft workers			
	Numbers of workers		Proportion of women in crafts	
Year	Reported	Under nondiscrim. assignment	Reported	Under nondiscrim. assignment
70	502	502	3.6	3.6
71	502	831	3.7	6.1
72	525	1,055	3.9	7.9
73	607	1,385	4.6	10.5
74	806	1,598	6.4	12.7
75	799	1,581	6.8	13.4
76	734	1,522	6.7	13.8
77	726	1,641	6.6	15.0
78	784	1,767	7.2	16.1
79	2,048	–	16.5	–
80	553	–	4.5	–
81	535	2,249	4.4	18.5
82	571	–	5.1	–
83	508	–	6.3	–

able in the industrial relations professional literature.[8] It is a matter for conjecture.

In any case, we may summarize this case by saying that over a 14-year period, despite considerable opportunities to do so, very few additional women were added to the crafts work force of Michigan Bell. The purpose of bringing it forward is to suggest that, in truth, affirmative action has not been seriously enforced in many contexts.

[8] See Barbara R. Bergmann and William Krause, "Evaluating and Forecasting Progress in the Racial Integration of Employment," *Industrial and Labor Relations Review,* Fall 1972.

Defining Minority and Female Utilization by Employment Practices: Is It Consistent with OFCCP Regulations?

By Carl C. Hoffmann, Patty Reed, and Nancy Keeshan*

Introduction

Much of the debate over affirmative action has centered on the legitimacy of quotas or the preferential treatment of women and minorities in hiring and promotion. This debate has become a symbolic debate centered on this issue. The debate has overlooked the fact that much of the contents of affirmative action programs are, in essence, good business practices. The regulations are being debated as if they rise and fall on that one issue. Although there is much that is irrational in the regulations and the enforcement of the regulations, there is also much to recommend them. This paper argues that there is a purpose for the Office of Federal Contract Compliance Programs regulations. The regulations serve a function different from Title VII as enforced by the Equal Employment Opportunity Commission and the Federal courts. The function is to serve as an arena to ask what companies can do to improve opportunities for all people, to improve economic and social mobility for all people. That arena, for many reasons, has not been the Federal courts.

This paper tries very hard not to get caught up in the sound and the fury of the debate. In fact, the paper is an attempt to capture out of the experience of 8 years, and in 26 plaintiff cases and in 24 defendant cases, what is valuable and good on both sides of the debate. Equal access to jobs in modern society is the same as equal access to land provided in the Homestead Acts, for they both, in their days, were access to a livelihood. The debate over equal opportunity is central to the tradition and values of the United States. Title VII and the OFCCP regulations are a part of that tradition and deserve an

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informed debate. This paper attempts to discover and elaborate the part of affirmative action that is in the best of the tradition of the United States.

First, by tracing the history of Title VII and the Federal courts, we argue that the EEOC and OFCCP have served different functions and purposes. Then, using research drawn from this history of Title VII enforcement, we suggest ways of improving OFCCP regulations. Finally, we argue that there is a need for the regulations that is consistent with positions argued by both conservative and liberal groups, specifically, that OFCCP regulations go beyond what the Federal courts are able to do in improving a company's personnel practices in ways consistent with free market principles. The enforcement of these regulations is the only forum in which the Federal Government can question market imperfections such as seniority systems like those upheld in the *Teamsters* case.[1]

(For the sake of clarity, because the words underrepresentation and underutilization are often used interchangeably and, in fact, when defined are similar in definition, this paper will use the word underutilization exclusively.)

Section I

The following is a quote from the Supreme Court ruling in *International Brotherhood of Teamsters* v. *United States:*

> [A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. . . .[2]

This quote has become a symbol over which much debate has taken place. One side of the debate perceives the quote as representing a statement of goals which suggests that the purpose of Title VII and affirmative action is to obtain equal representation of women, minorities, and other protected groups at all levels of management and in all occupations. For example, if 45 percent of the labor force is female, eventually 45 percent of all upper level management and of all professional, technical, and craft positions will be female. Not surprisingly, this interpretation is supported and cheered by many groups and feared by as many others.

Those who fear this interpretation perceive the quote as a threat to the very system into which minorities and women wish admission. This group argues that skills and effort would not be valued in a system whose purpose is to correct the history of past wrongs by imposing what is, in many cases, an artificial and unobtainable goal that favors minorities and women. They argue that, indeed, the wrong would be creating "reverse discrimination" or "affirmative discrimination."

The first group, characterized by advocates of protected groups, is expressly interested in changing policy to obtain "ends" represented by increasing numbers of minorities and women in all jobs and in correcting institutional discrimination that will not be cured by changes in the free market process. The second group, characterized by defendant groups, is much more interested in protecting the current process, specifically, the economic process where they see the free market, if relied upon, as being nondiscriminatory.

The debate has taken place in two basic arenas. The first arena is the EEOC and Federal courts' reinforcement of Title VII. Most of the employment discrimination battles have been fought in this forum, which provides most of the legal precedents that define discrimination and ways to correct it. The other forum has been the OFCCP, which has used the contractual process to force companies doing business with the Federal Government to define and cure discrimination. As we will describe, the debates have taken different forms in the two arenas.

The different levels of the debate can be best described by an old adage that points out the difference between doing something well and doing something right. The OFCCP is interested in both phrases, particularly the latter. The EEOC and the Federal courts, for a host of reasons, have been primarily interested in the former phrase. In each arena there has been some element of the two positions. Often the plaintiffs' standard for underutilization has been based on some variation of more liberal interpretations of the *Teamsters* quote, while

[1] All studies cited in this paper, when not explicitly cited as part of a court case, come from reports produced by Hoffmann Research Associates, Inc. For a complete report of the findings from any of these studies, please write to Hoffmann Research Associates, Inc., P.O. Box 1139, Chapel Hill, N.C. 27514.

[2] 431 U.S. 324 (1977).

[3] Ch. 60, OFCCP, EEO, DOL Regulations, subpt. B, sec. 60-2.11(b).

the defendants have sought explanations that rely on examining the fairness of the employment process that produced apparent discriminatory outcomes. Deciding what point of view is more correct in a case has been difficult for the courts and the OFCCP because of differing circumstances in each case and differing interpretations of Title VII.

To gain a clearer understanding of the difficulties faced by the courts and the OFCCP, consider the basic problem of how to determine when a minority group is underutilized in a company. The OFCCP regulations give the following definition of underutilization: "having fewer minorities or women in a particular job group than would reasonably be expected by their availability."[3] Availability is the key word. How does a company measure how many minorities and women are available for a given job?

Court Interpretation: Population Availability

In the case titled *EEOC* v. *Radiator Specialty Co.* (RSC), the plaintiff wanted the courts to accept that the number of blacks in the general population surrounding RSC represented the number of blacks available for the jobs (professional, clerical, management, and sales) in question. The plaintiff made the following uncontested showing:

> That the company had "filled by outside hiring or by promotion from within over 100 vacancies in its sales, managerial, professional, and clerical classifications since 1971, but that the representation of blacks among the 'new hires' in these classifications had been substantially less than their representation in the *general population,*. . ."[4]

Further, the plaintiff showed that although blacks made up 57 percent of the general population (or overall work force), they constituted less than 8 percent of the white-collar work force.

At trial it was found that, at least for the professional positions, qualifications were required that were neither commonly possessed nor readily acquired by the general population. Hence, the plaintiff's statistics relying on the general population were found inappropriate to a prima facie case.

RSC, on the other hand, wanted the court to accept the availability of blacks for the jobs in question as being represented by the 1970 census statistics showing the percentage of blacks employed in professional, managerial, sales, and clerical jobs in Mecklenberg County, the area surrounding the facility. A comparison of the population in Mecklenberg to RSC showed that RSC had a higher percentage of black employees in professional and managerial positions than did the outside labor force.

The court, although accepting the defendant's position for professional jobs, noted the limitations of the defendant's statistical analysis by claiming that census figures of the surrounding labor force do not purport to measure the percentage of qualified persons in its population, but that in the absence of more *relevant* evidence (i.e., applicant flow), RSC's statistics should be considered as at least one indication of the percentage of qualified blacks in the labor pool. Hence, RSC was found not to be underutilizing blacks in professional jobs.

In this case, the court helped reinforce this method of analyzing of underutilization (i.e., a comparison of the percentage of blacks in specific job categories in a company's work force with the percentage of blacks in similar job categories in the immediate labor force) as an indication of qualified employees available for the position. Even though the court clearly recognized the limitation of the method, it found that this was the beginning of the process of determining underutilization.

A closer examination of this case suggests that there is more to the availability of workers than counting those who already have experience in the job. What about the availability of current employees who could be promoted into a job? The method used in the RSC case for determining underutilization denies the basic fact that companies can create qualified employees as well as hire them. If companies hired only qualified people and qualified people meant only people with prior relevant experience to fill positions, there would be no one to hire after the present generation of experienced employees retired.

In spite of the increased stress on credentials, most companies develop and create qualified employees to some extent. In fact, it is still the case that most people start at the bottom of the job ladder and work their way up.

It is quite common to find many companies with a "promotion from within" policy where no craftsmen are hired directly into journeymen positions; all

[4] 610 F.2d. 179 (4th Cir. 1979).

[5] Holsey v. Armour Meat Packing of Charlotte, N.C., Slip op., August 1984.

employees are hired into a laborer position, no matter what their qualifications, and are required to go through extensive apprenticeship programs in order to obtain craft status. Other companies have "open transfer" policies that will allow people to move from one job to the next and only require those people to have the ability and desire to learn how to perform the new job. Open transfer policies can apply to jobs as technical as computer engineering and computer programming, where some companies, as a matter of policy, train all of the individuals who hold these positions, and with no requirement of prior experience or training in the area.

Court Interpretation: Personnel Process

Perhaps the best way to describe the process by which companies develop their personnel is to give two examples. These examples will show how the process can be used to define underutilization and how this definition produces varying standards according to the process.

In the mid-1970s two food wholesalers were sued for race discrimination. Both are located in Charlotte, North Carolina; both were the same size; and both sold and distributed wholesale food in the same markets across roughly the same geographic area. Neither company had any extensive training program for employees. To apply the examples to the present discussion, we shall describe the analysis done for both trials. The analysis involved computing what the availability of blacks for the job of salesman should be in an effort to determine whether blacks were underutilized in each company's work force.

Company: Armour Meat Packing

Armour Meat Packing Company promoted or hired 64 salesmen during the period relevant to the race discrimination suit.[5] Thirty-four of these people were promoted from inside the company, while 30 were hired from outside the company. Only one black became a salesman in the period under investigation. Armour argued (similar to RSC in the above case) that less than 3 percent of the external sales force was black; therefore, it was not surprising that only one black was hired. But an analysis of Armour's internal promotions and transfers and its external hiring practices showed that it very rarely hired people with prior sales experience, even though Armour claimed prior experience was a necessary qualification for the sales position. In fact, the sales job was one that attracted people with varied occupational backgrounds and was viewed by Armour's labor force as a goal of the promotion process. An examination of the job histories of the 34 people who were promoted from within (over half of those who became salesmen) showed that over 60 percent of those who achieved sales positions started work at Armour in positions well below the status of sales jobs. These positions included operative, labor, and service jobs. (See table 1.)

Many promotions took place prior to the move to the sales job. Roughly one-third (or 11 people) were promoted from operative positions, one-third (or 10 people) from clerical positions, and one-third (or 11 people) from managerial positions (in Armour's case, defined as foreman). There were also a number of steps involved in the promotion process that ultimately led to the sales position. A policy of internal promotion such as Armour follows clearly questions the relevance of the external census data as an indication of qualification for promotion.

But what was the internal availability of blacks for the sales job? Were all the people in the jobs held prior to promotion white? Though blacks were well represented in the operative, laborer, and service worker positions, less than 5 percent of the managerial and clerical positions were held by blacks. These positions provided two-thirds of the internal supply of salespersons. (See table 2.)

Two questions have arisen from Armour's promotion practices. First, did Armour promote fairly from the job categories that were held immediately prior to promotion to the sales job? Second, if blacks and whites had equivalent career patterns from the initial job that they held at Armour, what should have been the proportion of blacks promoted to the sales job?

Both of these questions can be answered by weighting the number of people promoted from each category by the proportion of blacks in each category. This is the same as saying that the results of the promotion process should be the same for blacks and whites. If the company had been promoting fairly, the proportion of blacks promoted from jobs held immediately prior to the sales position should have been 12 percent. If the entire work history for blacks and whites had been fair, the proportion would have been 19 percent instead of the 2.9 percent that it was.

TABLE 1

First Job Held at Armour (FRSTJOB) and Armour Job Held Immediately Prior to First Sales Job (PRIJOB) by EEO Category

	Promotions into sales			
	FRSTJOB		PRIJOB	
EEO category	**N**	**%**	**N**	**%**
Professionals*	0	0.0	1	2.94
Managers	4	11.76	11	32.35
Clericals	8	23.53	10	29.41
Operatives	18	52.94	11	32.35
Laborers	3	8.82	0	0.0
Service workers	1	2.94	1	2.94
Total promoted into sales	39	99.99*	34	99.99

* Includes technical.
** Percent does not equal 100 due to rounding of figures.

TABLE 2

Racial Composition of Armour's Active Work Force by EEO Category

EEO category	**%Blacks***
Professionals**	20.00
Managers	5.71
Clerical	0.0
Operatives	20.71
Laborers	50.00
Service workers	100.00

* Adapted from defendant's exhibit 1.
** Includes technical.

TABLE 3

Last Job (Per One-Digit Census Code) Held Prior to Being Hired as Salesman at Armour and External Availabilities of Blacks per 1970 Census for Charlotte-Gastonia SMSA

	New hires into sales		1970 Census avail-	
One-digit census code	N	%	ability of blacks	Extension*
Professionals**	3	10.00	5.73	0.57
Managers	8	26.67	3.21	0.86
Sales	8	26.67	3.83	1.02
Clerical	4	13.33	9.46	1.26
Craftsmen	2	6.67	12.02	0.80
Operatives	3	10.00	21.45	2.15
Transport workers	1	3.33	28.58	0.95
Service workers	1	3.33	41.12	1.37
Total	30	100.00		8.98

* Represents percentage of externally generated Armour sales force expected to be blacks; product of percent of new hires and 1970 census availability figure.

** Excluding teachers and health-related professionals.

How similar is the process of external hiring to internal promotion? (See table 3.) From the external labor force, Armour hired 3 professionals, 8 managers, 8 salesmen, 4 clerks, 2 skilled craftsmen, 3 machine operators, 1 transportation operative, and 1 service worker. When the same weighted analysis described for internal promotions is done on the external hires, the results show that the representation of blacks in these categories ranged from 3.2 percent to 41.1 percent. If the company had hired fairly from all these categories, the proportion of blacks hired from the external labor market would have been approximately 9 percent. These external figures establish an expectation that 2–3 percent of the 30 salespeople to be hired from outside the company would be black. Based on the proportion of blacks in categories that were available for promotion to sales, we could expect 3–4 of the 34 salesmen promoted from within to be black. But only 1 black out of what was potentially 7 actually was hired into a sales position.

By this statistical measure, a measure affirmed by both the district and circuit courts, blacks were underutilized. This analysis suggests that the best source of people for the Armour's sales positions from an *affirmative action* point of view was the internal labor market where the availability of blacks was approximately 12–19 percent. But is the internal labor market best from the company's point of view?

A study of productivity measures comparing those salesmen hired from outside and those promoted from within indicated that the employees who remained in the sales position for the longest period of time and were most successful in the job were those promoted from within, who had no prior sales experience and who had received some company training along the way. This productivity analysis seems to indicate that Armour's internal labor force may not have been utilized sufficiently.

Company: "Family Foods"

For confidentiality, the second food wholesaler in Charlotte will be fictitiously called "Family Foods." Family Foods used a very different pattern of internal promotion versus external hire from that used by Armour. During the same time period, only 16 of 83 salesmen were promoted from within Family Foods' labor force (compared with over 50 percent promoted from within Armour's). For those promoted within Family Foods, we see the same pattern of the initial job being held by those in labor or operative positions and the job held immediately prior to promotion being a clerical position to which many of the initial hires had been promoted. (See table 4.) In contrast to Armour, however, 24 percent of the clerical workers at Family Foods were black (these were the "feeder" jobs to sales). (See table 5.)

The increased proportion of blacks in the feeder categories produces a much larger black internal availability computed for both overall career patterns (53 percent) and for jobs held immediately prior to promotion to sales (39 percent). The external hiring patterns of Family Foods are far less heterogeneous than Armour's. While Armour hired from a broad range of census categories, Family Foods hired over 70 percent of its new workers from either the sales or manager and administrator categories, categories that had lower black representation. (See table 6.)

Therefore, though more salespersons were hired from the external labor force, they came from jobs with lower black representation. The result for the sales position is a lower external availability figure of 8.8 percent for blacks. These figures suggest that between 6 and 8 blacks should have been promoted from within and approximately 6 blacks hired from outside, for a potential range of between 12 and 14 black hires or promotions. Only 3 blacks, however, were hired. Which source produced for Family Foods the sales employee who performed better in terms of productivity and tenure? Unlike Armour, for Family Foods, these employees came from external hiring rather than internal promotions.

Applying Family Foods' employment practices of hiring to Armour's labor force yields an overall black availability for Armour of less than 10 percent. However, applying Armour's hiring and promotion process to Family Foods' labor force, one finds an overall black availability of well over 30 percent due to the larger percentage of blacks in Family Foods' internal work force.

Both companies were found by the district court not to be applying hiring processes fairly. The analysis shows that in the same city, the same industry, and for companies of the same size that deal in the same markets, black availability for wholesale food sales positions ranged from under 10 percent to well over 32 percent. That range translates to a total of 32 jobs that might have gone to blacks in just these two companies, depending on what standard and process applies. Which process is correct and what ought to be expected of a company in changing its employment practices to increase minority availability? Unfortunately, finding a procedure to determine underutilization that can be applied in every situation to every company may be impossible.

So far, this paper has identified several factors that should influence how availability figures are interpreted in the attempt to determine underutilization of minorities and women. These factors are: (1) the employment source used by a company, internal or external labor pool; (2) the jobs from which people are employed; (3) the number of minorities and women represented in those job sources; and (4) the source from which those people are employed who remain longer in the company and perform their job better.

There are more factors to consider, however, when determining underutilization. They are more complex and difficult to measure and, therefore, more difficult for the courts to evaluate. When looking at the true availability of a group of workers, are all those that have the required qualifications for a job equally qualified? Are they all equally interested in the job and equally able to follow through on their interests and qualifications? Are there anomalies in the geographic and economic labor market that affect the availability of a certain group? Are all people in the labor force from which applicants are chosen at the same point in the

TABLE 4

Census Category of First Job Held at Family Foods (FRSTJOB) and of Job Held Immediately Prior to First Sales Position (PRIJOB) (Internally Generated Positions Only)

	FRSTJOB		PRIJOB	
Census category	**N**	**%**	**N**	**%**
Clerical	5	31.25	11	68.75
Operatives	4	25.00	4	25.00
Laborers	7	43.75	1	6.25
Total promoted to sales	16	100.00	16	100.00

TABLE 5

Family Foods—Blacks in Each Relevant Census Category

Year end 1975	
Census category	**Blacks**
Clerical	24.4
Operatives	73.3
Laborers	61.8

TABLE 6

Last Job Held Prior to Being Hired by Family Foods Directly into Sales Position and External Availability of Blacks for Charlotte SMSA of Employed Persons

	New hires: sales		Availability	
Census code	**N**	**%**	**Blacks: 1970[1]**	**Extension[2]**
Mgr/admin	20	29.85	3.6	1.07
Sales	28	41.79	3.9	1.63
Clerical	3	4.48	9.8	0.44
Crafts	3	4.48	8.9	0.40
Operatives	3	4.48	32.0	1.43
Laborers	1	1.49	44.7	0.67
Service	1	1.49	66.5	0.99
Missing data or no prior job	8	11.94	18.6[3]	2.22
Total	67	100.00		8.85

[1] Adapted from defendant's exhibit 4(b).

[2] Represents percentage of externally generated Family Foods sales force expected to be black; product of percent of new hires and 1970 census availability figure.

[3] Availability of blacks overall in Charlotte SMSA.

employment process and, therefore, equally ready to advance to a new job? How much responsibility should a company be given for the availability caused by these factors?

These are difficult questions, and ones that understandably the courts have had difficulty in addressing. They are questions, however, that have to be answered before the much-needed procedure for reliably determining underutilization can be written.

Section II

Standards for Evaluating Underutilization: Title VII and the OFCCP Regulations

Section I of this paper presented some of the difficulties faced by the Federal courts and the OFCCP in enforcing Title VII and the OFCCP regulations. The clear message in section I is that there are many causes and definitions of underutilization of minorities and women in the work force. Which kinds of underutilization should companies be responsible for? Can a procedure be developed to evaluate personnel practices and their impact on the utilization of minorities and women?

Underutilization, as presented by the OFCCP regulations, actually contains two questions: (1) If a company applied its personnel practices fairly, what could one expect the representation of women and minorities in specific jobs to be? (2) Are those personnel practices themselves fair; i.e., could the practices be changed to increase or decrease availability?

The function of the OFCCP regulations is to ask companies whether they are executing their employment processes fairly and whether their employment processes themselves are fair. This is their strength, but also their biggest problem; for it is never really clear from the regulations which of those questions is being addressed at any particular time. It is difficult, therefore, for the companies to determine what standards they will be judged by and what actions they should take. Consider the following section of the OFCCP regulations:

> (b) *Utilization evaluation.* The evaluation of utilization of minority group personnel shall include the following: (1) An analysis of minority group representation in all job categories. (2) An analysis of hiring practices for the past year, including recruitment sources and testing, to determine whether equal employment opportunity is being afforded in all job categories. (3) An analysis of upgrading, transfer and promotion for the past year to determine whether equal employment opportunity is being afforded.[6]

Does the above regulation mean that a company should evaluate whether it *is* drawing fairly from these sources, or does it mean that a company ought to evaluate what sources it *could* draw from in order to enhance female and minority availability? The first question has largely been the province of Title VII in disparate treatment cases. Only in disparate impact cases do the Federal courts examine the fairness of a practice.

The first theory of discrimination, disparate treatment, looks at whether the treatment of minorities and women is different in kind from that of whites and males. The second theory, disparate impact, looks at apparently neutral processes, most often testing, that are applied to all groups in the same way, but that may affect protected groups in an adverse way. The courts under both theories have limited their decisions to the practices of a company and have avoided the problems of trying to decide what these practices could be.

An example will illustrate these problems. Toward the end of section I a hypothetical range of availabilities for wholesale food salesmen was produced. This was done by applying Armour's personnel practices to Family Foods' labor force and Family Foods' practices to Armour's. How the company can shift employment practices depends on many issues that are not easily measured. In the case of Family Foods, are there sufficient numbers of both whites and blacks in its internal labor force with the necessary interests, qualifications, abilities, and availability to become salesmen? It may be that Family Foods has defined its internal jobs and arranged its hiring practices to select a broad range of people, many of whom are not capable of performing sales work.

On the other hand, Armour may have defined its jobs and organized its work and hiring practices in such a way that a greater proportion of its internal labor force is capable, interested, and willing to make the move from operations to sales. But by being more demanding at the entry-level position, it may have eliminated more minorities than Family Foods. How these two companies could alter what they do to increase the availability of blacks and the

[6] Ch. 60, OFCCP, EEO, DOL Regulations, subpt. C, sec. 60-1.40(b)(1-3).

degree to which they should change are extremely complex questions.

From a statistical point of view, it is easy to evaluate the history of a company by studying the personnel processes of the company and the statistical patterns that result from those processes. By looking at the available facts, it is easy to demonstrate that both Armour and Family Foods were not fairly applying their employment practices. It is far more difficult, again from a statistical point of view, to say which company's practices are "correct" and *what might have* resulted had the companies done things differently. Although one can argue that Family Foods ought to have utilized its internal labor force more than it did, it is difficult to know with assurance how many promotions *would have* been available for blacks if Family Foods had utilized its internal labor force. The question for the courts can only be whether there was or was not an intentional or pretextual reason for avoiding the internal labor market.

So, even though the OFCCP regulations encourage companies to take new, positive action to prevent underutilization, the courts in several cases say that they cannot second-guess business decisions. They can only assess whether those decisions have a disparate effect on minorities and women. Nowhere is that made more obvious than in *Hill* v. *Western Electric Company*[7] where the court implicitly stated that labor force studies must be limited to actions that are "historically possible" within the company.

In the Federal courts, with respect to Title VII, especially for the purpose of determining underutilization, it is clear that the history of statistical and social science applications largely answers the question of whether a company's practices have been fairly applied or whether there is a reason for a practice that limits the number of minorities and women. The courts, therefore, assess history and what has been, only rarely asking what could be.

Standards for Evaluating Underutilization: Alternative Factors Influencing Availability

Along with the courts' assertion that the effects of a company's actions must be measurable, there may be other limitations to the kinds of underutilization on which the courts hold the companies responsible. Some of these limitations may be related to the factors identified at the end of section I that influence underutilization figures. These factors are: (1) equal qualifications; (2) equal interest; (3) equal ability to follow through on qualifications and interest; and (4) anomalies in geographics or economics in labor markets. These factors can help to create deficiencies in the number of minorities and women in jobs. These deficiencies, however, may not necessarily mean discrimination by the company. To identify situations when this may indeed be true, each of the above factors, along with a fifth factor titled "Time Frame," is discussed below.

Alternative Factor 1—Qualifications

The overall question addressed in this section is: Are qualifications equally possessed by minorities and whites, males and females? It is important to remember that we are evaluating the proportions of groups who may be able to perform a job, not whether one person can perform a job as well as another.

There are several issues involved in the concept of qualifications. The first issue to be discussed in this section is one of credentials or certifications, which largely revolves around the formal statement by degree or certification that a person is capable of performing a job. A second type of "qualification" is one that is more difficult to measure because it is the end point of a process of interaction between the employee and the employer. This is a process by which both the company and the employee decide that the employee has the abilities to perform a job. This usually is a process of interaction and experimentation on the part of both parties and involves the company's perceptions of the employees as well as the employees' perceptions of themselves.

Qualifications as Credentials: Title VII cases speak mostly to qualifications and their effect on limiting the pools of people who could take a job. There are some instances where qualifications are quite obvious and not necessarily attainable on a job: airline pilots, doctors, engineers, nurses, aircraft mechanics, and even lawyers and statisticians are arguably jobs which require qualifications that are not readily acquired by the general public. The determination of availability for these positions is relatively easy to compute. One can look at the general population, or at the internal population of a company that possesses the requisite certifications, or at schools or

[7] 596 F.2d. 99 (4th Cir. 1979).

programs that produce those qualifications and accurately measure the proportion of minorities and women who could take those positions. Even though society is increasingly technical and seemingly obsessed with credentials and certifications, qualifications for most jobs are not so clearly definable.

Neither is the acquisition of the knowledge, skills, and overall abilities associated with a job so clearly defined. In fact, most promotions or transfers characterized by movement from labor to operative levels, operative to craft levels, or craft to management levels are promotions that involve an exchange of teaching and learning between employee and employer. The exchange is one where the employer detects within an employee the ability to learn a particular job and then provides the opportunity to apply that ability; or an employee expresses a desire to learn and the employer accepts the responsibility to teach.

Although this process of development would require some measurable basic skills that may be, and in many cases are, differentially possessed by the sex or minority groups, it is difficult to argue that people who are performing well in one particular job have some limited ability to perform another job that pays more or requires greater or different skills.

Qualifications as Process: How protected groups perceive their qualifications will have an effect on their availability and, therefore, their utilization. An example of qualifications differentially held comes from a study of a manufacturing facility of a pharmaceutical plant. In this plant women represented 55 percent of the packaging department, but only 7 percent of the production department. Positions in both departments were classified as machine operators, although the production division had poorer working conditions, rotating shifts with a great deal of overtime, and a $0.75 to $1.50 premium in pay.

The question raised by the OFCCP was: Why are women congregated in packaging and men in production? An investigation found that a contributing factor was the differing perception by men and women of their own abilities and the demands of the job.

The people in the filling and packaging division may have misperceived the job demands of the production division. People in packaging may view the production job as more difficult than it is, and so the perception of the job, not the reality of the job, may affect their desire to transfer. These differences in perception would have a disparate impact on filling and packaging employees generally and females especially, because they dominate that division. Alternatively, men and women may view the two jobs differently. Women may view the production job as much more difficult or unpleasant than the filling and packaging job, while men may view the jobs as essentially the same. The differing perceptions would affect the relative acceptance rates of jobs in the production division.

To discover how the male and female employees did perceive the two jobs, employees in the two divisions were asked what changes they would expect in terms of job characteristics and working conditions if they were to transfer from filling and packaging to production. (See table 7.)

Majorities of employees in both divisions perceive the production division personnel as experiencing an increase in salary and in number of hours worked. They see a decrease in the amount of time that would be available for oneself and one's family. Pluralities in both divisions also expect an increase in the amount of dirt, noise, danger, and extremes of temperature that must be tolerated. They perceive the work to require an increase in the weight that must be lifted and increases in the amount of detailed, mechanical, and complex work that must be done. The only real difference of opinion between divisions is that production employees perceive their work to be less boring and tedious than work in filling and packaging, but only 28 percent of the employees in that division agree.

Comparing the actual job descriptions for the two divisions, it appears that the work in the production division requires somewhat more technical skill in operation of computers, somewhat more detailed work with respect to understanding formulas of mixes and batches, more lifting, and longer hours than work in the filling and packaging division. Work in the production division also involves rotating shifts, worse working conditions, and weekend work. The filling and packaging division involves more repetitive assembly line work with fixed shifts that do not operate on weekends and does not require the same qualifications with respect to mechanical ability. Therefore, job descriptions are accurately perceived by the employees when they compare their positions to the others. How would this accurate perception of the job influence women to remain in the filling and packing jobs?

TABLE 7

Factors that Change When One Moves to Production from Packaging

Item	Change	*Reporting this change* Packaging	Production
1. Number of hours	Increase	67	60
2. Salary	Increase	77	78
3. Time for self and family	Decrease	51	54
4. Amount of dirt and grime	Increase	40	65
5. Amount of noise	Increase	45	61
6. Danger involved	Increase	68	59
7. Extremes of cold and heat	Increase	49	68
8. Weight lifted	Increase	65	53
9. Amount of detailed work	Increase	56	49
10. Mechanical nature of work	Increase	68	45
11. Complexity of job	Increase	55	65
12. Boredom and tediousness	Decrease	28	83
Approximate number		(84)	(86)

TABLE 8

Types of Work that Males or Females May Do Better

Item	Who does it better	*Percent agreeing* Men	Women
1. Longer hours	Doesn't matter	55	75
2. Noisy work	Doesn't matter	64	87
3. Complex work	Doesn't matter	86	88
4. Extremes of temperature	Doesn't matter	52	72
5. Heavy lifting	Males	98	93
6. Work away from family	Males	64	66
7. Dirty and greasy work	Males	44	43
8. Mechanical work	Males	74	42
9. Dangerous work	Males	61	43
10. Boring work	Females	50	63
Approximate number		(114)	(56)

Stereotypical views of the work appropriate for men and women were a possible additional barrier to women's movement into production, given the perceived changes in working conditions. Employees were asked a question to obtain the attitudes of men and women toward the competitive advantage of the sexes for certain types of work. The question read: "Different jobs have different characteristics, and I am going to ask you about a list of job characteristics. For each thing on the list, I'm going to ask you who can do it better: men, women, or does it matter?" (See table 8.)

Comparing the men's responses to the women's, it appeared that there was no pattern of competitive advantage of males versus females for longer hours, noisy work, complex work, or extremes of temperature. With regard to heavy lifting, the overwhelming majority of individuals at the company viewed this as a male job: 98 percent of the males and 93 percent of the females. Work away from family was considered something that a male could handle better than a female could: 64 percent (male) versus 66 percent (female). For dirty, greasy work, there was a consensus that this was male work, but 74 percent of the males viewed that working condition as better tolerated by men, whereas only 43 percent of the females viewed males as having a competitive advantage (with the vast majority of the remainder of females feeling that there was no difference). Mechanical work was viewed as male work by the consensus, by 74 percent of the males and only by 42 percent of the females. Dangerous work was viewed by the consensus as males' work, 61 percent males versus 43 percent females, with a smaller percentage being neutral. Boring work was considered by the consensus and both males and females to be female work.

Two items, heavy lifting and work away from home, stand out as male advantages in the consensus opinion and in the opinion of clear majorities of men and women. The only job characteristic where women were seen to have an advantage was tolerance for boring work. These variables indicate that most individuals at the company feel that males appear to have somewhat of a competitive advantage in the production division and females have a slight competitive advantage in filling and packaging. So there is little wonder that the distribution in their facility is what it is.

These differentially held perceptions are not directly dealt with in the regulations. In this particular example, several principles can be drawn that apply toward evaluating qualifications. First, these are qualifications of the threshold variety, which may be as formal as a medical degree or as informal but nonetheless practical as the ability to lift 75 pounds. These formal qualifications may be differentially held among the races and sexes. What is also important is the perception by the individual of his or her qualifications and how this translates into a competitive advantage in the marketplace. From this example, it is apparent that men and women thought themselves different on factors important to performing the job even though the company had encouraged men and women equally to seek the production division job. Employees' perceptions of themselves may derive from physical abilities or the structure of their lives outside of the workplace. However, these are limitations that could be overcome if a person were interested and motivated to overcome them. This is discussed in the next section.

Alternative Factor 2—Interests and Motivations

Interests and motivations are many faceted, but they largely revolve around what people want from work. These wants may take the form of security, income, advancement, interest, the social setting, or it may just be something to do. These interests and motivations are necessary in understanding how people translate their abilities and qualifications into making themselves available for jobs.

Even when qualifications are equally possessed among the sources that feed a job where minorities and women are underutilized, minorities and women may not have equal interest in that job. Different motivation patterns for men and women are well documented, especially in articles like "The XYZ Affair"[8] where it was found that women were less interested in taking jobs that were traditionally in the male field. Even though they had been equally encouraged to seek these positions, and the same number of men and women were offered these positions, women were not taking these jobs as frequently as expected. In the general labor force, women's reluctance to take typically male positions could be largely based upon their perceptions of their qualifications or the sex stereotyping of the job. This could also be based upon their loose attachment

[8] C. Hoffmann and T. Reed, "Sex Discrimination: The XYZ Affair," *The Public Interest* (Winter 1981).

to the labor force and their level of job commitment. Women may be less interested and less willing to remain employed and committed to careers. Again, this has been associated extensively in the literature with responsibilities of home and family. Family obligations can limit the ability of women to follow through on their motivations and interests.

A recent update of "The XYZ Affair" study examined the transition between clerical and management jobs and transitions from one operative job to another; from operative to craft positions; from clerical to management, computer, and sales positions; and from transportation operatives into managers and sales positions. In all instances it was found that there was a disproportionate lack of interest among women in specific kinds of jobs. Women did not indicate interest in jobs that would require extensive hours, jobs that were preparatory to other higher level management positions with no immediate reward, and jobs that would require them to give up husband and family.

Differential interests are also apparent among the races. In a recent study performed for a West Virginia construction company, a smaller than expected proportion of blacks was found to be entering into apprenticeship training programs available in the labor force. When the bidding behavior of blacks was examined, a very interesting pattern was discovered.

First, blacks and whites were not bidding on the same types of apprenticeship programs. Blacks tended to be bidding on secure jobs with little chance of layoff. The jobs that blacks chose paid the same as the jobs that whites were bidding on, but the jobs were secure and safe in a time of economic downturn. Not surprisingly, these jobs were highly competitive and required a great deal of seniority in order to bid into them successfully. As a consequence, far fewer blacks were advancing into apprenticeship training programs than whites, albeit once blacks and whites entered training programs, they made it to journeyman status at exactly the same rate.

The success of blacks' ability to bid into secure jobs can be seen from the patterns of layoffs, for although far fewer blacks made journeyman status than whites who were hired during the same period, once layoffs occurred, a far higher proportion of blacks remained employed with the company. It is not surprising that blacks, who in this case had led extremely deprived employment careers, were interested in security and made that a major goal of their job-seeking behavior.

Alternative Factor 3—Ability to Follow Interest and Qualifications into a Job

There are attitudes held by some women and minorities that themselves limit their availability for entering jobs that they are interested in and qualified for. One such attitude was held by the majority of surveyed male and female workers at the previously mentioned pharmaceutical firm. They believed that men could be away from their homes and families more than women. One possible explanation of this attitude is that women may be more constrained than men by the requirements of managing the household and family. Women still bear the major responsibilities in our society for household duties and child care. To measure this hypothesis concerning time commitment to outside work for both males and females, pharmaceutical employees were read a list of 23 common tasks and activities, ranging from recreation to household business activities. (See table 9.) For each item on the list, they were asked how often they spent time on that activity on a scale ranging from every day to less than once a month. These items were grouped into two categories based on how closely correlated each estimate was with the others: a housekeeping group, which includes seven items, and a child care group, which includes five items.

Women clearly spent more time than men on housekeeping tasks, while men spent a little more time than women with child care tasks. When the housekeeping and child care groups are combined, however, women again score higher than men. All of these differences are significant. Clearly, from the findings with regard to the housekeeping group and the combined group, women have time commitments related to household reponsibilities that men do not have. These commitments may limit the time women have available for work outside the home. Therefore, women may not be available to take a job even though they may have the necessary interests and qualifications.

Alternative Factor 4—Geographic or Economic Factors in the Labor Market

Geographic: There are several geographic barriers that affect the availability of minorities and women for jobs. They are the location of a company, the living patterns of minorities and women, and the

TABLE 9
Utilization of Time Outside Work

	Range of scale	Means	
		Males	Females
Factor 1: Housekeeping			
Fix breakfast	Less often = 7	22.07	31.31
Make sack lunches	Daily = 42		
Go grocery shopping			
Clean, straighten house			
Make or help make dinner			
Wash or dry dishes			
Set or clean table			
Factor 2: Children			
Help children get ready for school	Less often = 5	14.91	12.31
Play with children	Daily = 30		
Help children with schoolwork			
Bathe children			
Get children ready for bed			
Factor 3: Housekeeping and child care			
Factor 1 plus factor 2	Less often = 12 Daily=72	37.04	43.63
Approximate number (n)		(115)	(60)

access to the transportation network that connects the two. If there is no mass transit system that services the geographic location of a company, the people who live far from the facility and who do not have reliable cars will have difficulty being available for jobs at that company.

Documentation of these structural problems can be seen in *Commonwealth* v. *Lucas*[9] and in *United States* v. *Fairfax County.*[10] These cases present the differing views on how to define the geographic boundaries from which the availability figures are drawn.

It is important also to recognize that geographic distributions of minorities and women vary from place to place and year to year. A company may be able to draw more minority employees to its New York City plant than to its Minneapolis plant, and the availability numbers of minorities in each city may vary from year to year.

Economic: Depending upon the economic cycle and the availability of labor, there is a great deal of variability in the numbers of minorities and women who are available for jobs. The following figures are from projections of a labor force calculated for a national transportation company of approximately 36,000 to 40,000 employees.

For an administrative supervisor position, minority availability ranged from 6 percent to 12 percent in the nationwide population. For mechanic positions, it ranged from a low of 7 percent to a high of 19 percent. For operatives positions, it ranged from a low of 3 percent to a high of 13 percent. For production control clerk positions, some years it was predicted that there would be an entire lack of available minorities and in other years as many as 15 percent of the people hired would be minorities. This was true for salesmen, where the availability in some years ranged from as low as 9 percent to as high as 16 percent; for supply attendants, where

[9] 18 FEP Cases 1.560 (N.D. Pa. 1979).

[10] 629 F.2d. 932 (4th Cir. 1980).

availabilities ran as low as 13 percent to a high of 26 percent; and for supervisory positions, where ranges were from 7 percent to 22 percent.

One reason why there was so much variability in these specific jobs was due to the changing numbers of minorities and women represented in the labor pools from which employees were drawn. In this particular company, the external labor force had fewer minorities and women available than the internal labor force. In years where there was little economic expansion and little growth, jobs would be largely filled from internal sources, which represented the highest availability of women and minorities. In years of rapid expansion, the internal sources would not be sufficient to fill the jobs and hiring could focus on the external labor force where more white males were available.

These random economic and geographic events in the labor force create disparities in the number of minorities available from year to year. Therefore, the differences that are used to determine underutilization ought to be based upon some measure which takes into consideration that, depending on the year, there will be times when minorities and females will be unavailable.

Alternative Factor 5—Time Frame

There are actually several reasons to examine availability factors with the focus on changes that occur over time. For instance, when looking at the incumbents of a job, one sees the results of the process that has normally occurred over a long period of time. If women are underutilized in a particular position, it may be the result of discrimination that took place years before involving practices in which the company is no longer engaged. This concept is reflected in *United States* v. *Evans*[11] and *Hazelwood School District* v. *United States.*[12]

Also, this underutilization may be due to historical patterns of behavior of women that, until recently, have been manifested in their lack of interest or lack of willingness to perform a particular job. It is well known that women's participation in the work force has changed radically within the last 10 years and that female availability for most jobs is higher now than it has been in the past. Thus, while a company may be hiring at availability, it may appear to be underutilizing minorities and women in a particular job because of the history of the incumbents of that job.

The courts in Title VII have recognized the importance of these historical patterns and have urged both plaintiffs and defendants not to rely on a static analysis of the labor force, but instead to look at the behaviors and processes by which people are hired over a period of time.[13]

Similarly, overutilization in a particular job group does not necessarily mean that a company is relieved of discriminatory practices. Consider an example that is indicative of a quite common occurrence. An entry-level position for sales clerk at a major company in the South has an internal representation of 33 percent black, but the external availability is 18 percent black. These figures seem to indicate that the company is not "deficient." Yet, examining the hiring process over the last 6 years, only 12 percent of the people hired were black. Upon closer investigation, one finds that the reason for the apparent "overutilization" of blacks is that the employees choose not to terminate. For blacks, this may be a relatively good job compared to their options in the external labor market. Whites, who feel their opportunities in the external labor market are good, are not inhibited from terminating.

Overutilization is not due to hiring at greater than availability; rather, it is the result of the ability to keep minorities in the company. In this case, the company chose to hire selectively and to reward all its employees by attractive promotion and training programs. These rewards were more attractive to blacks; hence, the company had an effective affirmative action program by OFCCP definition and not by overhiring.

Title VII indicates that a "pattern and practice" must be established not just by static analysis as called for in the OFCCP regulations. Title VII also states that various practices and their cumulative effects have to be considered and measured to gauge the cause of and to correct underutilization.

Standards for Evaluating Underutilization: A Combination of Factors

One of the well-established principles of human resource planning is that there is a maturation curve associated with promotion. What are the stages of this maturation curve? First, it takes time for an

[11] 437 U.S. 53, 558 (1977).

[12] 433 U.S. 299 (1977).

[13] *See* EEOC v. United Virginia Bank, Seaboard National, 615 F.2d. 147, 150 (4th Cir. 1980).

employee to acquire knowledge to perform a job, to mature into a leadership position, and then to receive recognition from superiors. It also takes time to learn what opportunities are available and to act on them. Normally, then, there is an initial time period where little opportunity for advancement is available for groups of people. Then, as individuals develop into their positions, there is an increasing rate of promotion. Finally, as the company exhausts the pool of promotable individuals in the cohort, the promotion rate gradually decreases. It is at this latter stage that termination and transfer rates tend to rise as employees seek other opportunities outside of the company or outside of the department.

What is important about this promotion curve, which rises and falls with the length of service of employees, is that an employee who leaves before the peak period of employment or stays after it is not likely to be promoted. Unfortunately, races and sexes have very different characteristic rates of termination depending upon pay, working conditions of the job, outside labor market opportunities, and the initial hiring practices of the company.

For example, a construction company, studied by Hoffmann Research Associates in 1982, hired 96 blacks into the laborer category and subsequently promoted 56 to craft training programs. If blacks had been promoted to training programs at the same rate as whites, 80 promotions would have been expected. However, if one adjusts for the fact that blacks terminated at a higher rate and in shorter time than whites, one would have expected 67 black promotions. The 11 promotion difference was accounted for by the blacks' preferences for more secure departments discussed earlier in the Interest and Motivation section of this paper.

This combination of promotion and termination processes, along with differential preferences, illustrates that individual factors never operate alone, and separating out cause makes it very difficult to determine whether a pattern is discriminatory. In this case, termination and preference were the cause of the pattern of fewer blacks receiving promotions. The higher rate of termination was a result of absenteeism that, in turn, was due to factors related to cultural poverty that equally affected blacks and whites in similarly deprived situations.

Summary

These patterns of variability make standardization and prediction of the exact number of women and minorities that will be available from year to year very difficult. This implies that there should be a range of acceptable behavior, based upon changing conditions in the economy, the labor market, and within the company. In a company that adjusts quickly to changing market conditions and changing labor markets, it is almost impossible to predict: (1) what the company's actual hiring will be and (2) what the company's ability to perform its expected employment goals will be. In saying that differences must be "gross and long lasting," the courts are recognizing that labor markets are, indeed, quite variable and that labor market areas are variable and changing. This justifies the courts' concern for time frames and assessment not just of individual years, but of trends established over a period of years. Variability patterns also justify why the courts have been interested in statistical probability and why courts have established standards that the probability or determination of gross or underutilization can be measured by two to three standard deviations.

Conclusions

Given the extent of factors that must be considered and the apparent difficulty of accurately measuring these factors, it may appear that the regulations are totally ineffectual in assessing availability and underutilization as well as totally unenforceable. One may ask: "Why should we keep them?" They should be kept because these are factors in which most companies are inherently interested. Factors discussed in the regulations represent the research required to plan for human resource needs and to make a company's personnel processes rational and efficient. This is the only forum where a company is forced to consider what its personnel practices ought to be.

The following example is a case that goes beyond the scope of Title VII, but that may be handled through the OFCCP regulations. In this case the plaintiff charged a national airline with discrimination in hiring and promotion of aircraft mechanics. In an effort to assess the availability of minority aircraft mechanics, the plaintiff found the following frustrating problem. As of 1981, the Air Force and the Navy had approximately 16–25 percent minority aircraft mechanics. Yet, FAA-licensed aircraft mechanics in the United States were somewhere around 3–4 percent minority, and the proportion of minorities in schools that produced certified aircraft mechanics was somewhere around 10 percent.

Why is there such a difference in the availability of aircraft mechanics from these three sources? Why are the Air Force and Navy able to have a higher percentage of aircraft mechanics than is available to the general public or even in training schools? These are issues raised around the institutional processes by which the qualifications of airframe and power plant licenses are transferred from the military to the private sector. This institutional friction that prevents the transfer of qualifications from one realm into another is the province of the OFCCP regulations, but not of Title VII. The courts must use the 3–4 percent availability figures of minority FAA mechanics, but it is important to have some organization, the OFCCP regulations, that asks companies to use alternative sources that have a higher proportion of minorities.

Although this paper asserts the need to keep the OFCCP regulations, problems remain in the current regulations that make them difficult to enforce. These problems are examined and solutions recommended in the final section of the paper.

Problems

One problematic factor in justifying the regulations is an apparently inherent contradiction between what can reasonably be expected from a company and what is an unreasonable expectation. The regulations are fundamentally good in that they promote sound business practices. At the same time, however, the regulations include almost absurd statements describing what a company should do, in essence, prescribing what the world should be like in terms of desired results and not process.

The naivete of certain regulations is the aspect that seems to present the greatest barriers to acceptance and that opens the regulations to a broad interpretation of intent. An example of such an interpretation is the *Teamsters* quote mentioned earlier in the paper that seems unreasonable and that tends to place an implicit burden of social change on contractors.

It is easy to see how aspects of the regulations can fuel the controversy between factions opposing the regulations and those supporting them. There are aspects of the regulations that go beyond evaluation of the process of sound and fair employment practice to an idea of promoting parity for all those in the labor force, e.g., as can be interpreted from the *Teamsters* quote.

An examination of what is reasonable and what is unreasonable in the regulations will isolate where future debate should focus and justify the existence of the regulations with certain modifications.

OFCCP Regulations Suggest Good Business Practices

In many cases, the absurdity of certain aspects of the OFCCP regulations overshadow their fundamentally desirable qualities, which suggest good business practices. Although the concepts of race and sex are emphasized, the regulations encourage results that could be found in a company with good personnel practices.

At their core, the OFCCP regulations really ask a company to study its work force and perfect its internal labor markets by eliminating any existing impediments to a free market. The regulations ask that a company know for certain that the qualifications for a job are valid, thus ensuring that it draws from the broadest range of people available to perform the job. The regulations also request that all information about the opening of and requirements for positions be made known to the largest possible number of people in order to encourage all people to seek the positions.

By making the labor market open to all people, the regulations ask a company to encourage all people to develop their skills and abilities with the knowledge that those personal investments will be rewarded. They encourage the company to invite and reinforce interest in advancement. In short, the regulations invite a company to become an active participant in developing and controlling its labor market.

The historic view of reacting to an external supply of labor with a given set of qualifications is one that sees the company as being at the mercy of that labor environment. In contrast, the OFCCP regulations have actually given rise to and reinforced the whole profession of strategic human resource planning, which encourages the most efficient, fair, and productive utilization of personnel. From the point of view of enforcement, however, it is difficult to measure the degree to which a company has perfected its labor market.

Although the goal of perfection is certainly an admirable one, a contradiction arises when we examine the language of how the regulations purport to achieve that goal.

OFCCP Regulations Also Encourage Bad Personnel Practices

Unfortunately, in an effort to emphasize minorities and women, the regulations often make statements that are, to some extent, inappropriate for business purposes or at least vague for enforcement purposes. Problems in definition also function to compound the absurdity. The regulations want a company to look at sources from which people have been drawn. However, when they suggest the sources that should be examined, they include many factors in the eight-factor analysis that are not necessarily associated with good business practices. For instance, companies must include the entire minority population of the labor area surrounding the facility, implying that men, women, and children of all ages are available to work. The regulations emphasize a broad view of the unemployed labor force in a particular area, without recognizing that not all unemployed people are qualified to perform all jobs. Further, they suggest that companies go beyond normal labor market processes when dealing with minorities and women to "a consideration of minorities and women not currently in the labor force."[14]

Although at one point minorities and women with requisite skills are stressed, the regulations modify the skill requirement by adding that a contractor ought to look to areas where it can reasonably recruit. Again, there is no definition of what is reasonable. The regulations overlook time frames in the consideration of whether a contractor is deficient, so they rely on a very static skill analysis. They suggest that one look at the qualifications for a job, but then amend that statement by saying that the requirements can be no greater than the "lowest qualified incumbent" in a job.[15] Negating the overall desire of most companies to hire the most qualified, these requirements, thus, ignore the variability of the labor markets and the fact that sometimes mistakes are made in hiring and discharge.

The regulations stress, without effort of definition, the degree of training that a contractor is reasonably able to undertake. The concept of qualifications in training and development tends to ignore the fact that companies view their internal environments and their competitive advantages differently. For example, many companies have structured their organizations with no training or development programs at all. These companies, quite literally, mine the external labor market of talent developed by other companies. The regulations ignore the fact that companies, in order to install effective training and promotion practices, must have hiring practices that stress (1) an individual's attachment to the corporation and (2) the ability to learn higher level positions. Unfortunately, the regulations also specify that the qualifications for selection cannot be more stringent than the job into which the person is hired. Hence, companies who do seek to promote and train may hire people who cannot be promoted or trained as a direct result of the guidelines.

The concept of applicant flow lacks definition and elaboration in the regulations, even though most of the court decisions in Title VII view applicant flow both for internal and external purposes as one of the best indicators of availability. This translates into regulations void of an appreciation for the complexities of the process of employment and lacking in acceptance of differential interests between protected groups and white males.

In the regulations, there is not a consideration of the variability of labor markets from one geographic area to the next; nor do they consider the fact that the proportion of hiring from the immediate labor area versus hiring from the external labor area varies greatly. Amazingly, the regulations even suggest that a company be involved in altering transportation and housing patterns. This suggestion seems reminiscent of southern mill towns after the turn of the century.

The section of the regulations explaining how contractors are to set up their goals and timetables also tends to ignore the volatile nature of the labor market. The contractor is expected to set an exact standard or goal, regardless of how many people are available for a position. This expectation is unreasonable in the constantly changing labor force. Again, there is a dual personality between the uniform selection guidelines and assessment of the achievement of goals and timetables. Goals are required at present if utilization is one whole person less than availability. However, the uniform selection guidelines say that selection criteria are not suspect if selection rates of minorities and women are as much as 20 percent different from white male selection rates. Here, the selection criteria are far less stringent than the utilization analysis.

[14] Sec. 60-2.13.

[15] Sec. 60-2.24.

At present, enforcement of the regulations requires that goals only be established on a year-by-year basis rather than over a long period of time. Due to rapid changes in local labor markets, it is much easier to achieve goals predictably over a long period of time when yearly random variations cancel out each other.

Also, the regulations do not recognize differing solutions other than hiring that companies use to correct underutilization. An alternate solution might include efforts to reduce the turnover rate and to retain minorities and women at a higher rate than white males due to incentives or training programs that are not easily acceptable as substitutes for hiring.

Finally, it has been our experience that equal employment opportunity specialists (EOSs) are not well trained in either Title VII law or statistics, nor are they trained in human resource planning concepts or the basic complexities of the employment process. Hence, rather than being trained in principles that can be applied flexibly, the EOSs seek security in their judgments by applying rules rigidly to all circumstances.

Recommendations

We make the following suggestions to modify the regulations. These suggestions are in keeping with the OFCCP regulations' goal that each company should aim to perfect its labor market. We believe that this goal of the regulations actually encourages companies to adopt good business practices.

The first suggestion is that regulation guidelines be clearly established on how to assess empirically what a company's labor force practices have been in the past. These methodologies, similar to the one presented in the discussion about Armour Meat Packing Company, are currently available in computer program packages. These programs combine very detailed census data with the study of employment flows that have historically appeared in the company.

If movement of minorities into jobs has been historically deficient, a company should take corrective action by first applying present practices fairly. Contract sanctions by the OFCCP should be based on transition of flow analysis rather than the static examinations that are currently used. Goals ought to be projected over at least 3 years and not subjected to evaluation based upon exact criteria. Achievement of goals should be evaluated based upon the probabilistic likelihood of achieving the goals. This allows the variability of the labor market to be taken into account and also provides a more reasonable time frame for goal achievement.

The second corrective action a company should take is to make an assessment about how its present practices should be modified in order to perfect its internal labor markets. Modifications might include studies of job content and qualifications, seniority agreements with unions, and policies that deal with training and development, recruitment, promotion, and transfer. These modifications ought to be based on enlarging the supply of labor for all positions. They should also be strictly evaluated as to their success by looking at changes in the content and types of people applying for and taking jobs. Race and sex, clearly, ought to be a part of these evaluation criteria. If personnel practices are found to be unfair, the success of their modification ought to be evaluated and the cause or reason for failure studied, and continuing efforts ought to be made to ensure equal opportunity.

Changes in how a company operates should have a measurable effect and that measurable effect ought to be used in enforcing or judging whether or not that company is in compliance with its Federal contract. Essentially, what we are suggesting is that a historical approach be used to draw a baseline for evaluating whether or not the company is applying its employment practices fairly. If it is not, corrective action ought to be pursued.

Regardless of the history of fair application of existing practices, the practices themselves still need to be evaluated regarding their fairness. If there are artificial impediments in the labor market, they should be removed and the effect of their removal measured as a demonstration of their success.

We are suggesting elimination of only the naive or inappropriate aspects of the regulations and reinforcement of the aspects that promote sound business practices. It is not suggested that a company be forced to apply exact standards in a highly complex world. It is not suggested that companies be forced into engines of social change antithetical to their economic well-being. It is suggested that the more incredible statements like "lowest qualified incumbent" be modified in view of more realistic assessments of the business world. Finally, it is suggested that companies be encouraged to seek perfection of their labor markets through reasonable means.

The modifications suggested here only require a more realistic view of the world in which companies operate and a more realistic assessment of the boundaries in which companies can reasonably be expected to work. This view mediates the current debate. It achieves the goals of those who seek a perfected labor market and calms the fears of those who see the regulations as going too far in making individual companies responsible for social change.

This two-stage approach would make the "shoulds" more enforceable and remove the confusion from the regulations when they try to deal with what is, what could, and what should be, all at the same time.

Underutilization, Discrimination, and Equal Employment Opportunity

By David H. Swinton*

Introduction

The centuries-old pattern of discrimination against black workers by white employers, workers, and unions prior to the passage of the Civil Rights Act of 1964 is well known. Throughout most of this period of American history, black workers who worked in majority-owned or managed establishments were primarily restricted to doing society's dirty work. Since blacks have never owned or controlled more than a miniscule part of the American economy, this meant that most blacks have had to accept whatever work they could find in white-controlled activities. Black workers in the rural South were restricted to working primarily as agricultural laborers, domestic servants, other menial laborers, and menial service workers. Black workers in the urban and industrialized sectors of the North were restricted to employment primarily as low-level industrial laborers, low-level services workers, and low-level operatives on jobs with undesirable working conditions. The jobs that were left for blacks, in general, were characterized by low wages, low social status, and poor working conditions.

Moreover, especially in the urban areas, blacks frequently experienced high rates of unemployment. The old cliche "last hired, first fired" was widely regarded as an accurate description of the tenuous position blacks had in the urban labor market. Thus, with the accelerated decline of agricultural employment after World War II and the increased migration to urban areas, the employment difficulties of black workers were exacerbated. Urban blacks typically experienced unemployment rates more than two times the level of those experienced by urban whites. This was offset somewhat in the pre-civil rights era by the higher participation rates of blacks, especially black females. Thus, the rate of employment of blacks was significantly higher than the rate of employment of whites despite the higher unemployment rates.

The consequences of black workers' high rate of unemployment, overutilization in low-wage, unstable jobs, and underutilization in high-wage jobs were black communities with exceptionally low levels of income, high poverty rates, and very poor living conditions. These conditions were widely believed to be contributing to increasing social pathologies in the black communities. Crime, juvenile delinquency, out-of-wedlock births, drug addiction, etc. were high and increasing. The extreme disadvantages of

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black communities led to increasing agitation and demands for change. The civil rights movement, which grew during this period, agitated primarily for policies that would bring an end to racial segregation and discrimination.

New equal employment opportunity (EEO) policies reflected in the Civil Rights Act of 1964, several Executive orders, and numerous court decisions were adopted in response to the situation described above with the express objective of ending racial discrimination in employment. Those that advocated EEO policies were motivated by the belief that much of the racial inequality experienced by blacks historically was due to racial discrimination. The EEO advocates believed that ending discrimination in labor markets would result in the elimination or significant reduction of racial inequality in the labor market within a reasonable period of time.

Indeed, changes in the labor market position of blacks in the period immediately following the passage of the Civil Rights Act of 1964 gave reasons for optimism about the efficacy of the EEO strategy. Gains were widely noted in the labor market position of blacks from the mid-1960s through the first half of the 1970s. Earning rate gaps declined, absolute unemployment gaps dropped, and occupational distributions converged. Absolute rates of poverty also declined dramatically between 1960 and 1970. Although there were a few dissenting voices, several leading researchers attributed these improvements to the impact of ending discrimination. The general public, in the main, accepted this interpretation and began widely proclaiming the final triumph over discrimination. Although these early analysts were aware that substantial gaps remained between blacks and whites, they expected, and even predicted, a rapid convergence of labor market position because of the end of discrimination.

The widely expected convergence in black and white labor market positions still has not arrived. The progress observed in the immediate post-1964 period in reducing wage and occupational disparities had completely ceased by the mid-1970s and the relative wage position of blacks has even eroded since the late 1970s. The situation with respect to unemployment and employment rates that never showed much improvement has been deteriorating ever since the early 1970s.

At the present time, in the mid-1980s, the labor market disadvantages of blacks are still large. Despite the brief period of improvement, the black population continues to have relatively low representation among jobs with high pay, job security, high status, and good working conditions. As has been the case historically, blacks still have relatively high rates of representation among the unemployed, and among those doing society's dirty work in low wage, low status, dead end jobs. Moreover, the employment rate advantage that blacks have traditionally held has been completely eroded by the increasing unemployment and job-finding difficulties of blacks. In terms of employment rates, blacks are currently experiencing their worst relative position in history.

Increasing economic distress within the black community and a significant widening in the economic gaps between blacks and whites have accompanied the eroding labor market position of blacks. Poverty rates have been increasing and a tangle of social pathologies such as high crime rates, high rates of family disruption, high levels of welfare dependency, and high rates of out-of-wedlock births have grown to alarming levels within the black community. The current situation in the black community may well be getting as bad as it was before the passage of the Civil Rights Act of 1964. This has led many to question the validity of the EEO strategy, to doubt the connection between discrimination and the observed inequality of results, and to advocate a rollback of affirmative action policies.

The primary objective of this paper is to discuss the relationship between the persistent low representation or utilization of black labor, discrimination, and equal opportunity policy. We will explore the extent to which the historic and current low representation of blacks in good jobs and in employment overall is caused by discrimination and the extent to which ending discrimination will end low-utilization racial inequality in labor markets. Obviously, the interest in the connection between the low representation or utilization of black workers and discrimination flows from the role of this connection in justifying the need for an active equal opportunity policy. We will also discuss the implications of the analysis for equal opportunity policy, in general, and affirmative action, in particular. Specifically, we will explore the role of utilization analysis in affirmative action policy and the appropriateness of affirmative action policy as currently constituted.

The paper will proceed in a straightforward fashion. In the next section, we will briefly discuss

and define the concepts of discrimination, underutilization, and underrepresentation. In following sections we will: discuss the determinants of the employment of workers and the relationship between discrimination and the level of utilization or representation from a theoretical perspective; present a brief review of the empirical evidence concerning the role of discrimination in creating the low rates of utilization of black workers overall and in good jobs; briefly consider the appropriateness and necessity of the existing approach to EEO policy and affirmative action in light of the preceding discussion; and, finally, a conclusion.

Discrimination, Underrepresentation, and Underutilization

In everyday usage the meaning of discrimination is clear. When we say that blacks experience discrimination in the labor market, we mean that blacks are treated less favorably than whites. Formally, we will define discrimination as treating individuals from two populations differently on the basis of some ascriptive characteristic of the populations, such as race, when the individuals are otherwise productively equivalent. In the labor market, discrimination will be said to occur whenever race has an independent impact on employment decisions. Thus, if race exerts an influence on decisions to hire, fire, promote, pay, etc. that is independent of productivity, then racial discrimination will be said to occur.

Discrimination may take a number of forms. First, discrimination may be direct. Direct discrimination exists whenever race itself is a primary criterion for decisionmaking. Historically, discrimination by race was direct through the early 1960s. Well-known customs circumscribed the employment of blacks. Sometimes these customs were even encoded in law and labor contracts. In any case, prior to 1964, social practice dictated an almost total exclusion of blacks from the better jobs in white-controlled institutions. It seems likely that, in the post-1964 period, direct discrimination has been reduced. However, direct discrimination has not vanished entirely; only its form has changed.

Direct discrimination may take two forms. It may be explicit, in which case race is openly used as a criterion for making decisions. Direct discrimination may also be implicit, in which case the use of race is covert and other reasons are advanced to cover up the racial basis of the decision. Since racial discrimination in employment has been declared illegal, direct, explicit discrimination has practically vanished. Open discrimination is no longer fashionable and even subjects the perpetrator to the penalty of law. Nonetheless, direct discrimination continues, but the open practice has been replaced by the implicit or covert form.

A second type of discrimination is indirect or institutional discrimination. In this case, discrimination results from using institutions in the labor market decisionmaking process that favor one population group over the other to a greater degree than the differences in actual productivity among the two population groups warrant. For example, one might use a college degree as a qualifying criterion for jobs that some blacks without college degrees can perform equally well as whites with college degrees. Since whites have higher proportions of individuals with college degrees, this selection criterion would discriminate in favor of whites. Besides biased selection criteria, institutional discrimination may also result from biased methods of disseminating information about opportunities and biased methods of performance evaluation.

Institutional discrimination may or may not be intentional. A particular employment practice may be selected for convenience or other seemingly legitimate reasons. Moreover, the institution may even be productively relevant and might also screen out some qualified whites. The essential characteristic of a discriminatory institution is that it screens out proportionately more capable blacks than capable whites. With the increasing rationalization of the employment decision, the scope for institutional discrimination has undoubtedly increased.

One other form of bias may result in discrimination against blacks. This is what we call locational bias. This type of bias arises when a location for an establishment is chosen that favors whites over blacks. Again, such locational decisions may or may not be intended to discriminate. However, if the location provides better accessibility to whites than to blacks, it will result in racial discrimination. In view of the widespread segregation in residential patterns, increasing locational discrimination is a strong possibility.

Discrimination, obviously, is a complex phenomenon that can take many forms. Moreover, once we have gone beyond direct, explicit discrimination, it may be practically impossible to prove discriminato-

ry intent if the discriminator is bent on concealing the intent. However, irrespective of the form or the intent, one thing is clear: If discrimination against a particular class has any impact, it will result in a reduction in the representation or utilization of that class in the jobs where discrimination is practiced. This conclusion, thus, leads to a natural definition for the concepts of underutilization and underrepresentation. Underutilization and underrepresentation can be defined as utilization or representation at a rate lower than the expected utilization or representation in a nondiscriminatory situation.

Expected Utilization in a Nondiscriminatory Market

The expected utilization or representation of any racial group among employed persons in a nondiscriminatory setting depends on how nondiscriminatory markets work. In every labor market there are two principal classes of decisionmakers. These are employers who make decisions about offering jobs to workers, and workers who make decisions about offering to work for employers. In economic theory, it is customary to assume that these decisions are made rationally, which means that both the employer and the worker will make offers that are intended to enable them to achieve their objectives. Thus, we would expect the rate of utilization of any group of workers in a nondiscriminatory market to be that rate which results from the attempts of employers and workers to achieve their objectives.

In general, one would assume that employers should desire to obtain the best work force possible. For employers, the desirability of an employee will depend on the employee's ability to contribute to the firm's production goals. In the absence of racism, the desirability of an employee can be said to depend on his or her productive ability. The probability of the firm's making an offer to any particular employee, therefore, depends on the productive ability of that employee and the probability that the offer would be accepted.

Similarly, workers would desire to obtain the best jobs possible. For workers, the desirability of a job will depend on its wages, working conditions, and other terms of employment. The probability of an employee seeking an opportunity at any given firm will depend on the desirability of the job and the possibility of getting an offer that, as we have seen, depends on the productive capacity of the worker.

In a nondiscriminatory world, therefore, each firm will have an applicant pool for each job category that varies directly with the desirability of jobs in that firm versus jobs in other firms and the size of the work force that has the required productive ability. The firm will then fill its requirements by hiring from these availability pools. It can be readily shown that, in such a world, expected representation or utilization of blacks will depend strictly on black and white taste for jobs and the racial distribution of productive capacity. If, as seems likely in a nondiscriminatory world, blacks value job attributes the same as whites, then the expected representation will depend solely on the racial distribution of capacity given the distribution of jobs. Under the circumstances, it can readily be shown that the expected representation of blacks in a nondiscriminatory world would always equal the proportion of blacks in the availability pools.

If effective discrimination occurs against a group, by definition this group will be underrepresented or underutilized. Thus, discrimination is a sufficient condition for underutilization and underrepresentation, as defined. Moreover, the laws of probability and the law of large numbers suggest that, in the absence of discrimination, the expected outcome is the most likely result. Thus, any large, systematic, or persistent deviation from the expected outcomes would have a low probability of occurrence. This observation is true for the labor market as a whole—any large employer or any group of small employers considered collectively. For an individual, very small employer, the actual outcome may deviate from the expected. Thus, underrepresentation and underutilization could only occur on a systematic basis if there were discrimination, making discrimination a necessary condition, as well. Thus, we can conclude that persistent and systematic representation or utilization of blacks at rates lower than their proportions among those who are productively capable can only occur if there is discrimination. Any consistent observation of underrepresentation and underutilization would, therefore, suggest the existence of some type of discrimination.

The above result only holds for the definition of underutilization-representation actually used. It is important to be clear about the specifics of this definition that permit the derivation of such a strong result. The key phrase in the definition is deviation from the *expected utilization-representation* in a *nondiscriminatory* situation. Low representation or utili-

zation, as we used the term in the discussion of historical rates of utilization, does not necessarily translate into underutilization as defined above. The referee for the low-representation concept in the preceding discussion was the population proportion, and the population proportion is not necessarily the expected proportion in a nondiscriminatory situation. The expected utilization of representation might be higher or lower than the population proportion in a particular market. Thus, to determine whether any actual rate of utilization is an indication of underutilization, one must be able to determine the *expected representation in a nondiscriminatory situation.*

This proportion would be equal to the black population proportion only if the proportion of the black population with the required productive capacity equals the proportion of the white population with the required productive ability. In other words, in a nondiscriminatory world, the expected representation of blacks would be equal to their population percentage only if the proportion of qualified blacks were equal to the proportion of qualified whites. If the proportion of qualified blacks were greater than the proportion of qualified whites, the expected representation of blacks would be higher than their population proportion. The expected representation would be less if the proportion of qualified blacks were less than the proportion of qualified whites.

The Size of the Underutilization Gap

The discussion, to this point, makes it clear that discrimination will lead to the utilization of the discriminated-against group at rates lower than the nondiscriminatory rate. Thus, observed low rates of utilization of black labor could result from current market discrimination. On the other hand, we have also seen that low rates of utilization could also occur even if current hiring practices were nondiscriminatory, if the distribution of productive ability were lower in the black community than in the white community. In this case, the low utilization rates would be due to differences in productive ability.

Based on the above discussion, we can divide the observed low rates of utilization in the black community into two components: a low productivity component, and a current market discrimination or underutilization component. There seems to be fairly widespread agreement that EEO policy ought to, at minimum, eliminate the underutilization component of the labor market disadvantage of blacks. The role of EEO policy in reducing the productivity component is not as clear. We will, therefore, first discuss evidence concerning the size of the underutilization component, and then return for a few brief comments about the role of past discrimination in fixing the size of the productivity component.

There has been a fairly large number of studies that have attempted to isolate the underutilization component of the black and white differences in labor market outcomes. Although the specific models vary, most follow a consistent methodology. All estimates attempt to isolate the productivity component and then calculate the underutilization component by subtracting the productivity component from the total difference.

All existing estimates of the underutilization or discriminatory component of the disparity between the labor market positions of blacks and whites have consistently found large underutilization components. The estimates for the percentage of the wage-rate gap that is due to underutilization generally range from 40 to 60 percent for the most completely specified models. Estimates of the amount of the employment disparity that can be attributed to underutilization are even higher, with productivity differences generally capable of explaining less than 20 percent of the employment disparity.

Obviously, the accuracy of the estimates of the underutilization component produced by this methodology depends on the accuracy of the estimate of the productivity component. If the productivity component is underestimated, then the method will overestimate the underutilization component, while if the productivity component is overestimated, the method will underestimate the underutilization component. This concern about accuracy arises because job-relevant productive capacity is an unobserved variable for all of the existing analyses. Therefore, a variety of measurable factors that are believed to determine on-the-job productivity is used in all analyses. Obviously, the accuracy of these estimates depends on how accurately the determinants of job-relevant productive capacity are specified.

The principal way that the methodology might underestimate the productivity component is by omitting important, unmeasured determinants of productivity. Components of productivity that early

critics of these studies often suggest were being poorly measured are: inherent ability and the quality of acquired abilities. However, some of the more completely specified models in later studies have included proxies for these factors without eliminating the large residuals. Other critics have suggested that the omission of such factors as attitudes or motivation for work and expectations have led to underestimates of the productivity component. However, economic studies such as those from the Michigan panel study on income dynamics have found that attitudinal variables have little discernible impact on economic outcomes. Moreover, a large number of studies have failed to find differences in the work ethic or expectations of black and white workers in the direction required to produce an overestimate. In short, there is little factual evidence to support the contention that the productivity component of the racial gaps is seriously underestimated by these studies.

In fact, there are reasons why the productivity component might be overstated by this methodology. This is because the proxies used may actually not be closely related to on-the-job relevant productive ability. For example, education is a principal variable in all studies. Yet, there have been several studies that have shown clearly that the work force is overeducated relative to the requirements of today's jobs and that there is a tendency to credentialism, i.e., requiring workers to have more education than is actually required for job performance. This suggests that some portion of the estimated productivity component may actually reflect institutional discrimination.

We can surmise, therefore, that estimates of upwards of 80 percent of racial gaps in employment and between 40 and 60 percent of the wage or earning rate gap were due to underutilization when these studies were done. Now, although some of these studies are about 15 years old, it seems that these estimates are quite unlikely to underestimate the current gap, *ceteris paribus.* There are two reasons for this conclusion. First, the gaps between white and black workers with respect to education have narrowed substantially, while there is little evidence that the skill requirements of jobs have increased. This would imply that the productivity component of the racial gaps should have declined, *ceteris paribus.* Second, as we have observed already, the overall gap between black and white workers has increased over the last few years. In view of the fact that the skill gaps have probably narrowed, this would imply that the underutilization component would have had to increase, *ceteris paribus.* Thus, as long as all else remained equal over this period, the earlier estimates would understate the underutilization component of today's racial gaps.

However, all else has not remained equal during the last several years. In particular, there has been an increase of structural inequality. This factor would tend to increase gaps between those of high productivity and those of low productivity. This change would increase the productivity component of the inequality gap and increase the overall gap. The other significant change during this period was the expansion in the proportion of the white population working. This change has also increased the overall gap; however, it is likely to have done this by increasing the underutilization component.

Thus, the two major changes have both worked to increase the overall racial gaps, but have exerted opposite influences on the relative size of the productivity and underutilization gaps. However, the white labor force expansion would appear to have exerted an impact of much larger magnitude and, therefore, the likely effect of relaxing the *ceteris paribus* assumption would be to increase the importance of the underutilization component.

However we cut it, the evidence suggests that a large portion of the current labor market gaps between blacks and whites is due to underutilization or discrimination. Before we turn to a consideration of the implications of this fact for EEO policy, however, we should take a closer look at the so-called productivity component of the racial disparity.

The productivity component, as we have seen, is that component of the inequality gap that is due to differences in current on-the-job productive ability between blacks and whites. Before we conclude that these differences have no relevance for EEO policy, we need to consider briefly the origin of these productivity differences. The productivity of any given individual, at any point in time, is determined by two factors: acquired abilities and inherent abilities. It, therefore, follows that the differences in the productive abilities of blacks and whites, at any point in time, are also attributable to differences in acquired and inherited abilities.

Now, if we assume that blacks and whites have equal distributions of inherent abilities, it follows that all of the productivity differences must be due

to differences in acquired abilities. In fair human capital markets, blacks and whites of equal ability would acquire equal human capital as long as they had equal resources and taste. Assuming taste equal, differences in the acquired abilities of blacks and whites must be attributed to differences in resources and discrimination in human capital markets. However, since differences in resources must result from differences in historical paths of earnings, it follows that, under the conditions posed, all resource differences must, themselves, be due to historical discrimination. It follows, therefore, that differences in productive abilities are, themselves, just the present day legacy of historical discrimination.

Even if the assumptions made in the above argument were relaxed, it would still be the case that a good portion of the current differences in productive ability reflect the legacy of discrimination. In that case, most, if not all, of the racial disparity can be attributed to current or past discrimination. Nonetheless, it is still useful to maintain a distinction between the productivity gap and the underutilization gap, because the latter can be completely eliminated if all forms of current discrimination were eliminated, and elimination of the former would require steps beyond the elimination of current discrimination.

This also provides an answer to the question concerning the long-run impact of nondiscrimination on underutilization. According to the above analysis, underutilization, as defined, will be completely eliminated by a nondiscriminatory market. Low representation may still exist, but it should be explained by differences in job-relevant productive capacity. Thus, absent explanation, the work force should match the racial and ethnic composition of the work force in the relevant labor market.

Implications for Equal Opportunity Policy

The objective of EEO policy is to end discrimination and the impact of the legacy of discrimination. Therefore, the natural goals of EEO enforcement should be the elimination of underutilization. Underutilization, defined narrowly, will include only the disparities in representation caused by current market discrimination. Defined more broadly, it includes the gaps in utilization caused by discrimination-induced disparities in productive capacity. The objective of eliminating underutilization, narrowly defined, will be achieved when current market discrimination is eliminated. The broader objective will be achieved when discrimination-induced disparities in education and skills and knowledge acquired on the job are eliminated.

Despite an increasingly popular view that discrimination is no longer a major factor in today's labor markets, as we have seen, the best evidence available suggests that a substantial part of the present labor market disadvantages of black workers results from current and past market discrimination. The analysis suggests that effective equal employment opportunity policies still have an important role to play in improving the labor market situation of black workers.

EEO policies that can eliminate current market discrimination are required to eliminate underutilization. Policies that could effectively prevent current discrimination by themselves would eliminate 50 percent or more of the overall labor market disparity. Moreover, a substantial part of the remaining disparity that is due to current productivity differences is a result of the legacy of past discrimination. Therefore, EEO policies that compensate for the legacy of past discrimination could play a role in improving the current labor market situation of black workers and eliminate a good portion of the remaining disparity. Without such policies, it is hard to see how blacks could ever obtain labor market parity without drastic redistribution of power and wealth.

We have had an active EEO policy ever since the passage of the Civil Rights Act of 1964. Yet, if our analysis is correct, this effort has not eliminated either current market discrimination or the vestiges of past discrimination. This suggests a need to revaluate our equal employment opportunity enforcement effort. If EEO policy is to have a major role in improving the labor market position of blacks, changes are required that will make the effort more effective at preventing current market discrimination. We might also desire to improve the capacity of EEO efforts to help eliminate the vestiges of discrimination. The question that we need to answer is: What types of changes are required? If the performance of EEO efforts in the recent past is any guide, without some type of change EEO policies will not be an effective remedy for the labor market disadvantages.

One direction of change that seems completely off base is the direction suggested by many so-called

conservatives. These observers have become increasingly vocal in advocating what they call a colorblind EEO policy. Apparently, what they mean by this is the abandonment of such affirmative action practices as the use of numerical goals and timetables, the reliance on the individual complaint process instead of an active government-initiated enforcement process, and the abandonment of statistical evidence provided by patterns of representation in favor of proof of deliberate intent. In our view, the adoption of these practices would be tantamount to abandoning EEO policy altogether.

The notion that EEO policy should be colorblind or that the original intent of the civil rights movement was to create a colorblind EEO policy is a patently ridiculous notion based on crude historical revisionism. The legislation, Executive orders, and court decisions that collectively comprise EEO policy emerged in response to a particular historical situation where protected-class individuals were being seriously harmed by the discriminatory behavior of nonprotected groups. In other words, whites were harming blacks by discriminating against them and not the other way around.

Whites clearly had, and still have, a dominant position in the society—politically, economically, and socially. Their socioeconomic dominance was clearly being used to discriminate against blacks, and this was causing blacks great harm. At the same time, the superior position of whites made, and still makes, it extremely unlikely that blacks could seriously harm whites through discrimination. Under the circumstances, the only logical purpose of civil rights policy is to prevent nonprotected groups from continuing to use their superior socioeconomic position to discriminate against the protected classes.

Effective EEO policy has no choice except to be color conscious. It must be conscious of the fact that blacks are the potential victims of harmful discrimination and whites are the potential perpetrators and beneficiaries. Thus, effective policy must scrutinize the behavior of whites to ensure that it is not discriminatory so long as whites have both the power and the incentive to discriminate. There is no justification for policies to protect whites from discrimination, since the potential harm that could be done to whites by black discrimination is miniscule.

Those who have latched on to the colorblind slogan appear to be victims of a simplistic error in reasoning. They have been unable to distinguish between the long term objective of the civil rights movement to ultimately create a society where race or other such irrelevant attributes do not determine one's fate and the policies required to bring about such a society. There is no logical inconsistency between the desire to create a society where color is irrelevant to success and the use of color-conscious strategies to bring such a society about. Indeed, under the present circumstances, given the racism of our society and the extremely unequal distribution of power and resources, there is no alternative to race-conscious policies.

Nor is the suggestion that EEO enforcement should rely completely or primarily on an individual complaint process any more reasonable. This suggestion reveals a total lack of understanding of the nature of discrimination in the post-Civil Rights Act era. Since discrimination has been declared illegal, discriminators no longer openly announce their discriminatory intent. In today's labor market, discrimination is hidden behind a facade of legitimate-sounding reasons. Not having access to employer records, the individual worker will not know, in general, whether or not the same criteria are being applied fairly. It, therefore, is practically impossible for individuals to know whether they did not receive an opportunity for discriminatory or legitimate reasons.

Moreover, institutional or locational discrimination need not even be intentional, and the offending employers may not even be aware of the discriminatory impact of their practices. Biased institutional or locational practices tend to affect entire classes of individuals and are only discriminatory because of classwide differences in population characteristics.

Some biased institutional practices, such as biased methods of advertising, will result in individuals not even being aware of the existence of opportunities. It is, therefore, ludicrous to expect the typical individual to be able to detect and file complaints about institutional or locational discrimination.

Finally, we should also note that the differences that are attributable to productivity differences will frequently not arise wholly from the activities of any single employer. These differences may also arise from current or historical practices of a group of employers and of other institutions through which skills or education are acquired. Thus, there may well be no individual employer against whom a complaint can be lodged.

Considering all of the above factors, it is apparent that an efficient EEO policy cannot rely on individual complaints. Eliminating discrimination is a task that will require active detection and monitoring activities that can only be done by an enforcement agency.

It also seems obvious that the enforcement effort must rely on statistical evidence of underutilization rather than proof of intent. In the first place, such evidence is reliable as an indicator of a potential problem of discrimination. As we have seen, discrimination will inevitably lead to underutilization, and underutilization is not likely to occur if discrimination is not being practiced. In the second place, proving intent is very difficult. Finally, as was indicated, intent is not necessary for employment practices to have a discriminatory impact.

Utilization analysis has a dual role to play in an efficient EEO policy. First, utilization analysis, properly done, can be used to detect the possible existence of EEO problems. If there is an EEO problem, a proper utilization analysis will reveal underutilization. A proper analysis should also reveal the appropriate allocation of responsibility for the overall representation gap between current market discrimination and productivity differences.

Second, utilization analysis can help determine appropriate numerical goals for EEO implementation efforts. Obviously, the appropriate goal will be based on the amount of underutilization revealed and the amount that is expected to be eliminated by the implementation of appropriate remedies. Such goals can be an extremely important management tool. Failure to achieve the goals can alert the implementing agency to possible problems of implementation and enable the agency to take timely corrective action if warranted.

There has been a fair amount of criticism against the use of utilization analysis and numerical goals and timetables. The criticisms fall into two classes. First, it is alleged that numerical goals establish unfair preferential quotas for protected classes. Second, it is alleged that insurmountable technical difficulties would make it impossible to establish meaningful and fair goals. In our view, both of these criticisms are invalid.

The first objection misunderstands both the basis and the purpose of goals. Properly designed goals are based on a utilization analysis that has identified underutilization. Goals are appropriate only where underutilization has been detected and are designed merely to eliminate underutilization. If there is no underutilization, then there can be no positive goal. Therefore, it follows that properly designed goals do not provide preferences for protected classes. They merely end preferences or unfair advantages for the nonprotected classes.

The technical difficulty objection has a little more merit. Technical difficulties with measuring availability do exist. However, the problem is not insurmountable. The definition of underutilization, especially for the narrower concept, merely requires the identification of the distribution of relevant job capacities among protected and nonprotected groups. Utilization analysis, thus, requires knowledge of the requirements of jobs and the capacity of the population groups. The problem of utilization analysis, thus, boils down to a problem of collecting and analyzing appropriate data. This, clearly, is not an insurmountable problem.

Utilization analysis alone will not identify the actual practice that causes an EEO problem or the most appropriate remedy for the EEO problem. Utilization analysis is, thus, only a starting point for EEO policy. An effective EEO policy also must include components that identify the specific employment practices and productivity gaps that cause underutilization, formulate appropriate remedies for underutilization, and implement the remedies, once formulated. Discussion of these components of an effective EEO policy is beyond the scope of this paper.

Finally, we shall conclude this discussion of policy implications with a few remarks about current policies. The analysis suggests that the broad characteristics of existing EEO policy are probably not far off the mark. However, our general impression is that the effort is not being implemented well. Our analysis suggests that enforcement should be active instead of passive, with the initiative for detecting discrimination resting in the hands of the EEO implementation agency. It appears that the EEO effort has never been active and aggressive enough in detecting discrimination. The effort to detect discrimination ought to be increased. Investigations ought to be initiated by the agency and ought to be frequent, as long as discrimination is as widespread.

Good utilization analysis ought to be the main tool for detecting discrimination. The methodology and data for good utilization analysis remain underdeveloped. Utilization analysis is also not uniformly and

consistently applied. The current practice of relying on utilization analysis done by employers without providing uniform methods or data is clearly defective. A uniform and consistent methodology for utilization analysis with consistent and high quality data ought to be developed as a high priority.

Moreover, it would also appear that insufficient effort has been devoted to methods of determining the causes of underutilization. As a result, remedies may not, in general, be specific enough to be effective. Although the EEO effort has changed some of the superficial characteristics of employment practices, it is not clear that it has rooted out the fundamental sources of discrimination. There is a need for the government to identify more effectively the causes of discrimination and to specify more effective remedies. the current practice of relying on employer-designed affirmative action plans is unlikely to result in significant improvement in labor market discrimination. The EEO effort could, perhaps, be improved most by the development and implementation of a uniform set of standard fair employment practices for each type of job and industry.

Conclusion

Racial inequality in labor markets is still rampant and, in fact, has been increasing in the last several years. Our analysis suggests that much of this labor market inequality for blacks is due to the persistence of racial discrimination. The analysis suggests that a strengthened EEO policy would be required to eliminate current discrimination and the legacy of past discrimination from the labor market. Yet, the current direction of change for EEO policy is towards weakening an effort that had never been very strong in any case.

Why has effective discrimination against blacks increased during the last decade after a brief period when it appeared that discrimination was being defeated? Why have we embarked upon a course to weaken an already inadequate EEO effort when it appears to be that there is no longer a consensus in the white community that high priority ought to be given to EEO efforts? In fact, just the opposite consensus exists.

This change appears to result from the increased economic difficulties and slower rates of growth experienced since the early 1970s as compared to the 1960s. The impact of the increased difficulties was to make fewer whites willing to give up the advantages they gain because of discrimination. Fewer whites are for active promotion of equal opportunities for blacks when it appears that this will cost them. In an era of expansion, the demands for equity can be met without anyone feeling the pinch. The abandonment of strong EEO policy is simply the result of white politicians playing to the selfish interests of the white majority.

For those who believed very strongly in the ability to bring about equality of opportunity through a few simple reforms, the experience of the last 10 years must, indeed, be very sobering because this experience suggests the extreme difficulty of bringing about a permanent solution to the problem of racial inequality and discrimination through reform. In our democratic society, there is always a politician willing to pander to the selfish interests of the majority. Since blacks are a minority, it is hard for them to get priority accorded their interests when resources are scarce and white demands are high.

As long as whites have disproportionate shares of economic power, guaranteeing equal opportunities for blacks implies ensuring that whites do not discriminate against blacks. This would seem to imply the need for a strong and permanent EEO effort. However, the strength with which EEO policy is implemented, at any point in time, is a political decision, and whites also dominate the political process. It would, therefore, appear that whites will be able to have society back away from strong EEO policies whenever they like. It seems that EEO advocates simply cannot count on the government to provide a permanent solution for the problems of blacks that conflict with the interests of whites in our democratic society.

There is no way out of this paradox for the reformist, since reform does not alter the basic distribution of resources or power. Therefore, even after reforms such as the initiation of new EEO policies, blacks remain dependent on the good behavior of white owners or managers of businesses or on the goodwill of the government, which whites control, to ensure their economic well-being. History taught us in the Reconstruction era, and is repeating the lesson today, that this is a risky dependency. Whites cannot be counted on to continue their support for equity for blacks when situations change and their costs increase.

A permanent solution requires breaking this dependency. Black economic well-being must either be

made independent of white behavior or blacks must have the capacity to ensure favorable white behavior. In any case, a solution can only be permanent if blacks have an independent ability to guarantee its permanence. This implies a need for a permanent increase in the power and resources of blacks.

Speculation on the nature of this permanent solution is beyond the scope of this paper. Suffice it to say that it is apparent from historical experience that blacks will continue to search for such a solution. If the democratic social process continues to back away from EEO without finding a more effective policy to end discrimination and the cummulative disadvantages wrought by historical discrimination against blacks, blacks ultimately will come out of desperation to take their efforts for change outside of the established political channels once more, as they did during the great civil rights movement.

REMARKS

Statement

By Parren J. Mitchell*

I wish to take this opportunity to thank Chairman Pendleton and the other members of the Commission for granting my request to appear at these proceedings. The subject matter of your inquiry has been and remains the primary motivational factor for my many years of public service. It is also a matter of deep personal concern and commitment. The incessant attacks on affirmative action over recent years cause those of us who believe in equity to defend constantly that which should need no defending. But, if these detractors of affirmative action think that we shall tire, or abandon our gains, or lose sight of our purpose, they know us no better than they know the Constitution.

Those who challenge these affirmative efforts would have us believe that all "preference" programs are, by that fact alone, illegal. If the term "preference" is construed as the allocation of benefits by the government to a predetermined class of eligibles, then the Constitution may be validly interpreted as prohibiting both the unreasonable allocation of those benefits *and* the allocation of benefits to achieve other than a legitimate government purpose.

Within these constitutional restraints, the Congress routinely uses a system of both preferences and sanctions in order to achieve desired economic results. The Buy American Act[1] often requires that American business firms be given a bid preference of either 6 or 12 percent over foreign firms when competing for Federal contracts. Public Law 85-804 authorizes the military to pay extraordinary contractual relief to essential defense contractors if such payments are needed to keep them in business, even though such contractors are not otherwise entitled to such funds under the terms of their contracts. The tax laws allow our largest defense contractors to postpone the payment of Federal income taxes pending the total completion of a defense system. According to a recent article in the *Baltimore Sun,* under this provision of law, General Dynamics—which received $7 billion in Federal contracts last year—has paid no taxes since 1976.

On the "sanction side" of our laws, the Sherman and Clayton Acts are designed to prevent monopolistic and anticompetitive practices that can effectively thwart our free enterprise system. These laws discriminate between those who dominate a market and those who do not. Fines and criminal penalties are also imposed in many areas dealing with Federal contracting to ensure that the government is treated fairly and honestly when it purchases goods and

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[1] 41 U.S.C. §10a *et seq.*

services. No one can seriously deny the government's authority to do business with only those establishments that agree to supply conforming goods at reasonable prices. But we achieve this result, in part, through the administration of sanctions against those who would violate these congressionally imposed standards of conduct.

In order to assess the constitutional validity of these measures, we need to answer two inquiries: (1) Do these laws address a legitimate government purpose? and (2) are these laws an appropriate or reasonable means to address that legitimate purpose?

If the purpose of the Buy American Act is to preserve the domestic mobilization base, can anyone honestly conclude that the Congress lacks the constitutional power to address this legitimate purpose of our government? Further, is it not a reasonable approach to implement such purpose through the use of a limited bid preference?

In a similar fashion, it is also a legitimate purpose of this government to ensure that contractors *essential* to the national security receive reasonable amounts of assistance to remain in business. Congress has the right—indeed, the responsibility—to provide for the national defense. The courts have traditionally given the Congress broad latitude in this area.

It is, in addition, beyond dispute that Congress has the jurisdiction or power to stymie economic concentration by declaring illegal monopolies and other anticompetitive practices. In my opinion, there can be no greater threat to American freedom than the aggregation of wealth in the hands of a privileged few. The Congress, dating back to the last century, has recognized this economic reality and has adopted reasonable sanctions against those who would monopolize our commerce.

It is this same context of directing the formation of legitimate defense and economic goals that led to the enactment of the Small Business Act in 1953. I am sure that the Commission's research on the Small Business Administration has disclosed its gradual evolution through the Reconstruction Finance Corporation, and its predecessors, the Small Defense Plants Administration and the Small War Plants Corporation.

The small business set-aside program, which is, I understand, a matter of particular inquiry by this Commission, was authorized by the original Small Business Act. Under the set-aside procurement method, a Federal procurement officer may restrict competition for a government contract to small business concerns only. Conversely, since 99 percent of all businesses are classified as small, a small business set-aside precludes only 1 percent of the universe of all firms from competing for these awards.

To assess the validity of set-asides, we first need to explore the congressional purpose cited for its establishment in order to determine if a legitimate governmental purpose is being served. Section 15 of the Small Business Act cites three reasons for the use of small business set-asides. A set-aside is authorized if it is determined:

(1) To be in the interest of maintaining or mobilizing the Nation's full productive capacity;

(2) To be in the interest of war or national defense programs;

(3) To be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the government are placed with small business concerns.

As noted previously, mobilization and defense needs are legitimate governmental purposes that the Congress may, of course, address through legislation. The third justification for a set-aside—the "fair proportion" of total purchases—is an attempt by the government to ensure that through our purchase system we do not create any situation where there are so *few* producers of government-needed services and goods that they can virtually dictate the terms and conditions of all sales. A very strong analogy may be drawn between set-asides in the Federal purchases area and the Sherman and Clayton Acts. Both are designed to prevent monopolistic conditions. Set-asides, however, pertain only to the limited government purchase market while the Sherman and Clayton Acts, of course, pertain to the economy as a whole.

If anyone should challenge small business set-asides on the basis that we in Congress lack the authority to legislate on these issues, then that individual lacks even the most fundamental understanding of our Constitution. These purposes are beyond legitimate question.

The remaining part of our inquiry is whether the means the Congress has adopted to further these purposes are appropriate or reasonable. Resort to statistical data conclusively establishes that the

means Congress has selected to achieve the three set-aside purposes are clearly reasonable.

Although only 1 percent of the firms in the United States are large business concerns, they are receiving over 80 percent of the Federal purchase dollar. Of the less than 20 percent received by small business, more than one-half of that meager amount comes through the small business set-aside program. With the Department of Defense (which now accounts for nearly 80 percent of all purchases), the dependence of small business on set-asides is even more dramatic. In fiscal year 1984, the DOD purchased nearly $125 billion of goods and services from domestic business. Small business received only $24 billion, or 19.1 percent, of that amount. Of this $24 billion, nearly $12.5 billion, or 52.3 percent, was awarded through the set-aside program. Statistically, therefore, if a small business wishes to sell to the military, it is more probable than not that the sale will be effected through the set-aside program.

Given such a high rate of dependence on set-asides and such a small overall share of the Federal purchase dollar, we may conclude that set-asides have reasonably advanced the three legitimate governmental purposes. In fact, given a 50 percent "plus" dependence rate, one might even conclude that set-asides are *essential* to achieving those purposes.

The small business set-aside program reasonably allocates benefits on the basis of business size in order to achieve legitimate government purposes. Accordingly, there is no doubt that this program is a permissible exercise of congressional authority pursuant to article I of the Constitution. I do not, however, mean to imply that there are no problems with the bureaucratic administration of small business set-asides. In a few industrial areas, faulty "size standards" promulgated by the Small Business Administration have led, perhaps, to an overly "generous" definition of small business for certain classes of purchases. When this happens, the distribution of contract awards is not as effective as it should be. I believe this problem has caused a few industry groups to challenge the constitutionality of the entire program effort in order to increase the market share going to their most influential constituent members. However, agency management problems should not be confused with the constitutional authority of the Congress to legislate in certain areas. Indeed, if every administrative problem were made into a constitutional infirmity, the Congress would be effectively divested of its ability to legislate.

A program that is under far more criticism than small business set-asides is the section 8(a) program administered by the SBA. Under this program, SBA is empowered to provide small business concerns owned and controlled by socially and economically disadvantaged individuals such management, technical, financial, and contract assistance as may be necessary to promote competitive viability within a reasonable period of time. Central to this program effort is the provision of contracts through the SBA to 8(a) program participants.

Returning to the elements of constitutional analysis, it is necessary that the congressional purpose for this program be reviewed to determine whether it is a legitimate function of government. Fortunately, with respect to this program, there is no need to speculate as to congressional purpose or intent. Public Law 95-507, which codified the program effort in 1978, sets out both congressional findings and purposes. These findings and purposes may be found in section 2(e) of the Small Business Act and read as follows:

> (e)(1) With respect to the administration's business development programs, the Congress finds—
>
> (A) That the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;
>
> (B) That many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;
>
> (C) That such groups include, but are not limited to, black Americans, Hispanic Americans, Native Americans, and other minorities;
>
> (D) That it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;
>
> (E) That such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;
>
> (F) That such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and

(G) That such procurements also benefit the United States by encouraging the expansion of suppliers for such procurements, thereby encouraging competition among such suppliers and promoting economy in such procurements.

(2) It is, therefore, the purpose of section 8(a) to—

(A) Foster business ownership by individuals who are both socially and economically disadvantaged;

(B) Promote the competitive viability of such firms by providing such available contract, financial, technical, and management assistance as may be necessary; and

(C) Clarify and expand the program for the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

This statute, in effect, contains a congressional finding that there exists in this country a correlation between ethnicity and social and economic disadvantage. The Congress also found that it is in the national interest to expeditiously ameliorate this situation in order to obtain social and economic equality and to improve the functioning of our economy. The promotion of business ownership through the use of Federal resources (e.g., contract awards) was the means chosen by the Congress to effect these goals.

Are our goals constitutionally permissible? It is my opinion that they are not only permissible, but that they form the very fabric of our form of government. Under our Constitution there should be no correlation between race and poverty, but there is. There should be no relationship between life expectancy and the color of one's skin, but there is. There should be no ghettos; no ethnic underrepresentation in professional jobs; no freezing out of the talents and creativity that this segment of our population may contribute to our economic system—but there is. It is not only permissible for Congress to address these issues, but, in my opinion, it is constitutionally demanded.

Although there are few who would challenge our purpose, there is a growing number in this country who are challenging our means—affirmative means—to effect our business development goals. Through the use of rather simplistic slogans such as "reverse discrimination," they claim that any preference based upon race is illegal.

The Congress, however, is not displaying an invidious or irrational preference but, rather, one motivated by a compelling national interest. I think it approaches social hypocrisy to claim that we have legislated an irrational preference when the object of our efforts is and remains at a lower economic stratum—placed there by the prejudices of the very same dominant society that now feels "victimized." The purported "wrong" to the dominant society stems not from one group being made economically superior to them but, rather, from the historically disadvantaged who fail to be content merely to let a more racially benign system eventually right itself at some time in the indefinite future. These persons seek the expeditious conveyance of that full, unfettered opportunity that would have been theirs sooner were it not for discrimination.

Of course, the transference of these "class remedies" to individual actors in individual situations presents, for some, the most difficulty. A *particular* contractor fails to obtain a Federal contract because it was awarded to an 8(a) firm. Our innocent contractor claims to be a victim and now demands a remedy. But is this contractor really a victim? Is racial neutrality fair to minorities while the racial prejudices of yesterday continue to plague our daily lives? Did our disappointed contractor have a right to this contract or merely an expectation that the system would continue as it has in the past, that it would benefit from the preservation of the results of past discrimination?

In fiscal year 1984, only 1.6 percent of Federal purchases were awarded under the 8(a) program. Over the 16-year history of the program, only 1 percent of Federal purchases were awarded as 8(a) contracts. Nevertheless, it is estimated that well over 60 percent of all Federal prime contract awards to minority business come through the 8(a) program. For example, in FY 1983, 62.7 percent of all DOD prime contracts to minority business was awarded under 8(a). For the National Aeronautics and Space Administration, the comparable percentage is even higher. In FY 1983, 68.9 percent of all NASA prime contract awards to minority business was awarded under the 8(a) program.

Minority business is highly dependent on the 8(a) program, and yet the 8(a) program accounts for only a very small share of the total purchase budget. The so-called "intrusion" is slight, but the benefit to the minority business community is great. I believe we in Congress have more than met our responsibility to fashion a reasonable remedy.

The Supreme Court has already had an opportunity to decide the constitutional validity of a contract "preference" program for minority business. In *Fullilove* v. *Klutznick*[2] two plurality decisions, each representing the views of three Justices, upheld the constitutionality of my amendment to the Local Public Works Act of 1977. As you may know, my amendment provided generally that 10 percent of each grant authorized under that act be expended with minority-owned business. Succinctly stated, *Fullilove* held that when a competent legislative body—here the United States Congress—makes a finding of past discrimination, it has the authority to fashion reasonable remedies in an attempt to correct the present effects of that discrimination. To deny us this power is, basically, to relegate the legislature to nothing more than an impartial observer of our society, incapable of remedying present wrongs because it has been made historically blind.

I am convinced of the merits of what we have accomplished in this area and pledge to my allies and adversaries alike that my efforts will not diminish.

[2] 448 U.S. 448.

Statement

By Joseph P. Addabbo*

Mr. Chairman, I am Congressman Joseph P. Addabbo, a senior ranking member of the House of Representatives Small Business Committee and Chairman of the House Subcommittee on Defense Appropriations.

As coauthor of Public Law 95–507, I am pleased to present my testimony in support of two vital programs, the minority business set-aside program and the small business set-aside program. The maintenance of both programs is crucial for the small and minority business community to achieve competitive strength in the economic mainstream.

Minority Business Set-Asides

It is undisputed that historical patterns of racial and economic discrimination have prevented minority business from entering the mainstream of the economy. Opportunities for these firms to enter the marketplace are limited because of a lack of access to the business relationships necessary to achieve competitive viability. Congress has found that minority firms invariably find themselves confronted with a number of barriers to competition such as lack of access to capital, credit, and effective technical assistance. All these factors have a direct bearing upon the ability of minority business to participate effectively in both the public and private sectors. It is unquestionable that the duty lies with the Congress to eliminate all of these constraints on minority business in order to effectuate both the social and economic well-being of the minority community.

The congressional effort to address the inequities of past discriminatory practices began in 1972 with a determination by the House Select Committee on Small Business that "the minority businessman does not play a significant role in our economy due to major problems which, though economic in nature, are the result of past societal standards which linger as characteristics of minorities as a group." The Committee repeated that finding in 1975 and further recognized that there was clearly a need for Congress to take substantive action to cure the effects of past discrimination that have operated to impair the competitive position of minority business in the national economy.

It is well documented that the administrative efforts of the 1960s were designed to encourage ownership by minorities. Although these efforts were notable, a stronger emphasis needed to be placed upon the economic development of minority-owned firms.

In 1977 Congress decided to address the problem of underrepresentation of minority business in the

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public sector. At that time, the participation of minority firms in the Federal procurement process was disproportionately low, with such firms performing less than 1 percent of all Federal contracts. The opportunity arose when Congress was considering amendments to the Local Public Works Employment Act. This bill authorized $4 billion for Federal grants to State and local governments for the construction, repair, or other improvements of local public works projects. An amendment was offered by my colleague, Congressman Parren Mitchell, that provided that 10 percent of each grant be awarded to minority business firms. A waiver provision was contained in the bill in the event that the requirement proved impracticable to meet. As introduced, the amendment was designed to channel funds into the minority business community to ensure that minority firms received their fair share of government contracts. The amendment passed the House and was subsequently enacted into law.

The 10 percent set-aside program proved to be extremely successful in providing immediate relief to the minority business community. Despite the fact that the program enjoyed overall success, it did not proceed without legal challenge. A number of lawsuits were filed in several district courts asserting the unconstitutionality of the MBE set-aside provision. Finally, in *Fullilove* v. *Klutznick,* 48 U.S. 448 (1980), the Supreme Court issued a landmark decision that culminated the legal challenges to the MBE set-aside program. This is the only Supreme Court case that has addressed the question of affirmative action in the context of promoting the development of minority business enterprise.

In *Fullilove* a number of contractors and subcontractors attacked the 10 percent MBE provisions contained in the Local Public Works Employment Act on the grounds that the provision, on its face, violated the equal protection clause of the 14th amendment and the equal protection component of the due process clause of the 5th amendment.

On July 2, 1980, the Supreme Court issued a decision that upheld the constitutionality of the 10 percent MBE set-aside. A plurality opinion was authorized by the Chief Justice for himself and Justices White and Powell. The analysis set forth two tests that were to be used in evaluation of the MBE provision: (1) Whether the objectives of the legislation were within the power of Congress; and (2) whether the use of racial and ethnic criteria was a constitutionally permissible means for achieving the objectives.

With respect to the first issue, Chief Justice Burger determined that the MBE provision was clearly an exercise by the Congress of its spending power, one that has been historically used to further broaden policy objectives. He further stated that a rational basis existed for Congress to conclude that the contracting practices of prime contractors could perpetuate the lack of access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce. The Chief Justice concluded that Congress could take the necessary and proper action to remedy the situation, under both the commerce power and the spending power.

In determining whether Congress had the authority to legislate remedial measures to redress the effects of past discrimination, the Chief Justice relied, to a substantial degree, upon information contained in reports prepared by the House Committee on Small Business. The Committee reports provided the Court with sufficient evidence that Congress had an abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. The Court found little difficulty in finding the Congress to be a competent body to fashion reasonable remedial measures that are race conscious.

With respect to the second issue—whether Congress employed constitutionally acceptable means to effectuate its purposes—the Chief Justice determined that the use of racial or ethnic criteria is permissible when Congress is exercising its authority to enforce equal protection guarantees. The Chief Justice explicitly rejected the assertion that the MBE program deprived nonminority businesses of government contracts that they would have otherwise received. His response indicated that the impact on nonminority firms was an incidental consequence, not the objective of the program. Moreover, he concluded that some sharing of the burden by innocent third parties is not impermissible when the remedy is limited and tailored by Congress to cure the defects of prior discrimination.

It is within the context of the *Fullilove* case that one must examine the validity of Federal minority business programs. With regard to the 8(a) program, deference must be given to the unique competence of the Congress to decide upon appropriate remedial

measures to redress the effects of racial discrimination. Although Congress is not constitutionally required to develop a detailed record or make formal findings before it enacts a law, a sufficient legislative history exists to justify the need to legislate criteria that are preferential to racial minorities. The reasonableness of the congressionally developed means to achieve the objectives of the program is supported by statistics that indicate that the impact of this program on nonminority firms is slight.

The congressional commitment to promote the economic development of minority business enterprise continued despite the constitutional challenge made against the MBE set-aside program. While the *Fullilove* case was still in court, in 1978 Congress passed Public Law 95–507, the most comprehensive statute ever enacted dealing with minority business development. Public Law 95–507 provided, for the first time, a legislative foundation for the section 8(a) program. The foundation encompassed specific language that clearly articulated the objective of the 8(a) program to develop businesses owned and controlled by socially and economically disadvantaged individuals. More important, the bill contained specific congressional findings that certain groups have suffered the effects of discrimination and that it is in the national interest to ameliorate expeditiously the conditions of socially and economically disadvantaged groups. The bill further recognized that the procurement power of the Federal Government is immense and can be used effectively to assist the economic development of minority business enterprises.

Although many are quick to criticize the impact of the 8(a) program, it is important to note that the redirection of government purchases toward the minority business community through this program has done much to spur the growth and development of these businesses. For example, in 1980 alone the Federal Government spent approximately $100 billion for the purchase of goods and services. Of this amount, minority businesses received $3 billion in contract awards, 43 percent of which were awarded through the 8(a) program. Statistics indicate that for each successive year after 1980, the majority of contracts awarded to minority businesses came through the 8(a) program. Although the program is not without administrative problems, it has proved to be successful in providing a mechanism through which the minority business community can obtain much-needed access to resources necessary to become competitively viable.

The Small Business Set-Aside Program

Although the small business set-aside program has not been the subject of as much criticism as the 8(a) program, it is important to discuss how this procurement method has been effectively utilized to achieve a national policy objective to develop the small business community into a viable segment of the American economy.

As a result of the mobilization of industrial resources, Congress became concerned that government contracts were being awarded exclusively to large business concerns. Consequently, in an attempt to diversify sources of supply, the Federal Government established the Small War Plants Corporation to assist small business in winning a fair share of government contracts.

In 1951 the Small Defense Plants Administration was created for the specific purpose of increasing the industrial mobilization base during the Korean war. At the conclusion of the war, Congress decided that the needs of the government would be best served by the establishment of an agency that would encourage and assist small business during peacetime as well as during a mobilization period. Thus, in 1953 Congress passed the Small Business Act, which created the Small Business Administration (SBA). The act was extended in 1958 to provide the establishment of the SBA as a permanent independent agency.

In order to effectuate the purposes of the Small Business Act, Congress authorized the use of a set-aside method of procuring goods and services. The use of this set-aside method is to authorize any contract (or portion thereof) whenever it is determined:

1) To be in the interest of maintaining or mobilizing the Nation's full productive capacity,
2) To be in the interest of war or national defense programs,
3) To be in the interest of assuring that a fair proportion of the total goods and services' contracts for the government are placed with small business concerns.

Two of the three justifications for the use of small business set-asides relate directly to benefits that accrue to the government, not to the small business

community. Accordingly, it is reasonable to conclude that the government has a vital interest in maintaining a strong and effective set-aside program.

Statistics indicate that small business is highly dependent on the set-aside program to receive its fair share of government contracts. For example, during FY 1981–83 approximately 41 percent of all contract dollars received by small business were awarded through the set-aside program. Although small firms represent approximately 99 percent of all firms, they are receiving a disproportionately low share of the purchase budget. Of the $475 billion of Federal contracts awarded over the period 1979–83, small business received only $80.6 billion or a mere 17 percent of the total.

The maintenance of the small business community, through the utilization of the set-aside program, is critical to the achievement of the legislative objectives espoused by the Small Business Act. Small firms have demonstrated their ability to contribute to the viability of the economy by providing over 55 percent of all private sector jobs and creating over half of all industrial innovations. Substantial emphasis must be placed upon the critical role that small business continues to play as a job creator. According to the President's report on the *State of Small Business,* between 1980 and 1982, small business generated *all* of the 984,000 net new jobs in the United States.

The small business set-aside program has proven its success in serving the national interest. I am personally committed to preventing any action that would, in any way, undermine the effect of the vital program.

MINORITY AND WOMEN'S BUSINESS SET-ASIDES: AN APPROPRIATE RESPONSE TO DISCRIMINATION?

Minority and Women's Business Set-Asides: An Appropriate Response to Discrimination?

A Partial Response—Poorly Implemented

By Joan G. Haworth*

The business set-aside programs ordered by Congress were a response to the clear need to remove barriers to economic well-being for minority- and women-owned firms. Having recognized the impact of these barriers, Congress mandated, in Public Law 95–507, section 211, that large firms contracting with the Federal Government should negotiate or develop subcontracting plans that, among other things, set a goal for the award of a certain proportion of these subcontracts to small and small disadvantaged business concerns. Minority- and women-owned firms are specifically highlighted in these provisions. This law was passed in 1978 and further modified by Public Law 96–481 in 1980. Now, 7 years later, the question remains whether the implementation of the set-aside concept helped to improve the economic health of these firms sufficiently to warrant support for the programs. In their present format I believe they have not done their job.

There have been other attempts to develop set-aside programs in State and local government as well. Some of these programs mandate that specific proportions of the work go to minority subcontractors while others simply encourage minority participation. These programs may be part of construction contracts only, or they may include providers of supplies and services to the local government. In any event, data and analysis concerning these activities are sparse indeed and were not included in this paper.

The business set-aside programs were developed under the theory that a redistribution of the Federal and local governments' contract dollars to minority- and women-owned firms would provide these firms with business they could not obtain by themselves. If the new business is a net increase in the firms' sales dollars and properly priced, these target firms should realize an increase in their profits and should be able to expand their business contracts. Both of these results should improve the longrun viability of the target firms.

It has also been theorized that firms which were awarded Federal contracts over $10,000 (prime contracts) would be able to subcontract a certain proportion of their contract to minority- and/or women-owned firms. This subcontracting could be used to provide smaller, disadvantaged firms with contacts among larger firms, role models, and assistance in dealing with the government requirements that might restrict their access to the prime contract. Such contacts and liaisons should, again,

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produce greater business potential for the small, disadvantaged firm.

The business set-aside program is not designed to assist firms with problems. Firms with no excess capacity, with no current profits, or with a need for capital must look elsewhere for that kind of assistance. Firms that have not been created must look elsewhere. The Minority Business Development Council and the Small Business Administration are two agencies whose responsibilities may be better attuned to these problems. It must be recognized, then, that this program does not create businesses or set up entrepreneurs not yet in business. Although its purpose is to "foster business ownership" of socially and economically disadvantaged individuals and to "promote the competitive viability" of these firms, it was not the intention of this program's legislation to create new businesses.

The share of Federal contracts subject to awards through section 211, is not as high as the share of minority- or women-owned firms among all businesses. There have been several reasons cited for these results. Most of them can be summarized in three statements:

1. Potential disadvantaged contractors are not usually identified.
2. Enforcement of the laws has been inadequate to obtain the maximum redistribution effect.
3. The programs are designed to help promote healthy firms, but the implementation systems often attract only those firms that have a small chance of survival.
4. The scale of minority- and women-owned firms is so small that the firms cannot compete for large-scale government contracts.

Consequently, the business set-aside program has not met the redistribution goals of the early 1970s and may not be able to do so without a serious reevaluation of these goals.

Profile of Minority and Women Entrepreneurs

Minority-Owned Firms

In 1982, 6.2 percent of self-employed workers in the nonagricultural industries were nonwhite. That proportion had not changed since 1972. In that fiscal year 1.8 percent of Federal prime contracts went to minority-owned firms. The distribution of these dollars varies by industry and by agency in such a way as to suggest that the program was not effectively monitored or uniformly enforced in that year or, apparently, in other years.

Table 1 provides the distribution of self-employed workers by industry for 1972 and 1982. Self-employed workers are used here as one proxy for minority-owned firms, since the racial distribution of self-employed people should not be substantially different from that of single-owner firms. In fact, 12 percent of all small businesses employ one to four people. Fifteen percent of small business Federal contractors who are minority- or women-owned fell in that category. In 1969, 72 percent of all minority-owned firms had no paid employees, and more recent data suggest little change in that proportion. The table shows the differences in the percentage distribution by industry for whites and nonwhites. Over the past decade self-employed minorities have moved out of manufacturing and transportation (such as taxicab service) and into wholesale and retail trade and private household services. Although private household service does not easily transfer to government contract needs, the wholesale and retail trade group could be helpful in fulfilling supply contracts. It is clear, however, that only a few minority-owned firms are likely to be in the industries where the largest contracts are awarded.

Women-Owned Firms

In 1980, 26 percent of all nonfarm sole proprietorships were operated by women. Table 2 provides the distribution of these firms by industry and shows a large number of firms operated by women in the wholesale/retail trade industry and in services. Women were almost one-third of the sole proprietorships in each of these industries and over one-third of the sole proprietorships in finance, insurance, and real estate.

The manufacturing, construction, and agricultural industries have a smaller proportion of women among the sole proprietors. Thus, to the extent that the larger Federal contracts are likely to require products from these industries, women will not be assisted much by a set-aside program. Indeed, where local set-aside programs are applied only to new construction, neither women nor minorities are likely to be able to benefit greatly.

TABLE 1

Self-Employed Workers in Nonfarm Industries by Industrial Classification and Nonwhite Status, 1972 and 1982

	1972			*1982*		
	Total	**White**	**Nonwhite**	**Total**	**White**	**Nonwhite**
Industry division	*(thousands)*	*%*	*%*	*(thousands)*	*%*	*%*
Total	5,365	93.8	6.2	7,262	93.5	6.2
Mining	13	100.0	0.0	34	100.0	0.0
Construction	746	94.2	5.8	1,117	94.6	5.4
Manufacturing	244	93.4	6.6	354	95.8	4.2
Durable goods	164	92.7	7.3	213	95.8	4.2
Nondurable goods	80	95.0	5.0	140	95.7	4.3
Transportation and public utilities	203	88.7	11.3	304	90.5	9.5
Wholesale and retail trade	1,688	94.5	5.5	1,870	93.0	7.0
Wholesale trade	213	97.2	2.8	180	94.3	5.7
Retail trade	1,475	94.1	5.8	1,590	92.8	7.2
Finance, insurance, and real estate	262	96.9	3.1	490	97.6	2.4
Services	2,209	93.3	6.7	3,093	92.6	7.4
Private households	29	86.7	13.3	61	83.6	16.4
Other service industries	2,180	93.4	6.6	3,032	92.8	7.2
Business and repair	488	94.3	5.7	906	93.8	6.2
Personal	730	90.0	9.9	792	90.1	9.9
Entertainment and recreation	98	94.9	4.1	158	92.4	7.6
Professional	841	95.6	4.4	1,131	94.1	5.9
Medical, exc. hospitals	344	93.3	6.7	333	91.3	8.7
Hospitals	3	100.0	0.0	2	100.0	0.0
Welfare and religion	13	76.9	15.4	36	86.1	13.9
Education	125	96.8	2.4	178	94.4	5.6
Other	357	97.8	2.5	582	96.0	4.0
Forestry and fisheries	23	87.0	13.0	45	88.9	11.1

Note: Detail may not add to totals because of rounding. Estimates for industrial classifications may differ slightly by tabulation and should be used carefully in instances of small numbers.

Sources: U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2096: *Labor Force Statistics Derived from the Current Population Survey: A Databook*, September 1982, 1:615–31, table B-16 and *idem, Employment and Earnings*, January 1983, 30:161, table 26.

Analysis of Federal Contract Awards

Several recent studies have analyzed the participation of women- and minority-owned firms in Federal contract awards. Not all of these contracts were awarded through set-aside programs. However, it appears that all set-aside grants are included in this analysis. One study that provides good data on this topic was commissioned by the Small Business Administration and written by Ann Maust of Research Dimensions, Inc. Another useful source of data has been *The State of Small Business: A Report of the President* for various years.

Federal contracts over $10,000 are denoted as prime contracts in this paper. Table 3 shows the distribution of these contracts into three product categories—"research and development," "supplies and equipment," and "other services and construction." It is clear that over half of the Federal prime contracts are for "supplies and equipment." Hence, wholesale trade and manufacturing industries are most likely candidates for these contracts. Small businesses have been defined in various ways since 1977, but usually the definition has focused on firms with fewer employees (below 1,000) and lower business receipts than others. Among Federal contractors in 1981 and 1982, small businesses have received 15 to 16 percent of all prime contract action dollars. Minority-owned businesses were awarded between 1.8 and 2.2 percent of prime contract dollars in the same period. Since minorities are approximately 6 percent of the self-employed nonfarm population, there is a difference between their representation and their share of contract dollars. Subsequent charts show that women-owned firms have even greater differences. It is not even clear what the appropriate share of contract dollars should be. The size of the applicant firm and the products or services needed by the Federal Government may need to be used to define a performance criterion. Clearly, more information is required before this hurdle can be jumped.

Type of Products/Services

The distribution of Federal contracts differs significantly according to type of product or services awarded. Most awards to small businesses are in the category of "other services and construction," and "supplies and equipment" is a close second category. However, the minority-owned firms are far more heavily into "other services and construction" (where many of the set-aside programs are most effective) and much less likely to be involved in continuing contracts for "supplies and equipment."

Receipt of Federal contract awards by women is so small as to make analysis extremely difficult. Table 4 demonstrates that women-owned businesses were involved in only 0.4 percent of all Federal contracts in recent years. Even this small rate of participation showed a dramatic increase of nearly 17 percent from FY 1981 to FY 1982 when total awards made were increasing at a rate of 14 percent. During that period minority-owned firms' awards decreased by less than 1 percent. The small dollar base of contracts awarded to women- and minority-owned firms makes these percentage changes less meaningful than we would like. My conclusion from this table is that although small businesses are not a major component of Federal prime contracts, women- and minority-owned firms are even more completely "out in the cold."

Agency Differences

The major agency among Federal prime contract agencies is the Department of Defense (DOD). Table 5 shows the performance of that agency in 1981 and 1982. Although total awards by this department rose 20 percent over the previous year, small businesses received only 18 percent more contract dollars. Women-owned businesses received a 13 percent increase in dollars awarded by DOD compared to the 17 percent increase seen in all contracts awarded data from table 4. By contrast, however, the DOD was able to increase prime contract dollars to minority-owned firms by 13 percent in the face of the overall decline in share shown previously. In fact, in 1982 over 72 percent of the minority-owned firms and more than 56.7 percent of women-owned firms' awards came from this Department. Neither minority- nor women-owned firms show as large an increase as DOD's overall contract dollars in these 2 years.

Other agencies also contribute to prime contract awards. Those agencies with more than $1 billion of prime contract action dollars are listed in table 6. The table illustrates the distribution of contract dollars to small firms by agency budget. Thus, for example, over 50 percent of the Department of Agriculture's 1981 awards went to small businesses, but less than 2 percent of the Office of Personnel Management's awards were given to small busi-

TABLE 2

Comparison of Women-Operated to All Sole Proprietorship Firms by Nonfarm Industries, 1980

Industry division	All firms	Women-operated firms	Women operated as % of industry total
	(Number in thousands)		
All nonfarm industries	9,370.0	2,535.2	26.0%
Agriculture services, forestry, and fishing	307.7	30.8	10.0
Mining	119.8	11.0	9.2
Construction	1,073.3	19.9	1.9
Manufacturing	296.2	53.3	18.0
Transportation and public utilities	438.8	27.7	6.3
Wholesale and retail trade	2,527.1	824.8	32.6
Wholesale	329.8	34.0	10.3
Retail	2,066.3	759.0	36.7
Unallocated	131.1	31.8	24.3
Finance, insurance, and real estate	1,049.0	354.8	33.8
Services	3,842.8	1,199.8	31.2
Not allocable by industry	75.3	13.2	17.5

Note: Detail may not add to totals because of rounding of data. Women-operated percentages of industry totals are computed from rounded data.
Source: U.S. Department of the Treasury, Internal Revenue Service, *1979–1980 Sole Proprietorship Returns* (1982), table 13.

TABLE 3

Federal Prime Contract Actions by Product Service to Small and Small, Minority-Owned Business, Fiscal Years 1981 and 1982

Product/service	Prime contract actions *(thousands of dollars)*		Total small business awards		Small, minority-owned business awards	
	FY 1981	FY 1982	FY 1981	FY 1982	FY 1981	FY 1982
Total	$128,419,676	$146,986,119	15.69%	14.74%	2.16%	1.80%
Research and development	16,078,800	19,992,902	5.98	4.68	0.81	0.68
Other services and construction	39,624,955	47,834,301	22.43	19.76	4.26	3.32
Supplies and equipment	67,715,921	79,158,916	14.05	14.25	1.25	1.17

* FY 1981 prime contract action total does not include revisions.
Source: Federal Procurement Data Center, Special Report 919B, Mar. 25, 1982, and Special Report 369F, Mar. 24, 1983.

TABLE 4

Federal Government Prime Contract Awards of Over $10,000 to Small Business and Small, Minority- or Women-Owned Business, Fiscal Years 1981 and 1982

	FY 1981	FY 1982	Percent of total		Percent change
	(thousands of dollars)		FY 1981	FY 1982	FY 1981 to FY 1982
Total awards	$128,641,261	$146,986,119	100.0	100.0	14.3%
Small business awards	19,867,449	21,670,707	15.4	14.7	9.1
Small, minority-owned business awards	2,664,847	2,647,850	2.1	1.8	–0.6
Women-owned business awards	500,088	584,407	0.4	0.4	16.9

Note: Totals derived from agency and product/service tabulations for prime contract awards may differ slightly.
Source: Federal Procurement Data Center, Special Report 401A, Apr. 8, 1983, in *The State of Small Businesses: A Report of the President,* March 1984, tables A1 and B4.

TABLE 5

Department of Defense Prime Contract Awards Over $10,000 to Small and Small Minority- or Women-Owned Business, Fiscal Years 1981 and 1982

	FY 1981	FY 1982	Percent of total		Percent change
	(thousands of dollars)		FY 1981	FY 1982	FY 1981 to FY 1982
Total awards	$97,211,154	$117,017,740	100.0	100.0	20.4%
Small business awards	14,363,018	16,963,947	14.8	14.5	18.1
Small, minority-owned business awards	1,689,248	1,908,982	1.7	1.6	13.0
Women-owned business awards	292,163	329,211	0.3	0.3	12.7

Note: Totals derived from agency and product/service tabulations for prime contract awards may differ slightly.
Source: Federal Procurement Data Center, Special Report 401A, Apr. 8, 1983, in *The State of Small Businesses: A Report of the President,* March 1984, tables A2 and B5.

TABLE 6

Percentage of Dollars from Prime Contract Actions Awarded to Small Firms from Selected Federal Agencies, 1981

	Percentage of all dollars awarded to:				
	All small firms	**Minority-owned firms**		**Women-owned firms**	
Federal agency[1]	*Percent*	*Percent*	*Ratio*[2]	*Percent*	*Ratio*
Agriculture	53.0	2.5	.047	1.2	0.23
Defense	13.0	1.4	.108	0.1	.008
Energy	3.0	0.9	.296	0.5	.197
Interior	26.9	7.1	.264	0.9	.033
Transportation	37.9	4.5	.119	0.9	.024
GSA	34.0	10.3	.303	1.0	.029
Veterans Admin.	38.9	6.0	.154	3.0	.077
NASA	6.2	1.5	.242	0.1	.016
TVA	46.8	0.1	.002	0.1	.002
Office of Personnel Management	1.8	0.01	.006	0.001	.001

[1] Agencies selected were those with more than $1 billion in prime contract actions during the year.
[2] The ratio is the target firms' percentage of contracts relative to all small business' percentage of contracts.
Source: Special Reports from Federal Procurement Center as tabulated in Ann Parker Maust, *An Analysis of Smaller Firm Participation in Federal Contracting, FY 1981* (Research Dimensions, Inc., Nov. 10, 1983).

nesses. The Tennessee Valley Authority (TVA), Veterans Administration (VA), Department of Transportation, and General Services Administration (GSA) all devoted more than one-third of their 1981 contract budgets to small businesses. As we noted earlier, however, these contract dollars awarded to small businesses are somewhat affected by the products or services desired and the effectiveness of the agencies' links to small businesses.

The second and fourth columns of table 6 show the percentage of contract dollars awarded to minority- and women-owned firms by agency. For minority-owned firms, GSA is a large contract source. The Veterans Administration and Interior Department also awarded more than 5 percent of their contract dollars to minority-owned firms. The VA is the only noteworthy agency for women-owned firms. Over 3 percent of that agency's 1981 contracts were awarded to this target group.

Some agencies may not be able to award contracts to small businesses because their product needs are not met by the current distribution of small firms by industry. In these cases we would not expect much contract action for minority- or women-owned firms, since most of those are also small businesses. However, some agencies were better at attracting and identifying competent minority- and women-owned firms. The third and fifth columns entitled "Ratio" show the ratio of the target firm's percentage of contracts relative to all small firms' share. The larger this ratio, the larger the share of small business prime contracts that was awarded to minority- or women-owned firms. For example, almost 20 percent of all of the Energy Department's awards to small businesses went to women-owned firms and nearly 30 percent went to minority-owned firms. No other agency did as well for women-owned firms.

On the other hand, several agencies were quite efficient in finding acceptable minority firms among small business prime contractors. NASA, Energy, Interior, and the GSA identified enough minority firms to award more than 24 percent of their contract dollars to small businesses. It appears that the search and award mechanisms in these agencies are quite effective for minority-owned firms and/or that the products and services required by these agencies match the distribution of minority-owned firms. The performance of these agencies with respect to women shows either very poor industry matching or poor implementation of the set-aside and other affirmative contract programs.

TABLE 7

Percentage of Dollars Awarded by Type of Contract for All Federal Contracts Awarded in 1981

	Percentage of dollars awarded to:		
Type of contract	**All small firms**	**Small minority-owned firms**	**Small women-owned firms**
Fixed price	18.9%	2.3%	0.4%
Cost	4.4	1.1	0.3
Time and materials	21.5	3.4	0.8
Labor hour	34.7	11.9	1.4

Source: Ann Parker Maust, *An Analysis of Smaller Firm Participation in Federal Contracting FY 1981* (Research Dimensions, Inc., Nov. 10, 1983), appendix D.

TABLE 8

Percentage of Dollars Awarded by Method of Procurement for All Federal Contracts Awarded in 1981

	Percentage of dollars awarded to:		
Method of procurement	**All small firms**	**Small minority-owned firms**	**Small women-owned firms**
Negotiated contracts:			
Competitive	54.0%	28.0%	51.0%
Noncompetitive	23.0	68.0	35.0
Two step formal advertising	0.8	0.05	—
Other formal advertising	22.0	4.0	14.0
Total	100.0	100.0	100.0

Source: Special Reports from Federal Procurement Center as tabulated in Ann Parker Maust, *An Analysis of Smaller Firm Participation in Federal Contracting, FY 1981* (Research Dimensions, Inc., Nov. 10, 1983), table 11b, p. 38.

It may be that the characteristics of the prime contracts offered affect the ability of agencies to participate in the set-aside program. Tables 7 and 8 show the distribution of contract action dollars by type of contract and by procurement method. Women and minorities are most likely to have a "labor hour" contract and least likely to have received a "cost or cost plus" contract. However, if the "cost or cost plus" contracts go to small businesses, then women- and minority-owned firms are more likely to receive this kind of contract than either "fixed price" or "time and materials."

The procurement method also differs by size of contract winners. Most small firms received competitive, negotiated contracts that are usually the most costly to prepare. This is also the method of procurement that was successful for over 50 percent of those contracts awarded to small, women-owned firms. The noncompetitive, negotiated contracts were the most frequent of the awards to minority-owned firms. Competitive, negotiated contracts were the next most frequent among successful minority-owned firms. Finally, it may be useful to note that although small businesses received approximately the same dollar awards from the "negotiated, noncompetitive" contracts as from "other formal advertising" contracts, that was not true for either minority- or women-owned firms. These methods of procurement are much less likely to be used in the target firms' contract awards.

Conclusions Regarding Federal Set-Aside Programs

The data presented in this paper illuminate the economic status of minority- and women-owned firms. These firms are distributed in industries differently from other small firms. (Tables 1 and 2.)

They are predominately very small firms with a small capital base, selling products and services that may constrain somewhat the ability of the set-aside programs to meet their goals.

However, it is not clear why these differences between the participation of minority- and women-owned firms and other firms should be so great. Several facts must be reconciled. First, minority-owned firms have quite different shares of Federal contracts for "research. . ." and "other services" than for "supplies and equipment." (Table 3.) This difference does not seem to be entirely consistent with their industrial distribution, so it is not clear what the determining factors were in recent contract awards.

Second, some Federal agencies are far more successful than others in making contract dollars available to minorities and women. (Tables 5 and 6.) Again, these differences in results do not appear to be entirely consistent with industrial characteristics, but may be related to agency commitment, type of contract, or method of contract procurement.

Third, there have been changes in the proportion of awards made to small minority- and women-owned businesses recently that affected minorities differently from women. (Table 4.) There has been no analysis of why these differences occurred.

Fourth, it is clear that both minority- and women-owned firms were less likely to be awarded "time and materials" contracts and more likely to obtain "labor hour" contracts. (Table 7.) The implications of this pattern of distribution for the target firms' economic viability do not appear to be good.

Finally, women-owned firms were far more likely than minority-owned firms' to obtain competitive, negotiated contracts where overhead and preaward costs were greater. All small firms' awards are also greatest in this category. Minority-owned firms obtained most of their contracts through noncompetitive, negotiated contracts. (Table 8.) This type of contract should benefit minority-owned firms and should be encouraged for other small firms.

Recommendations

The small business with fewer than 50 or 100 employees and the entrepreneur have been great outlets for many of those who have been discriminated against in the past. These opportunities have been a source of upward mobility and relative economic freedom for those people who may not be successful in the bureaucratic format of larger corporations or government agencies where subtle discrimination, ignorance, and bigotry might occur. Yet, the government programs to foster small business have not been very effective in fostering minority and women participation and growth.

The encouragement and support for these economic activities has larger, indirect effects for minorities and women. Firms owned and operated by minorities or women provide role models for others in their situation. They also provide sources of employment for other minorities and women. In addition, the economic value of these contracts, particularly for minorities, is often spread throughout their communities in, for example, purchases from other minority-owned firms.

My review of the data suggests that there are large numbers of minority- or women-owned firms that could be participating in Federal contract business. However, few of these are involved in the current Federal programs. This appears to be the result of several factors, including the following:

1. Most of the efforts of the Federal set-aside programs have been directed to economically disadvantaged firms rather than to economically viable minority- and women-owned businesses.
2. There is a lack of information about viable minority- or women-owned businesses available for contract work.
3. There is a lack of information among these same businesses about the Federal contracts that are being awarded.
4. There has been a lack of study and research concerning the influence of product needs on the expected proportion of contracts awarded to target firms.
5. There has been little facilitation of the contract award process for small businesses that cannot usually carry the tremendous costs of competitive negotiations.
6. There appear to be no effective sanctions, or enforcement of the existing sanctions, to encourage the "flowdown" provisions that large contractors are supposed to follow when awarded Federal contracts.
7. There has been too much focus in the set-aside programs on those small, minority- or women-owned firms that are not currently economically viable and that need management skills and/or capital to survive.
8. There are no measures of performance, with appropriate data, that allow us to assess the extent

and success of Federal agency commitment and progress.

9. The costs of the current set-aside programs have led to charges of inefficiency and subsequent constraints on the program. Its ability to function without rethinking the program's goals and resources is in serious jeopardy.

In light of these inadequacies in the current programs, I have the following recommendations:

A. Develop a centralized information system for the use of agencies and small businesses which is sufficiently current that firms will still have time to respond to contract requests, and agencies will have time to identify and contact reasonable contract award candidates.

B. Fund a study, using available data, to determine the extent to which contract needs can be met by minority- and women-owned firms. Include a study of the impact of negotiated contracts, "cost or cost plus" contracts versus "fixed cost" contracts, on the likelihood of target firm participation.

C. Encourage economically viable minority- and women-owned firms by providing incentives for their participation in Federal contracting and for their use of their own "flowdown" models. Do not drop firms from Federal contract programs just because they are successful in obtaining contracts for more than a fixed period of time.

D. From the research in recommendation B develop a performance criterion, which may be multidimensional, that is measured at least biannually and use it to assess the performance of Federal agencies with contracts to award.

E. Publicize the performance criterion and the good Federal performers to State and local agencies so that they might develop their own viable programs to encourage minority- and women-owned businesses.

F. Facilitate Federal contract participation by minority- and women-owned businesses by providing recordkeeping services consistent with Federal requirements. Provide training programs to assist firms in developing their own recordkeeping programs. These firms might even be used to assist other minority- and women-owned businesses in their recordkeeping through their "flowdown" efforts.

G. Facilitate Federal contract participation by minority- and women-owned businesses by funding contract proposal development seminars for negotiated, competitive awards. Provide training materials to viable target firms to assist them in their proposal preparation and reduce their cost.

H. Encourage Federal agencies to partition large contracts into several smaller contracts that target firms would be able to apply for.

I. Separate business assistance and management skill training for new or developing firms from contract award activities. When the firms' capital bases, business focus, and management skills are functioning, the contract award work will be able to be developed separately in accordance with the recommendations I have described above.

There is little question that encouraging minority- and women-owned firms is an important policy that should be supported. Given the large budget deficits and the drive to encourage efficiency in the Federal Government, it is essential that this policy be cost effective. By providing training instead of substitute resources, the government's participation is finite and not necessarily forever. By placing the responsibility for effective contract placement in the hands of the Federal agencies making the awards, we have put the incentives in one of the places they belong. By making use of information systems that could identify appropriate firms and contracts, the incentives are also placed on individual minority- and women-owned firms whose best interest is served by attracting more viable business to their firm. Finally, by encouraging economically viable firms in these programs, we enhance both the likelihood of their success and the incentive to continue the relationship for both the contractors and the Federal agencies.

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Minority and Women's Business Set-Asides: An Appropriate Response to Discrimination?

By John W. Sroka*

Overview of the Construction Industry

The construction industry in the United States is one of the largest sectors of the economy and one of the most varied in structure and composition. Its operations employ more than 3.9 million workers each year, in locations and at worksites that are constantly changing as one contract is completed and another job begins. In addition to those employed directly in the industry, the industry produces a significant indirect employment in supply and service industries. The contract construction industry is among the top users of wood, steel, plastic, glass, petroleum products, and many other commodities.

Current U.S. Department of Commerce reports show the seasonally adjusted annual rate of new construction put in place at $310.3 billion or roughly 8.5 percent of the Nation's gross national product. The $310 billion is composed of approximately 25 percent public construction and 75 percent private sector construction.

The construction product is distinguished by its immobility; hence, the mass production techniques found in other goods-producing industries are largely absent in construction. The resulting market structure is predominately a local one. The geographic dispersion of the construction industry throughout the country also sets it apart from other large industries such as steel, automobile, mining, refining, and textiles. Unlike these rather concentrated industries, the construction industry is active in all regions of the Nation.

As in most industries, the characteristics of the construction industry are reflections of the nature of the construction product.

In one sense, there is no "market" for most kinds of construction products. With the significant exception of single-unit residences, virtually all construction is "made to order." Work is started at the behest of the buyer, not the producer, and the specifications are tailormade to the individual project. Decisions on what will be produced and when it will be produced come mainly from sources external to the industry. The result is an extreme diversity of demand.

The durability and costliness of construction products renders the demand for them highly unstable. The replacement or renovation of most existing structures can be deferred to a time when the economic horizons appear brightest. As a result, the demand for construction tends to fluctuate much more dramatically than for other products. This imposes on the industry a need for flexibility much

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greater than that required by other industries. In addition, it creates an element of uncertainty that magnifies the problems otherwise inherent in developing and maintaining a skilled labor force.

Because of continuous fluctuations in employment, there is a relatively weak employer-employee attachment—particularly in the unionized sector. When a contractor needs a large work force with diverse skills to build a large and complex project, workers may be drawn from a wide area surrounding the worksite. Such instance may be the first and last time that a particular employee will work for a particular contractor.

The industry is typified by family-owned businesses that work close to home, jealously guarding their integrity and reputation in the community in an extremely competitive and open industry. Construction is not dominated by a few firms; rather, it is dominated by the open competitive bid system. That is, competition in terms of price and ability to complete the task determines which companies win contracts. Depending on the nature of the construction project, the general contractor may complete the work entirely with his own forces, or he may subcontract the specialty work as may be required for a complete job.

The industry is also one of but a few that permit an individual to make a start with little or no capital. An emerging construction firm generally uses credit to buy materials and arranges for short term loans to pay for equipment rental and labor costs. This ease of entry into the industry, while safeguarding and assuring competition in the industry, is also one of the chief reasons for the high rate of failure in the industry.

Two characteristics of the construction industry need particular emphasis.

First, the subcontracting system offers entrepreneurs a training ground in which to develop the skills necessary to become a successful contractor. It also allows the general contractor to delve into new markets within the industry by subcontracting for those specialized aspects of a job for which the contractor may not have the needed in-house expertise.

Open competitive bidding is the second major characteristic that adds to the ease of entry into the industry. Virtually all public works construction, whether it be on the Federal, State, or local level, is procured through open competitive bidding. This is also true in the private sector where most construction contracts are awarded to the lowest bidder. In construction, *all* competitors submit a sealed bid by a stated deadline. *All* bidders bid on the same specifications and *all* are expected to meet the same standard of quality. In this way, open competitive bidding ensures that the construction purchaser will receive the highest quality product for the lowest possible price. It also ensures that the only factor that will be considered in selecting between qualified contractors, is the price offered. This is true not only for the general contractor, but also for the subcontractors who are selected in the same manner.

The construction industry, consequently, can quite properly be referred to as one of the true bastions of the free enterprise system.

The Construction Procurement System

The letting of public construction contracts, Federal, State, and local, is customarily regulated by State or Federal statutes. Ordinarily, public construction contracts must be awarded through open competitive bidding procedures to the lowest responsive and responsible bidder. The process, protected and established by statute in most States and practiced in all 50, functions to avoid favoritism, prevent fraud, obtain the lowest price, and, thus, protect the interest of taxpayers.

According to this procurement method, the government agency makes detailed project drawings, specifications, and bidding instructions available to all interested contractors. Contractors then begin estimating the cost of the project based on design, proposed materials, labor cost, overhead, and profit. If subcontracting a portion of the work is contemplated by the general contractor, the general contractor must then solicit subbids from subcontractors.

Subcontractors are specialty contractors who perform the portions of the overall work that cannot be performed efficiently by the work forces of the general contractor. The amount of work subcontracted generally varies with the type of construction performed. In a building project, for example, subcontracting is much more prevalent than in a heavy or highway project. In a building, subcontractors might be used for heating, ventilating, electrical work, painting, plastering, and roofing, among other items. On a highway project, the general contractor performs most of the work with his own forces—the general contractor will do the excavating, heavy

earthwork and paving; the subcontractor, specialty items such as seeding, fences, guardrails, signs, and lighting.

No contractual relationship exists between the government agency and subcontractors, and no bid security is generally requested of the subcontractor. If a subcontractor makes mistakes and consequently makes too low a bid, he may withdraw it or refuse to work for that amount, and with no bid security, he can do this without direct penalty. This, of course, increases the risk to the general contractor, who has used the low bid in preparing his own overall bid for the project.

In preparing his overall bid for the project, the general contractor uses the lowest bids received from subcontractors in order to assure that his overall bid will be the lowest possible.

A default of a subcontractor does not free a general contractor from its contractual responsibility to perform the contract. Harmony between the general contractor and the subcontractor is of vital concern to the government in terms of the character of performance of the contract. This harmony, as well, is important to the general contractor because the general contractor must be able to work with the subcontractors in scheduling work in the proper sequences and ensuring that the subcontractors are meeting dates and keeping the project on schedule.

The general contractor prepares an overall bid for the project that includes the low subbids, if applicable, and submits a *sealed bid* along with a bid bond to the government agency. A bid bond assures the government that the contractor will build the project for the amount of money cited in the bid.

The sealed bids are *opened publicly* by the government agency, read aloud, and evaluated by the government agency. The contract is then awarded to the lowest responsive and responsible bidder. A responsive bid is one that offers precisely what the government is seeking. A responsible bidder is one who has the ability to meet successfully the requirements of the contract, and the government agency must make an affirmative finding as to responsibility.

The contractor binds himself to that submitted firm price even though the project may take years to complete. By virtue of the firm price contract, the contractor assumes all future price risks that may result during performance of the contract; he assumes the risks of weather, subcontractors' performance, labor disputes, material shortages, material price increases, unrealistic time schedules, general economic conditions, and numerous other variables.

This procurement method—open competition with award to the lowest responsive and responsible bidder—assures intense competition within the industry, and assures that the project will be completed at the most economical cost to taxpayers.

Definition and Examples of Minority and Women's Business Set-Aside Programs

Federal

Public Works Employment Act of 1977

Section 103(f)(2) of the Public Works Employment Act of 1977 (42 U.S.C. §6705(f)(2)) was introduced on the floor of both the House and the Senate as an amendment to the act and was adopted with very limited discussion. There was no congressional committee consideration on the provision.

Section 103(f)(2) provides that "no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." Minority business enterprise was defined as "a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." The statute then defined minority-group members as: "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

The effect of this so-called minority business enterprise (MBE) provision was to mandate that when general contractors were selected through normal competitive bidding procedures for local public works projects, the grantee (State or local government) was to require that each bid include a commitment to set aside at least 10 percent of the contract funds for business concerns owned by the specially designated minority-group members, this to the exclusion of all other bidders.

Small Business 8(a) Program

Direct Federal procuring agencies are required to cooperate with the Small Business Administration by providing contracts to be used in the SBA 8(a) program. The SBA then sole source negotiates with

a socially and economically disadvantaged firm in the 8(a) program for completion of the contract. Items to be negotiated include the price for the project, business development funds to acquire equipment, and advance payments to fund the work. The 8(a) firm is permitted to subcontract as much as 85 percent of the contract.

Grant-Awarding Agencies

Federal agencies that give grant funds to State and local governments are limited by OMB Circular A-102, Attachment O, in what they can require the grant recipient to do to utilize MBEs. This circular does, however, require grantees to take the following six steps to assure maximum utilization of small and small disadvantaged businesses:

(1) Including qualified small, minority, and women's businesses on solicitation lists;

(2) Assuring that small, minority, and women's businesses are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into small tasks or quantities to permit maximum participation of small, minority, and women's businesses;

(4) Establishing delivery schedules, where the requirements of the work permit, which will encourage participation by small, minority, and women's businesses;

(5) Using the services and assistance of the Small Business Administration and the Office of Minority Business Enterprise of the U.S. Department of Commerce, as appropriate; and

(6) If the contractor awards subagreements, requiring the contractor to take the affirmative steps in paragraphs (a) (1) through (a) (5) of this section.

These requirements are *minimum* standards. Grant recipients are allowed—in fact, encouraged—to put their own MBE requirements into contracts. Therefore, a local executive order or ordinance requiring the contractor to do more than is included in these six steps is permitted.

Women's Business Enterprise

Direct Federal Procuring Agencies—Direct Federal agencies establish annual procurement goals for awards to women-owned business enterprises and ask WBEs to identify themselves in the contract form.

Grant-Awarding Agencies—Grant recipients are required to follow six affirmative action steps in utilizing women-owned businesses.

Additional Grant Agency Requirements—The Department of Transportation requires States to establish annual WBE utilization goals. State departments of transportation include WBE goals in their contracts.

Section 105(f), the Ten Percent Disadvantaged Business Enterprise Provision of the 1982 Surface Transportation Assistance Act

On January 6, 1983, President Reagan signed into law the Surface Transportation Assistance Act of 1982 (STAA), Public Law 97-424.

Section 105(f) of the Surface Transportation Assistance Act of 1982 provides as follows:

> Except to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8 (d) of the Small Business Act (15 U.S.C. §637(d)) and relevant subcontracting regulations promulgated pursuant thereto.

As contained in the Department of Transportation implementing regulations to section 105(f), the 10 percent preference is applicable to disadvantaged business enterprises (DBEs) defined as follows:

> "Disadvantaged business" means a small business concern: (a) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
>
> "Small business concern" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.
>
> "Socially and economically disadvantaged individuals" means those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities or individuals found to be disadvantaged by the Small Business Administration prusuant to section 8(a) of the Small Business Act.
>
> Recipients shall make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. Recipients also may deter-

mine, on a case-by-case basis, that individuals who are not a member of one of the following groups are socially and economically disadvantaged.

(a) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(b) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race;

(c) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(d) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas; and

(e) "Asian-Indian Americans," which includes persons whose origins are from Indian, Pakistan, and Bangladesh.

On July 21, 1983, the Department of Transportation published in the *Federal Register* (vol. 48, no. 141, p. 33431) a final rule implementing section 105(f) of the 1982 STAA. The DOT regulation required each State to establish annually a 10 percent DBE goal or attempt to justify to DOT's satisfaction a lower goal. A State's attempted justification of a lower DBE goal would not even be considered by DOT unless it was concurred in by the State's Governor.

The final regulation also noted:

The Department can succeed at meeting its obligation to ensure that ten percent of funds in the FHWA and UMTA programs are expended with disadvantaged business only to the extent that the Department's individual recipients set and meet goals of at least a ten percent level.

and:

For these reasons, a basic premise of the final regulation is that the ten percent participation requirement of Section 105(f) will be met only if recipients set and meet goals of at least ten percent. This is why recipients for goals of less than ten percent must be supported by adequate justification.

The implementation of section 105(f), by requiring each State to establish annually a 10 percent DBE goal, or attempt to justify, with the Governor's concurrence, a lower goal, has resulted in the great majority of the State departments of transportation (State DOTs) establishing over the last 2 fiscal years DBE goals of 10 percent, regardless of whether, in their opinion, a lower goal more reasonably reflected the availability of DBEs.

As table 1 shows, only five States sought and received approval for DBE goals less than 10 percent in FY 1984, and in FY 1985 the number of States requesting less than 10 percent again was five.

Implementation of section 105(f) has compelled the great majority of State DOTs to adopt 10 percent statewide DBE goals, and because the DOT's policy with regard to individual project DBE goals is that "the goals for all projects when taken together, must be consistent with (i.e., equal to) the State's approved overall annual goal," most State DOT's are incorporating DBE goals on a *contract specific basis* of at least 10 percent and requiring contractors bidding on those projects to meet or exceed the DBE goals before being awarded the contract. Almost without exception, the States are only considering a contractor's efforts to utilize DBEs to be adequate when that contractor has met or exceeded the DBE contract goal.

State and Local

With the establishment of the Federal examples in the form of the Public Works Employment Act of 1977 and section 105(f) of the Surface Transportation Assistance Act of 1982, State and local governments have moved to establish a literal myriad of minority or disadvantaged business preferential procurement programs of their own.

A recent survey of State chapters of the Associated General Contractors asked for information regarding such programs at the State and/or local level. Although responses were only received from 34 States, those responses identified 22 State preferential programs and 50 local government preferential programs. A copy of those survey results is appended to this statement.

These programs, at the Federal, State, and local level, have been generally termed "goal" rather than quota programs; however, the distinction is generally only a semantical one. Presumably, a goal program is one that requires the attainment of a stated percentage of minority business utilization or evidence of good-faith efforts to attain the stated percentage. Under these programs, however:

- Evidence of good-faith efforts has been ignored or capriciously revised.
- Bidders have been required to subcontract work that, under normal business considerations, would not be subcontracted.

TABLE 1

Federal-Aid Highway Program, Fiscal Years 84 and 85
Disadvantaged Business Enterprise Percentage Goals

Region 1	FY 84	FY 85
Connecticut	10	10
Maine	10	6
Massachusetts	10	10
New Hampshire	5.5	10
New Jersey	10	10
New York	10	12
Rhode Island	10	10
Vermont	5.5	10
Puerto Rico	10	50
Region 3		
Delaware	10	10
Maryland	10	10
Pennsylvania	10	10
Virginia	10	10
West Virginia	10	10
Dist. of Columbia	25	35
Region 4		
Alabama	10	10
Florida	10	10
Georgia	10	10
Kentucky	10	10
Mississippi	10	10
North Carolina	10	10
South Carolina	10	10
Tennessee	10	10
Region 5		
Illinois	10	10
Indiana	10	10
Michigan	10	10
Minnesota	10	10
Ohio	10	10
Wisconsin	10	9

Region 6	FY 84	FY 85
Arkansas	10	10
Louisiana	10	10
New Mexico	10	11.3
Oklahoma	10	10
Texas	10	10
Region 7		
Iowa	8	10
Kansas	10	10
Missouri	10	10
Nebraska	10	10
Region 8		
Colorado	10	10
Montana	6	6
North Dakota	3.3	6
South Dakota	10	10
Utah	10	10
Wyoming	4.5	5
Region 9		
Arizona	10	10
California	13	13
Hawaii	18	18
Nevada	10	10
Region 10		
Alaska	10	10
Idaho	10	10
Oregon	10	10
Washington	10	10

- Bidders have been required to award subcontracts at prices higher than available from other sources.
- And contracts have been awarded to other than the low bidder because the low bidder did not attain the stated percentage of minority business utilization.

Clearly, in practice, the "goal" programs have been implemented as quota programs.

The Basis and Justification for Minority Business Set-Asides and Whether the Number of Minority and Women's Businesses and Their Percentage of Public Contracts Are the Result in Whole or in Part of Discrimination

Congress enacted section 103(f)(2) of the Public Works Employment Act of 1977, without prior discussion at either Senate or House hearings, when it was introduced as an amendment on the House floor. There was no showing or finding of prior discrimination against minority contractors, although the courts that have upheld the statute have apparently assumed that such exists.

The 1982 section 105(f) provisions resulted from an amendment introduced by Rep. Parren Mitchell on the House floor. The only legislative history for this amendment consists of a brief floor statement made by Representative Mitchell. In the statement, Representative Mitchell said that his amendment was designed, like a similar provision in the Public Works Act of 1977, "to ensure the participation of [small and disadvantaged] businesses in these massive public spending [programs]." Mr. Mitchell said that the 1977 amendment had been found constitutional by the Supreme Court in 1980 and has succeeded in causing $600 million to be awarded to minority businesses. He pictured the amendment as a means of dealing with the high rate of unemployment among minority workers.

These programs are presumably based on statistics showing only a small percentage of public construction contract awards to minority business firms, with an inference, stated or otherwise, that such statistics are attributable to past or present discrimination. The assumption apparently is that one would expect to find more proportional representation absent past or present discrimination.

It is incomprehensible to imagine how discrimination could enter into the public construction procurement process. Government agencies receive *sealed bids;* they are opened publicly, read aloud, and the award is made to the lowest bidder. So too, general contractors, in order to protect their competitive posture and assure that their overall project bid is the lowest possible, must solicit subbids from all available subcontractors and must use the lowest bid—to do otherwise would be competitive and economic folly.

These programs do nothing more than divide American citizens into two classes, one assumed to be the "majority," the other termed the "minority." The "minority" class is then, in turn, further divided into two classes—the preferred group, as evidenced by the rebuttable presumption of social and economic disadvantage that exists for some minorities under the section 105(f) 10 percent quota and the not-so-preferred.

The low percentage of public works construction awarded to MBE/DBE firms is a symptom—but not of discrimination.

Small businesses, including MBE/DBE firms, face major obstacles to remaining in the construction marketplace. The obstacles are well-known and include inadequate availability of working capital, lack of experience, difficulty in obtaining bonding, lack of technical expertise, and problems with paperwork and regulations.

Despite adequate identification of the obstacles, Federal, State, and local programs aimed at assisting minority business and disadvantaged business firms have not been geared toward removing these obstacles. Instead, these programs have simply required that a stated amount of public construction work be awarded to these firms—in essence, if minority-owned and disadvantaged-owned firms are not receiving a sufficient quantity of public construction contracts, let's make sure they do—hence, a quota or set-aside program.

The approach, unfortunately, has some very severe side effects:

- It wastes taxpayers' money.
- It distorts the open competitive bid system.
- It conflicts with State statutes and Federal procurement regulations.
- It twists the Constitution.
- It is a mandate for discrimination.

The Fairness of Minority and Women's Business Set-Aside Programs and the Effect of Business Set-Asides on Minority Enterprise and Business Contracting Generally and the Utility of Business Set-Asides

Cost

Any law or regulation that assigns a portion of a market to a particular group, in essence, legalizes monopoly. Setting aside a stated percentage of a construction market for minority or disadvantaged firms creates a monopoly for these preferred groups. It is a well-established law of economics that monopoly power leads to higher prices. The 10 percent quota established in the Public Works Employment Act of 1977 was no exception. At the time, Congress did not assess the economic impact of the law. In the intervening year, however, the Comptroller General of the United States did perform an independent analysis of the law's economic consequences (January 16, 1979, B-126652). The following are taken from the General Accounting Office report:

about 40 percent of the prime contractors on 7,196 projects had problems with the prices quoted by minority firms. Most prime contractors stated that price quotes by minority firms generally increased costs because contracts were negotiated or competition was limited to minority firms.

- The price quotes of minority firms averaged about 9 percent higher than normal prices.

- About two-thirds of the prime contractor respondents who cited added burdens in dealing with minority firms incurred additional costs after construction began. For example, one prime contractor stated that he had subcontracted with a minority firm that later defaulted and went broke. The prime contractor had to pay for some supplies and some of the minority firm's payroll at a cost of about $9,000.

Construction costs on some second round projects escalated because the prime contract award did not go to the low bidder. A North Carolina project visited had an increased cost of over $21,000 because the low bidders on two prime contracts were declared nonresponsive for not meeting the minority requirement. The next low bidder on both contracts submitted bids totaling $91,519 compared to the low bids, which totaled $69,963.

GAO determined that the price quotes of minority firms averaged about 9 percent higher than normal prices. When this 9 percent is applied to the $560 million contracted to minority firms under the program, we see that about $50.5 million more than necessary was spent on these construction projects. When added to the administrative costs to monitor and implement the minority quota (25 percent of $29.4 million, or $7.3 million) the total of the taxpayers' money unnecessarily spent to construct these projects was $57.8 million.

As significant a cost as is the $57.8 million, it does not include the additional costs incurred because some prime contract awards did not go to the low bidder. If the GAO's cited example of the North Carolina project is any indication, the additional costs incurred by awarding to other than low bidders could match the already identified $57.8 million price tag.

Due to the similarities between the 1977 MBE quota and the 1982 DBE quota in the Surface Transportation Assistance Act, there is every reason to believe that these same unnecessary increased costs are being experienced in the Surface Transportation Assistance Act 10 percent quota, as well as in all MBE/DBE quota programs at the Federal, State, and local level.

Recently, the Associated General Contractors of America surveyed its highway contractor membership regarding their experiences with the section 105(f) 10 percent requirement of the Surface Transportation Assistance Act. The questions and responses in figure 1 indicate the cost burden associated with the program:

Impact on Procurement

The construction industry relies almost exclusively on open competitive bidding procedures. As previously discussed, statutes require formal advertising of construction contracts in most instances, ensuring competition, lowest price, and protection against favoritism and bias.

Goal or quota procurement preference programs change this economical and proven procurement system. Under these programs, States—contrary to the dictates of their own procurement laws—may be unable to award contracts to the lowest bidder. By its very definition, a quota or set-aside system results in prime contractors having to award subcontracts on other than a low-bid basis and in States and the

FIGURE 1

- Do you believe section 105(f) has increased costs of Federal-aid highway projects:

YES	373	(# of Responses)
	96%	(% of Total Responses)
NO	15	(# of Responses)
	4%	(% of Total Responses)

- If your answer to "6" is "Yes," what do you believe the cost impact of section 105(f) to be?

359 (# of Responses)
7% (Average % Cost Impact)

Reasons for cost impact (3 most common:)

1. Having to accept DBE quotes when receiving lower quotes from non-DBE;
2. Expense associated with soliciting quotes from DBEs, etc., increased bidding costs; and
3. Increased costs associated with contract performance—financial uncertainties associated with working with unknown, underfinanced or inexperienced DBEs.

- In attempting to meet minority business goals on Federal-aid highway projects, have you had to subcontract work to minority businesses even though nonminority firms have quoted lower prices for the work?

YES	320	(# of Responses)
	86%	(% of Total Responses)
NO	53	(# of Responses)
	14%	(% of Total Responses)

Federal Government having to award contracts on other than a low-bid basis.

Government programs that mandate use of preferred subcontractors on a basis other than the customary merit and price have disrupted the construction industry. As noted, these preferred groups have been able to demand a premium as their price for participating in government public works programs. Under penalty of having its bid rejected as nonresponsive for failing to include a minority or disadvantaged subcontractor, the general contractor has little choice but to comply. The minority or disadvantaged subcontractor may be a complete unknown in terms of performance, quality of work, and reliability, so the general contractor will likely allow extra funds in the bid to guard against contingencies, contrary to the public interest in lowest price. The forced relationship may not work with the harmony that facilitates the best performance for the government.

These types of problems were clearly evident in the Comptroller General of the United States' report on the 10 percent quota requirement in the Public Works Employment Act of 1977. That report found:

> About 19 percent, or one of every five projects, had delays after construction started because of problems with minority firms. The delays averaged about five weeks.

> An estimated 48 percent of the prime contractors on 3,500 rural projects and an estimated 51 percent of the prime contractors on 3,696 urban projects had problems locating minority firms to satisfy the 10 percent requirement. About 49 percent of the prime contractors that had problems finding minority firms said they went outside their normal market to do so.

Discrimination

Increasingly, MBE/DBE preference procurement programs at the Federal, State, and local levels require that award of construction contracts and subcontracts be made on criteria irrelevant to price or ability to perform the contract.

Increasingly, requirements are being imposed that require that the award of public construction contracts be made based on race, ethnic origin, or sex.

Increasingly, law-abiding construction contractors and subcontractors are prevented from bidding on contracts or prevented from receiving award of contracts because:

- They are not the required race.
- They are not of the required ethnic origin.
- They are not the required sex.

The result is that their livelihoods and the livelihoods of their employees are severely impacted.

Such programs are blatantly discriminatory.

When government sanctions race, ethnic, or sex consciousness, it practices the very discrimination it purportedly seeks to eliminate.

These discriminatory programs are resulting in the closing of existing markets and the resulting loss of business to existing nonminority firms now unable to compete due to legislative and regulatory requirements.

Highway construction, as an example, does not easily lend itself to a large or significant amount of subcontracting. Highway construction is an equipment-intensive and capital-intensive industry. On the average, 90 percent of a typical highway construction contract is accomplished by the general contractor's own work force, leaving 10 percent available for subcontract award, usually in specialty areas such as guardrail installation, signing, barrier and related safety work, landscaping, and fencing.

Because the overwhelming number of MBE firms exist in these areas where initial capitalization requirements are minimal, e.g., landscaping, guardrail installation, hauling and grading, efforts by States to meet MBE/DBE program quotas result in the award of a disproportionate number of construction contracts to firms operating in these areas.

This, in turn, works an unfair hardship on existing firms that engage in those same fields of endeavor. Established nonminority landscaping or hauling firms are now being foreclosed from bidding on the very type of work that sustained them over the years, due to the fact that the law has, in effect, exclusively reserved such work for MBE/DBE firms under set-aside programs or because prime contractors can no longer accept quotes from existing non-MBE/DBE firms because they must meet MBE/DBE subcontracting requirements mandated for the award of a contract.

A December 1984 questionnaire, distributed to AGC's highway membership, made the following inquiry:

> Do you know of specialty subcontractors who are being, or have been forced out of business because their discipline is one in which minority firms are largely being used to meet contract minority business goals on Federal-aid transportation construction projects?

Many AGC members responded that they personally knew of such individuals. Many nonminority

specialty contractors responded to the questionnaire, citing the detrimental impact of section 105(f) on their livelihood.

The following are representative responses to the questionnaire:

Arizona

Our company cannot compete because of the preference given my minority competitors . We are about to quit business.

California

We are working with non-minority subcontractors who have had their annual income reduced by 30 percent to 50 percent by work being given to minority firms.

Colorado

We do highway seeding and landscaping. Our work is mandated to be subcontracted to minorities, or it is set aside. Our volume has decreased from approximately $1,000,000 in state work to $250,000—in an increasing market! We are told we are low but they can't use us because of the ten percent.

Idaho

Within our area it has hurt non-minority contractors quite substantially. In our bidding process I hardly even solicit a bid from a non-minority contractor. I can't use them even if they did quote. In a recent $8.5 million job we bid, I did not (could not) solicit any non-minority bidders or I could not meet the quotas set up for the job. Small non-minority contractors dislike the 1982 STAA. It's destroying their livelihood and their respect for our government. It's an unfair law and results in reverse discrimination against contractors who have been in business for many years. Rather than assisting in non-discrimination toward ethnic groups, it is polarizing such groups.

Illinois

I personally am familiar with two businesses whose volume of work has dropped about 75 percent due to the DBE participation goals. Their specialty is one that a minority business chose to work in, and with the goals set by the state, the prime contractors are using the minority. It won't be long before these small specialty contractors will be virtually out of business.

Indiana

A non-minority company has done aggregate hauling for us for over 10 years. On three different contracts we had to use DBE firms. . . .The non-minority company has informed us that his receipts are decreased by 30 percent because of the DBE goals.

Iowa

[A non-minority company] used to do our guardrail work but has had to leave the guardrail business because it is one of few subcontractable bid items that minorities have any qualifications in.

Kansas

We are WBE (Women Business Enterprise) contractors. We feel that we are gradually being pushed out of business because of the goals of Section 105(f). . . .I feel that this is one of the most unfair pieces of legislation there is. Since when is it right to DICTATE that one business should get a job because they are a minority or woman? Even though we are a WBE, I would rather actively compete because I had the best price and did the best job.

Kentucky

[A non-minority firm] is not yet out of business, but will always ask first if there is any use submitting a quote. Several contractors tell them there is no possible way they could use a non-minority seeding and guardrail subcontractor.

Maine

We are not specialty contractors, but rather a small general contractor. We are being forced out of the highway program by the 10 percent minority clause. About the only way we can meet the minority quotas set in the bid book is to take the 20 percent of culvert costs and use euipment and trucks hired through a minority contractor. We feel this is a mockery of the intent of the program. Our opinion of the minority quotas as set up in this state is that they are helping a handful of minorities with no visible effect on the others. We feel that the taxpapers of the State of Maine and of the United States are paying dearly for a pittance of benefits.

Michigan

This is happening to us. We are primarily a subcontractor doing concrete work. General contractors don't need us, or don't even want a price from us because they are looking for DBE quotes only. I believe this quota system is discriminatory against contractors like ourselves, and we have been in business for 36 years.

Minnesota

In many cases, at least twelve last year, prime contractors awarded subcontracts to minority firms over us because of the goals. I would say the average price increase is 5 to 10 percent.

Missouri

Most non-minority seeding, fencing, guardrail and landscaping specialty contractors are either out of business or having an extremely difficult time since the 10 percent quota was passed.

Montana

For the past two years, we have been competitive in our painting and signing prices. However, the prime contractors, needing to meet their goal requirements, have had to award this portion of the contract to a DBE/WBE. We have an expensive investment in a new paint machine, but so far have not been given the opportunity to use it because of lack of work. Prime contractors have been outspoken to us on this matter—they chose the minorities and women businesses over us to guarantee award of the contract, even though we were low.

It is important for you to know some additional thoughts on this matter. We are not opposed to women in business. We are not opposed to Indians, Blacks, Hispanics, etc. in business. On the contrary, we welcome competitive bidding in our business. This is what free enterprise is all about to us. We are opposed to the control over the awarding of these contracts. This whole Surface Transportation Act belies the initial conception of its beginning, i.e., to avoid discrimination against any one individual(s). We have become the minority; we are being discriminated against. Our business is suffering considerably because of this Act. After much consideration we feel we have been backed into a corner. The only alternative for us is to put the company in my name, allowing me to become the major stockholder of a women owned business. We realize this is a drastic step. It is very costly, time consuming, and still does not ensure WBE certification. Since there does not seem to be a change from the federal government on this position in the future, we must act now as a matter of survival. We find that our holding onto principle, by having faith in our system of private enterprise is costing us too much. I only hope we have not waited too long.

Nebraska

There are many specialty subcontractors who are close to going out of business as they have lost markets that were their livelihood. We used to perform a large amount of storm sewer work and now can't get the work when we are low because the prime contractors need a minority to meet their goal.

New York

We lose approximately 45 percent of the projects we quote on because contractors are intimidated and coerced by the New York DOT Affirmative Action personnel into awarding the work to a minority firm at a higher price in order to meet the contract goals.

North Carolina

Guardrail and seeding contractors who existed prior to 105(f) have either disappeared or merged with minorities. They are a direct victim of discrimination. This is a program of reparation, not minority realization.

North Dakota

Many firms that are in the specialty items are being hurt by the minority firms because this is an area that is easy to get into and one area that is usually easy to get a minority quote. Many firms do not even quote any more because they know the minorities will get the work.

Ohio

Our firm specialized in concrete curb, curb and gutter, sidewalk, median barrier, and pavement markings. What has been the detrimental impact of the DBE, MBE, and WBE set aside program on our corporation? It has reduced the volume of our work from just over $12,000,000 in 1980 to just over $4,000,000 in 1984, and as of December 1, 1984 we have ceased bidding.

We have sold some of our equipment to a minority firm and presently are leasing the rest to the same firm. If this firm continues to be successful, we hope to sell them the remainder of our equipment. This minority firm is also absorbing a large number of our former employees—some of whom have been with us over 30 years. It is quite a sad event to see that which took 33 years to build and which you expected to see your family continue suddenly dissolved, not because of anyone's deficiency but simply because of the color of their skin and Federal and State Legislation. If we can be of any assistance in helping you fight such discriminatory legislation, please contact us.

Oregon

Our major line of work has been as a specialty subcontractor in the area of guardrail, barrier and permanent signing. As a direct result of the 1982 STAA setting DBE goals, our company, as a non-DBE, has been adversely impacted economically. My partners and myself are seriously questioning our ability to survive any longer in this type of market.

Pennsylvania

One respondent forwarded a copy of a letter he had written his Senator in response to a request for a campaign contribution:

In response to your request for support, I am sorry to say that I will be unable to support this or any political fund in the future because our political system is depriving us our livelihood.

To explain, when Congress passed, and President Reagan signed into law, the Surface Transportation Act of 1982, whereby a 10 percent quota, (sorry goal), for Disadvantaged Business Enterprises was established (with no committee hearing debate or discussion on the matter) this little political manuever to pacify and gain support of the Black Caucus has caused our business to be virtually worthless.

We are a guardrail and landscape contractor of which 90 percent of our work is on a subcontract basis from prime contractors. Since we are not a certified DBE Enterprise,

our quotations or bids are overlooked even if we are the low bidder, because the prime contractor is required to meet a DBE quota (sorry goal).

Without work, we have no profits. Without profits, we have no available monies for our political system. When Congress realizes the harm they have dealt to companies such as ours and does something about it, we will again be able to support monetarily our political system.

South Dakota

We are specialty subcontractors who have been in business for 28 years and have a very proud track record in our state for doing high quality work with very high relationships with both prime contractors and our highway department. But due to this unfair law of the land we are grossly discriminated against and forced out of business—besides not having a market within which to sell our company. Nobody can buy our business and hope to stay in business as long as this unfair law is in effect. We have tried to sell at 30 cents on the dollar but still are not able to.

Please—anything you are able to do will be deeply appreciated by all of us.

Texas

Texas DOT—Collin County; December 1984 letting—prime contractor was forced to use a DBE price on sewer that was $50,000 higher in order to meet DBE goals.

Texas DOT—Grayson County; December 1984 letting—prime was forced to use a DBE price $180,000 higher to meet the goals.

We were the losing subcontractor in each case.

Utah

[A non-minority company] was one of the leading signing and guardrail contractors in the Salt Lake Valley. As a result of DBE/MBE requirements, their business has diminished considerably. They are not out of business, but they have a very difficult time obtaining subcontracts for signing and guardrail, even though they are usually very competitive.

Washington

We receive many lower quotations from non-MBE/DBE subcontractors for signing and guardrail work that we must ignore in favor of higher DBE/MBE firms in order to meet these "goals." A guardrail subcontractor is one non-DBE/MBE firm that is frequently low, but is not used because of DBE/MBE goals.

Wisconsin

[A non-minority firm] was the finest landscaper and most reasonable in the State of Wisconsin. He was in business for approximately 35 years and forced out of the operation due to the minority requirements.

Wyoming

I believe I can speak to this question effectively. We are primarily a subcontractor concrete contracting company. Work that historically has been work that we could have done, had our price been low, is no longer available to us. This work ranged in size from $1,000.00 to $300,000.00 subcontracts. In March of 1984 we were disallowed even the opportunity to submit sub quotes on concrete curb and gutter and paving work on a highway project due to the fact that the general contractor's only area of work open to minority participation was the work we normally do. We were refused the opportunity to submit a quote on our bread and butter work. What do you think of that, Mr. Congressman and Mr. Senator?

An entire class of nonminority citizens is being systematically excluded from the right to participate in the very type of work that sustained them and their employees over the years, as a result of these discriminatory programs.

Governmentally sanctioned discrimination is infringing in the most harmful way on the legitimate interests and expectations of innocent third parties—solely on account of race, ethnic origin, or sex.

Alternative to Minority and Women's Business Set-Asides

To survive and flourish in the construction industry, one must learn to be competitive—one must learn to submit the lowest responsive and responsible bid.

Simply mandating that a stated percentage of work be awarded to a particular type of firm does nothing to assist that firm to become competitive; in fact, it may remove the incentive to even want to learn to be competitive.

There are numerous alternatives to quotas that offer much better chances of success without the harmful side effects of quotas. Some examples are:

- Increased development of programs and services in the areas of management, technical, and financial assistance. Technical services could include assistance in becoming licensed as a contractor in those States and localities such as licensing, understanding bonding requirements, and obtaining loans and working capital.
- Minority business enterprises could be greatly assisted by the elimination of public construction agency competition via public force account construction. Small construction projects have

proved to be the ideal training grounds for emerging small and minority business enterprises. Yet, we are presented with an extraordinary contradiction: As a social policy, the Nation has attempted to encourage the growth and development of minority-owned firms; but many cities, counties, and other public agencies refuse to put small construction projects out for bid to the private sector, instead keeping them to be performed by taxpayer-financed construction operations. This system, commonly referred to as public force account construction, removes from the marketplace hundreds of thousands of construction opportunities that are within the scope of MBE qualifications and bonding capacities and narrows the market for projects that are within their current capacities.

- The cost of government regulation seriously impedes MBEs and other small businesses, since profit margins do not allow for the additional overhead cost of compliance. Removal of stultifying regulations and their accompanying paperwork burdens would allow MBEs more easily to remain in the construction marketplace.

There is also another form of alternative that must be discussed. The existing quota programs are based on a philosophy of "equal results" as opposed to equal opportunity.

Affirmative action, as that term was originally conceived in the 1960s, carried with it no connotation of preferential treatment. It was, instead, a term used to describe programs established for the express purpose of ending the historic pattern of classifying persons on a racial basis. If anything, the term was synonymous with "race neutral" programs that sought to include previously excluded groups, but judge *all* persons without regard to their race or some other equally irrelevant characteristic. Things seemed to change in the 1970s. Instead of race neutrality, terms such as "racial balance" and "racial preference" were increasingly used. The quest for race-neutral "equal opportunity" changed into an insistence upon race-conscious "equal results." Suddenly, regulation and allocation by race were no longer wrong per se. Rather, it depended on who and what was being allocated. The Nation was being told that if a racial preference would achieve some desired statistical result, then the race-conscious preference should be tolerated. The Nation became conditioned to the phrase "using the race to get beyond racism," and with it came governmental use and encouragement of racial discrimination and the very racism decent people wanted to obliterate.

The alternative is clear and simple. We must return to true equal opportunity.

Conclusion

Increasingly, requirements are being imposed at the Federal, State, and local level that require the award of public construction contracts to be made based on race, ethnic origin, or sex.

Increasingly, nonminority or nondisadvantaged construction contractors and subcontractors are prevented from bidding on contracts or prevented from receiving award of contracts because: They are not the required race; they are not of the required ethnic origin; they are not the required company size.

These programs unnecessarily increase costs to the detriment of the taxpaying public, virtually destroy open competition, and are blatantly discriminatory.

Survey of State and Local Special Preference Procurement Programs

Name of State: Alabama

State Program: no
State Competitive Bidding Law: yes
Local Program: yes
Name of Locality: City of Birmingham
Authority: Executive Order 31–81
Requirements: Preliminary injunction was granted on enforcement of Birmingham City Ordinance No. 77–81 as amended which required contractors on Birmingham construction contracts to "expend at least 10 percent of contract, if awarded, for bona fide Minority Business Enterprises," on December 12, 1977, by Circuit Court, Tenth Judicial Circuit of Alabama, and injunction declared permanent on January 13, 1981. The Alabama Supreme Court affirmed permanent injunction on August 21, 1981. The Supreme Court of the United States refused in January 1982 to review the Alabama Supreme Court decision.
The city of Birmingham continues to require minority participation in city construction contracts. The instrument used is an Executive order from the Mayor requiring submission of a Minority Business Utilization Form with each bid. If low bidder does not have amount of minority subs considered to be sufficient by city officials, threats to cancel all bids and re-bid or use contract manager are used to increase minority participation.
Local Competitive Bidding Law: yes

Name of State: Arizona

State Program: yes
Authority: Regulation
Requirements: Ten percent contract amount is to be subcontracted to minority business enterprises. Although "best faith efforts" to meet the requirements are considered, in practice contractor must achieve 10 percent to be awarded the contract.
State Competitive Bidding Statute: Citation 18–217
Local Program: yes
Name of Locality: City of Tucson
Authority: Ordinance
Requirements: 21 percent of contract amount is to be subcontracted to minority business enterprises. Although "best faith efforts" to meet the requirement are considered, in practice contractor must achieve 21 percent to be awarded the contract.
Local Competitive Bid Statute: 38–502

Name of State: Arkansas

State Program: no
State Competitive Bidding Statute: 76–507, 14–612
Local Program: no

Name of State: California

State Competitive Bidding Statute: yes
Local Program: yes
Name of Locality: San Diego
Requirements: 21 percent of contract amount is to be subcontracted to MBEs, 1.5 percent to WBE.
Name of Locality: San Francisco
Authority: Ordinance
Requirements: Ten percent of all contracts are to be set aside for exclusive MBE bidding, 2 percent for WBEs. Five percent bid preference is given to MBE/WBE on all other contracts, 30 percent of other contracts are to be subcontracted to MBEs, 10 percent to WBEs.

Name of State: Delaware

State Program: no
State Competitive Bidding Statute: Title 29, Chapter 69
Local Program: yes
Name of Locality: Wilmington
Authority: No. 84–003, No. 84–065 sub no. 1 to No. 84–001
Requirements: Fifteen percent of contract amount is to be subcontracted to Minority Business Enterprises, Disadvantaged Business Enterprises. "Best faith efforts" are recognized.
Local Competitive Bidding Statute: yes
Name of Locality: New Castle County
Authority: Executive Order No. 23 (1984)
Requirements: Fifteen percent of contract amount to be awarded to MBEs, 5 percent of contract amount to be awarded to Women's Business Enterprises. Affidavit from contractor that percentages cannot be met can result in a waiver of requirements.
Local Competitive Bidding Statute: yes

Name of State: Florida

State Program: yes

Authority: Section 235.31(1)(f) Florida, Statute Section 339–0805
Requirements: Allows State to set aside for exclusive bidding by minority business enterprises and women's business enterprises construction contracts for educational buildings and transportation projects. On transportation project contracts, 10 percent of contract is to be subcontracted to MBEs. "Best faith efforts" are accepted.
State Competitive Bidding Statute: yes
Name of Locality: Dade County
Authority: Ordinance 82–67
Requirements: Certain contracts are set aside for exclusive bidding by Minority, Disadvantaged, Women and Black Business Enterprises. Also, a stated percentage of the contract (varies from contract to contract) must be subcontracted to MBE, DBE, WBE, BBE firms. Failure to meet stated percent results in denial of award.
Local Competitive Bidding Statute: yes
Name of Locality: 18 Western Florida Counties
Authority: Ordinance
Requirements: Ten percent of contract amount is to be subcontracted with MBE, DBE, WBE. "Best faith efforts" will be considered.

Name of State: Idaho
State Program: yes
Authority: Regulation
Requirements: Ten percent of contract amount to be subcontracted to MBEs.

Name of State: Illinois
State Program: yes
Authority: Statute 83–1332
Requirements: Five percent of contract is to be subcontracted to DBE, 5 percent of contract is to be subcontracted to WBE, "best faith efforts" are recognized.
State Competitive Bidding Law: 127 Illinois Revised Statute 132.6

Name of State: Indiana
State Program: yes
Authority: Executive order
Requirements: Five percent of contract amount to be subcontracted to MBEs.
Local Program: yes
Name of Locality: Indianapolis, Marian County
Authority: Ordinance 125, 1980
Requirements: Ten percent city funds to be expended with MBEs.

Name of State: Kansas
State Program: no
State Competitive Bidding Law: KSA 75–3739, 3741, 3741(B)
Local Program: yes
Name of Locality: City of Hutchinson
Authority: Policy
Requirements: Various percentage requirements are established on contract-by-contract basis for subcontracting to MBE, WBE.
Local Competitive Bidding Statute: yes

Name of State: Kentucky
Local Program: yes
Name of Locality: Louisville
Authority: Ordinance No. 136, Series 1983
Requirements: (a) If in any calendar year, based upon the above-referenced determination, 20 percent of expenditures have not been awarded to minority businesses made up of racial minorities, then minority businesses made up of racial minorities shall receive a 5 percent credit on all bids submitted in the succeeding calendar year in response to advertisements for competitive sealed bids.
(b) If in any calendar year, based upon the above-referenced determination, 5 percent of expenditures have not been awarded to minority businesses made up of women, then minority businesses made up of women shall receive a 5 percent credit on all bids submitted in the succeeding calendar year, in response to advertisements for competitive sealed bids.
(c) If in any calendar year, based upon the above-referenced determination, 3 percent of expenditures have not been awarded to minority businesses made up of handicapped persons, then minority businesses made up of handicapped persons shall receive a 5 percent credit on all bids submitted in the succeeding calendar year, in response to advertisements for competitive sealed bids.

Name of State: Louisiana
State Program: yes
Authority: LA RS 39: 1963–1964
Requirements: Ten percent of all public works projects valued at $200,000 or less are set aside for exclusive bidding by MBEs. A 5 percent bid preference is given to MBEs on all bids.
State Competitive Bidding Statute: LA RS 38:2212

Local Program: yes
Name of Locality: City of Shreveport
Authority: City Council Resolution 259 of 1979
Requirements: Contracts valued at $10,000 or less can be set aside for exclusive bidding by MBEs. Ten percent of contract must be subcontracted to MBEs, "best faith efforts" are generally accepted.
Local Competitive Bidding Law: Chapter 2, Article 1, Section 2-8.2
Name of Locality: Monroe
Authority: Statute 7322
Requirements: Ten percent of contract must be subcontracted to MBEs, 2 percent to WBEs. "Best faith efforts" are not recognized in practice.

Name of State: Maine
State Program: no
State Competitive Bidding Law: 23 MRSA §753
Local Program: no
Local Competitive Bidding Law: Most municipal charters require this.

Name of State: Massachusetts
State Program: yes
Authority: MGC Ch. 7, Sec. 40c, E.O. 237
Requirements: Five percent of contract amount must be subcontracted to MBEs, 5 percent to WBEs. "Best faith efforts," in practice, are not generally accepted.
State Competitive Bidding Law: MGC Ch. 149, Sec. 44A-H Ch. 30, Sec. 30F-R and Sec. 40

Name of State: Michigan
State Program: yes
Authority: Statute PA 428, 1980
Requirements: Establishes annual State MBE/WBE procurement goals and directs each agency to implement subcontracting and joint venture requirements as specified by the Governor. Annual goals spelled out are:
1980-81: 150 percent of actual expenditures for 1979-80 for MBE
1981-82: 200 percent of actual expenditures for 1980-81 for MBE
1982-83: 200 percent of actual expenditures for 1981-82 for MBE
1983-84: 116 percent of actual expenditures for 1982-83 for MBE
This level of effort at not less than 7 percent of expenditures shall be maintained.
1980-81: 150 percent of actual expenditures for 1979-80 for WBE
1981-82: 200 percent of actual expenditures for 1980-81 for WBE
1982-83: 200 percent of actual expenditures for 1981-82 for WBE
1983-84: 200 percent of actual expenditures for 1982-83 for WBE
1984-85: 140 percent of actual expenditures for 1983-84 for WBE
This level of effort at not less than 5 percent of expenditures shall be maintained.
Name of Locality: Detroit
Authority: Ordinance No. 559-4
Requirements: Requires percentage of contract to be subcontracted with MBEs; percentage not specified.

Name of State: Missouri
State Program: no
Local Program: no

Name of State: New Hampshire
State Program: no
State Competitive Bidding Law: yes

Name of State: New Jersey
State Program: yes
Authority: Statute S-544
Requirements: Fifteen percent of total procurements for each State agency must be awarded to MBEs, 10 percent to WBEs. This can be achieved through total set-asides or subcontracting requirements.
State Competitive Bidding Statute: yes

Name of State: New Mexico
State Program: yes
Authority: State Statute NMSA 13-1—184-187
Requirements: Encourages State agencies to utilize small businesses—no percentage requirements specified.
State Competitive Bidding Law: NMSA 13

Name of State: New York
State Program: yes
Authority: State Statute Ch. 56, Laws 83, Executive Order 21
Requirements: Twelve percent of contract amount is to be subcontracted with MBEs. If not met, default or liquidated damages (monetary penalty) can be imposed.

State Competitive Bidding Statute: General State Finance Law, Public Buildings Act.
Local Program: no

Name of State: North Carolina
State Program: yes
Authority: NC House Bill 1116
Requirements: Requires State agencies to promote the use of small, minority, physically handicapped and women contractors—recently enacted, implementing regulations not included.
Local Program: yes
Name of Locality: City of Durham
Authority: City Council Policy
Requirements: Full policy not yet completed. Generally it will require participation of minority and/or women businesses in construction contracts exceeding $100,000.
Name of Locality: Winston-Salem
Requirements: Bidders agree on city contracts to use "best faith efforts" to carry out MBE/WBE utilization policy through award of subcontracts. Low bidder must submit letter detailing efforts to use MBEs that should include all correspondence whether successful or not.
Name of Locality: City of Charlotte, Mecklenberg County
Authority: Not stated.
Requirements: Overall and separate goals for subcontracting to MBEs and WBEs will be set annually—must submit documentation of "best faith efforts" if less than goal is accomplished—if contractor does not usually subcontract work, he is not required to.
A contractor must consider all quotes from MBEs and must document why a subcontract is not given to an MBE submitting a quote. If because quote was too high, contractor must show accepted bid. If contractor is found to be in noncompliance, this finding will be considered in making future awards.

Name of State: North Dakota
State Program: no
Local Program: no

Name of State: Ohio
State Program: yes
Authority: H.B. 584—Statute
Requirements: The program allows for contracts to be set aside for exclusive bidding by MBEs. Seven percent of the contract value on all other contracts is to be subcontracted with MBEs. "Best faith efforts" are accepted.
State Competitive Bidding Statute: Chapter 153 Ohio Revised Code
Local Program: yes
Name of Locality: Cincinnati
Authority: Ordinance 52–1982
Requirements: Fifteen percent of contract amount is to be subcontracted with MBEs. "Best faith efforts" are acceptable.
Local Competitive Bidding Law: yes
Name of Locality: Cleveland
Authority: Chapter 187 of Codified Ordinances
Requirements: Contracts can be set aside for exclusive bidding by MBE firms. 16.1 percent of contract amount is to be subcontracted to MBEs. Failure to meet MBE percent results in low bids being adjusted according to an MBE adjustment factor based on percent of MBEs to be used.
Name of Locality: Columbus
Authority: Columbus Code 3907.02
Requirements: Ten percent of contract amount is to be subcontracted with MBEs, 2 percent with WBEs. "Best faith efforts" are acceptable.
Name of Locality: Dayton
Authority: Section 35.32 Dayton Revised Code
Requirements: 20–25 percent of contract value is to be subcontracted to MBEs, 2 percent to WBEs. Bid price adjusted according to factor for percent of MBEs/WBEs to be used.
Local Competitive Bidding Statute: yes
Name of Locality: Toledo
Authority: Ordinance 92–83
Requirements: 12.3 percent of contract amount to be subcontracted with MBEs. MBE participation used in determining low bid.
Local Competitive Bidding Law: yes

Name of State: Oklahoma
State Program: no
Local Program: no

Name of State: Rhode Island
State Program: yes
Authority: Executive order
Requirements: Two percent of contract is to be subcontracted to MBEs; the percentage amount increases 2 percent each year until 10 percent is attained in 1988.
Local Program: no

Name of State: South Carolina
Authority: Subarticle 1 of Procurement Code
Requirements: The State can set aside contracts for negotiation with certified South Carolina based minority firms—price must be fair and reasonable. Firms that subcontract with MBEs shall be eligible for an income tax credit equal to 4 percent of payments to MBEs limited to a maximum of $25,000 per annum. Agencies set annual agency procurement goals.

Name of State: Tennessee
State Program: no
State Competitive Bidding Statute: no

Name of State: Texas
State Program: yes
Authority: Executive Order MW8
Requirements: Requires agencies to establish 30 percent Small and Disadvantaged Business utilization goals, 10 percent of which is specifically for MBEs. No specific contract requirements.
Local Program: yes
Name of Locality: Dallas
Authority: City Council Resolution
Requirements: Contractor to make "best faith effort" to subcontract 10 percent with small business, 3 percent with MBEs. City efforts indicate that the intention of the city is to require compliance.

Name of State: Vermont
State Program: no
State Competitive Bidding Statute: no

Name of State: Virginia
State Program: yes
Authority: Executive order
Requirements: Ten percent of contract amounts are to be subcontracted to MBEs/WBEs. The percent can go as high as 30 percent.
Local Program: yes
Name of Locality: Richmond
Authority: Ordinance
Requirements: Ten percent of contract value to be subcontracted to MBEs. Waivers are available if contractor unable to meet requirements.

Name of State: Washington
State Program: yes
Authority: RCW 39.19—State Statute
Requirements: 9.1 percent of contract amount is to be subcontracted with MBEs, 0.03 percent with WBEs. In practice, "best faith efforts" are not acceptable if percentages are not met.
State Competitive Bidding Statute: yes
Local Program: yes
Name of Locality: Port of Seattle
Authority: Regulation
Requirements: Fifteen percent of contract amount is to be subcontracted to MBEs, 3 percent to WBEs. "Best faith efforts" do not ensure award of contract.
Local Competitive Bidding Law: yes
Name of Locality: King County
Authority: Ordinance
Requirements: Seventeen percent of contract amount is to be subcontracted to MBEs, 5 percent to WBEs. "Best faith efforts" do not ensure award of contract.

Name of State: West Virginia
State Program: no
State Competitive Bidding Statute: yes

Name of State: Wisconsin
State Program: yes
Authority: State Statute—Wisc 16855-10M
Requirements: Five percent of contract amount is to be subcontracted to MBEs.
State Competitive Bid Statute: Wisc. 16855

Name of State: Wyoming
State Program: no

[Editor's note: Where categories such as "State Competitive Bidding Statute" were blank, they have been left out.]

Set-Aside Programs: Viable Vehicles for Change or Threats to the Free Enterprise System?

By James H. Lowry*

Introduction

It is a privilege and an honor to be a member of this distinguished panel. The topic we are to discuss, business set-asides, is timely, highly controversial, and, I believe, extremely important. From all indications, this administration is poised to take swift action on many of the past, existing, and proposed policies covering affirmative action for the accepted protected classes. If I can in any way assist this administration and the U.S. Commission on Civil Rights in these deliberations, then I would consider the many hours devoted to the preparation of this presentation well invested.

Unlike the other panelists, I am neither a lawyer nor a learned professor. As a result, my presentation will not offer authoritative charts, tables, computer runs, trend analyses, and legal opinions. If I were to attempt this approach, I am sure my presentation would pale in comparison to the scholarly works of Professors Bates and Haworth. Although my staff and clients contend that I aspire to be one, I am neither a lawyer nor a scholar, and thus I must leave the historical and legal perspectives to Mr. Sroka and Mr. Kilgore. In presenting my views, I will present them as:

- *A management consultant,* who for the past 16 years has devoted the majority of his professional life to designing, evaluating, monitoring, supporting, and, on occasion, dismantling minority business development programs;
- *A struggling black entrepreneur,* who in many ways has benefited from the types of programs we will discuss;
- *As a United States citizen* who strongly believes that the American free enterprise system:
  - is the strongest economic system in the world,
  - still prevents (with its imperfections) minorities and women from fully participating in it, and
  - will suffer structural damage if decisive action is not taken over the next 20 years to ensure equal access for all.

It is in the context of this last point that I am sure we will devote a significant amount of discussion to business set-asides. The key issue before us, as I see it, is: "Are business set-asides positive vehicles for change or basic threats to the foundation of the free enterprise system?" The further question you have posed is: "Are set-asides an appropriate response to discrimination?" As anyone who has ever worked in this field would say, it is difficult to offer a straight

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"yes" or "no" answer to this question without conducting an indepth analysis of the program's history, composition, strengths, and weaknesses. As a management consultant, entrepreneur, and U.S. citizen, I will attempt to highlight the findings and conclusions of over 8 years of effort to accomplish this task.

What Is a Business Set-Aside?

When one sees or hears the word "set-aside," one instantly thinks of four things: the Small Business Administration, minority business, fraud, and excessive costs. This is unfortunate, because over the years many Federal governmental entities besides SBA have designed set-aside programs. These programs were successful, but did not address only minority problems and were above reproach in terms of efficiency and legality. In fact, according to *The National Journal,* in 1979 the Federal Government alone had developed 35 provisions requiring specific use of the procurement process to accomplish social or economic goals. Many of these provisions went back to the turn of the century and covered such things as shipbuilding, labor surplus, and import regulations. Whether these different programs should be interpreted as business set-asides is open for discussion. One could borrow loosely from the definition of the Associated General Contractors of America, who say that: "Set-aside programs require federal agencies to remove individual contracts and classes of contracts from the open competitive system and 'set them aside' for restricted bidding."

Still, whether 1 or all of the 35 provisions outlined by the government would fit within the definition is not, and should not be, the real issue. The issue should be: Did the programs achieve their respective economic and social objectives? The further issue we will discuss in greater detail later is: "Did the programs reduce the economic gap between minority concerns who have not benefited on par and the majority concerns who have disproportionately benefited from the free enterprise system?"

How Does One Evaluate Set-Aside Programs?

As you can tell from my background, I have traveled and worked around the world. For over 20 years of my professional life, I have endeavored to utilize my skills and experience to make life better for as many people as I possibly could. You will note that during my early impressionistic, liberal days I worked for 6 years in the Peace Corps and, later, for 2 years in Bedford Stuyvesant with Robert Kennedy. During these 8 years I learned a lot of things, and like most individuals between the ages of 22 to 30, I became, over time, more conservative in my thinking. Although I became more conservative, I never lost the strong desire to assist people who were less fortunate than I.

As is usually the case, there was an incident during my young professional career that significantly affected my life. In my case the incident occurred on a tour I conducted for members of the board of directors of the Bedford Stuyvesant Restoration Corporation. On the tour were Andre Meyer, managing partner of Lazard Freres; Roswell Gilpatrick, former Deputy Secretary of Defense; and Daniel Lilienthal, former head of TVA. As these men and their fellow board members toured the community, I was amazed that not once did they discuss drug addiction, poor housing, poor education, crime, or bad health. For 4 straight hours they discussed only economic development and business projects.

To them the solution was clear; without capital and capital-producing institutions, Bedford Stuyvesant and all the other Bedford Stuyvesants of America were doomed to failure. For them, the lack of income-producing institutions was the real problem; poor education, crime, bad health, etc. were only the *symptoms* or the byproducts. One of them said very clearly to me that government can "transfer payments" and act as a catalyst for change, but it can't "produce wealth." He also added that only wealth will make a difference to the *"underclass."* I never forgot that tour; it altered the direction of my life, and it was foremost in my mind when I prepared this presentation.

This tour took place in 1967 and, unfortunately for many of the citizens of the underclass of Bedford Stuyvesant, the situation has not changed dramatically and, in many instances, has worsened. To quote the learned Harvard professor (and my nephew) Glenn Loury:

> Today nearly three of every five black children do not live with both their parents. The level of dependency on public assistance for basic economic survival in the black population has essentially doubled since 1964. About one-half of all black children are supported in part by transfers from the state and federal governments. Over half of black

children in primary and secondary schools are concentrated in the nation's twelve largest central city school districts, where the quality of education is notoriously poor, and where whites constitute only about a quarter of total enrollment. Only about one black student in seven scores above the 50th percentile on the standardized college admissions tests. Blacks, though little more than one-tenth of the population, constitute approximately one-half of the imprisoned felons in the nation.

Although my nephew and I agree on most things, we disagree on the role of the black middle class, in the above situation, and particularly that of black entrepreneurs. I contend that until we have viable black businesses and a strong black business leadership class, the economic development that all America desires for the "underclass" of the inner cities will never occur. When I design and evaluate minority and women's business development programs, I do not view them as short term programs to affect a few rich or soon to be rich entrepreneurs. I look at these programs as potential agents for change. Within this perspective, I ask the following questions:

1. Did the programs have broad economic and social goals as well as narrowly defined programmatic objectives?
2. How successful were they in achieving these goals?
3. Did the programs provide a comprehensive training environment for minority entrepreneurs and managers?
4. Did the programs facilitate the hiring and retention of new workers, particularly from depressed areas?
5. Did the firm assisted return part of the government investment to the communities?
6. Did the program provide a base for further economic development?
7. Did the program have sufficient capital invested in it to achieve desired end results?
8. Was the program managed effectively and efficiently?
9. Was the program overly political?
10. Was the program a good model to be duplicated elsewhere?
11. Did the program foster better working relationships between majority and minority firms?

Too often minority business set-asides are not evaluated along these lines. Too often the criteria of evaluation are too narrow and unrealistic, if one thinks in terms of a limited time dimension. This is definitely the case with respect to the most controversial and discussed programs:

- The SBA (8a) program
- Public Law 95–507
- Public Works Employment Act (PWEA)
- Department of Transportation Surface Transportation Assistance Act (STAA)

Unfortunately, most of these programs have received a disproportionate amount of "bad press," which, in turn, affects the quality of such programs and the public perception of them. The key facts that most people, both within and outside of government, must consider are that these programs were quickly pulled together, of limited duration, and were reviewed to an extent not commensurate with their size compared to other major programs.

Justification for Set-Asides

To deal with the justification (or, in the case of other panelists, the lack of justification) for set-asides, it is imperative to look at the particular, indigenous nature of minority and women's business enterprises. What we will unfold in the following pages is that there are specific and extremely complex problems besetting the successful operation of minority and women's businesses.

"Bottom line" has become a popular "buzz word." It is used everywhere, from nonprofits to corporate boardrooms. As a struggling minority entrepreneur, I use it every day, as it is a way of life. Without knowing where the bottom line is, I will never know where my business is.

Therefore, the critics of the four programs mentioned above use "bottom line" in the sense of: "Is there a fair return, in terms of bottom line results, for the millions of dollars invested?" Although that question is valid in one sense, my question is: "What is the bottom line in terms of *equal* access to the free enterprise system *for all?*" Let us look at the state of minority- and women-owned business.

Although significant progress has been made over the past 15 years, minorities still remain outside the American economic mainstream. Barred by discrimination from entering the higher growth and more profitable industries, minorities have tended to start minimally profitable service and retail businesses in minority neighborhoods. Not surprisingly, such small-scale businesses are unable to attract sufficient capital and capable managers to achieve substantial growth, and are thus unable to gain access to large growth markets. Such firms tend to remain small

and barely profitable, if they are lucky enough to survive at all. Ultimately, because of their small size and the nature of their businesses, minority enterprises have been largely unable to penetrate the economic mainstream of corporate America.

Analysis of the Unique Characteristics of Minority Business

Minority Business Is Small Business

Minority businesses, as well as women's businesses, are generally small businesses, *privately owned and controlled* by minority-group members or women. Small businesses, defined here as those firms with fewer than 100 employees, are a major factor in the economy, comprising 99.7 percent of total business enterprises; employing 47.8 percent of total nongovernment, nonfarm employees; and contributing 42 percent of total U.S. gross business receipts.[1]

Small businesses also constitute the dynamic, leading edge of the U.S. business scene, accounting for 99.1 percent of all new enterprises from 1980–82. More significantly, the small business sector increased its total employment by 2,648,000 employees from 1980 through 1982 while larger concerns were losing 1,664,000 employees. There is very strong evidence that small businesses create more than their proportionate share of the Nation's jobs (figure 1).

Although the Nation's small businesses are critical to the economy and generate the majority of new employment opportunities, they have more than their share of problems. By other measures of performance, small businesses do not fare well; their failure rate is high and their growth rate low. Over 99 percent of failed businesses have fewer than 100 employees, and over 80 percent are under 10 years old. Although the average annual increase in sales for all firms was 7.7 percent, the percentage of sales increase declined almost uniformly from larger to smaller firms (figure 2), implying that larger firms are inherently better able to generate new business opportunities and maintain the increases over time. Small businesses are more highly leveraged on the average than large corporations, making them more susceptible to the adverse effects of increasing interest rates and dips in the economy. Furthermore, small businesses generate lower returns on their assets than larger corporations, although the gap has narrowed over time (figure 3). The inability to generate capital through retained earnings is a direct reflection of higher leverage and the lower rate of increase in sales revenues for small businesses, and contributes to the perpetuation of the cycle. Because of low profitability, more debt is required to maintain and/or increase sales, and the cycle continues.

Many factors contribute to the problem due to the volatile nature, increased risk, and reduced returns of small businesses in the U.S. economy. Moreover, minority- and women-owned businesses face even greater obstacles to success than the typical small business. As a result, minority and women's enterprises play an insignificant economic role, not only relative to large corporations, but also relative to other small businesses, as the following figures indicate:

- Minorities are over 20 percent of the total U.S. population, yet minority firms account for only 5.7 percent of all firms and only 0.6 percent of all employment (figure 4). Although the majority of the U.S. population is female, relative women-owned business participation is only slightly better than for minority-owned business;
- Minority firms are painfully small; and
- An entity with the combined sales of the entire *Black Enterprise 100* for 1983 would only rank 162 on the *Fortune 500* list of major industrials.

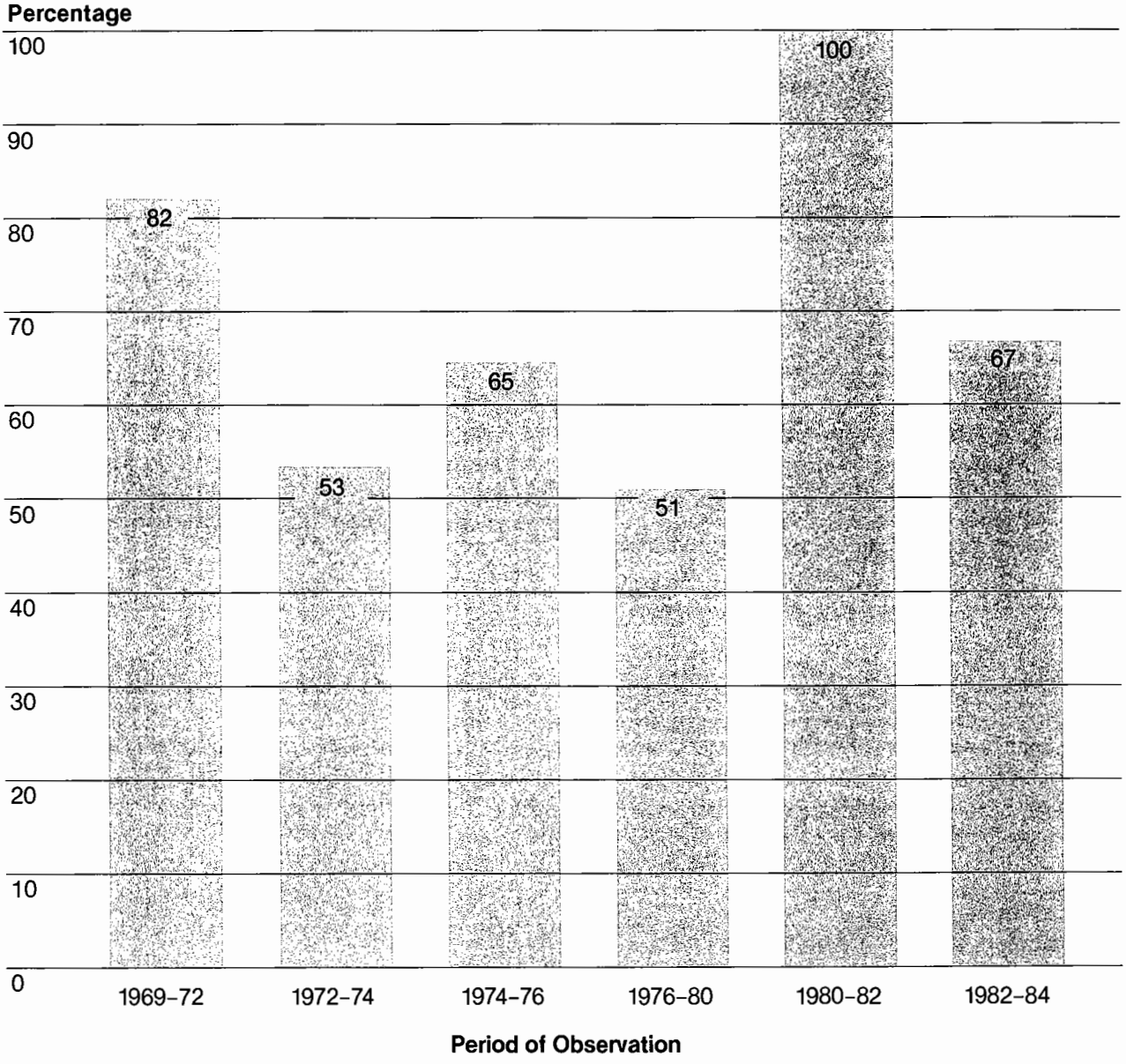
The average number of employees for the *Black Enterprise 100* and *Hispanic 100* firms, generally the largest of the minority firms, is less than 250. Only 13 of the *Black Enterprise 100* employ as many as 500 or more people. The top minority businesses have shown the capability to grow more rapidly than their majority counterparts in both sales and employment (figures 5 and 6). However, the huge difference in size between majority firms and minority and women's firms tempers the significance of those findings.

Minority businesses, and small businesses in general, have often been neglected in business and economic planning by the Federal Government. "What's good for GM is good for America" not only ignored the fact that the majority of American businesses are relatively small, but the statement, and the attendant philosophy, completely ignored the concept of minority and women's business development. Such thinking is still prevalent today. In the darkness of such neglect, the minority business sector has remained stagnant and all but nonexistent

[1] U.S. Small Business Administration, *State of Small Business* (March 1982).

FIGURE 1

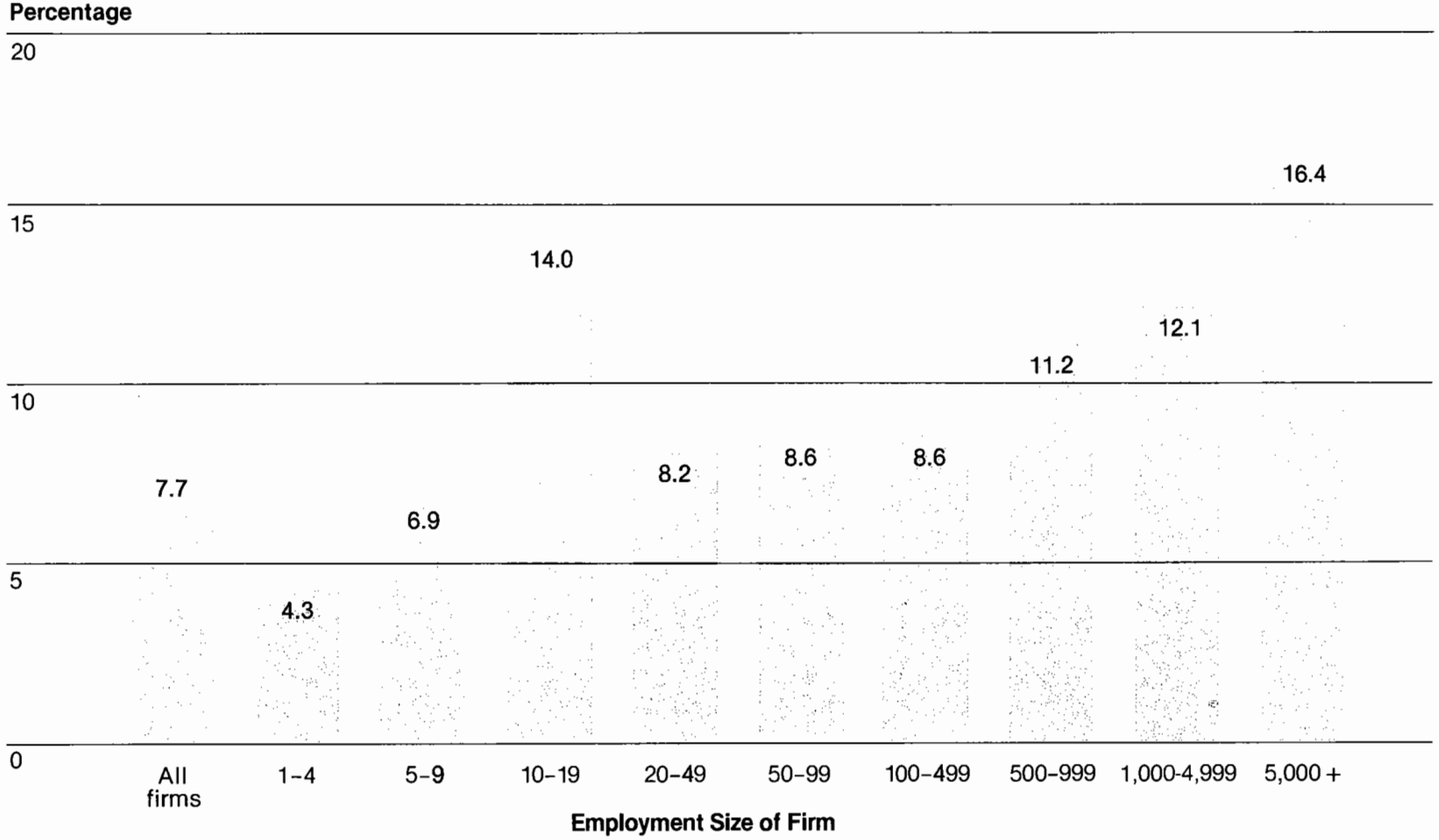
Percentage of New Jobs Generated by Small Businesses, 1969–84



Source : U.S. Small Business Administration, *Economic Policies in the 80's: The Small Business Factor* (June 1984).

FIGURE 2

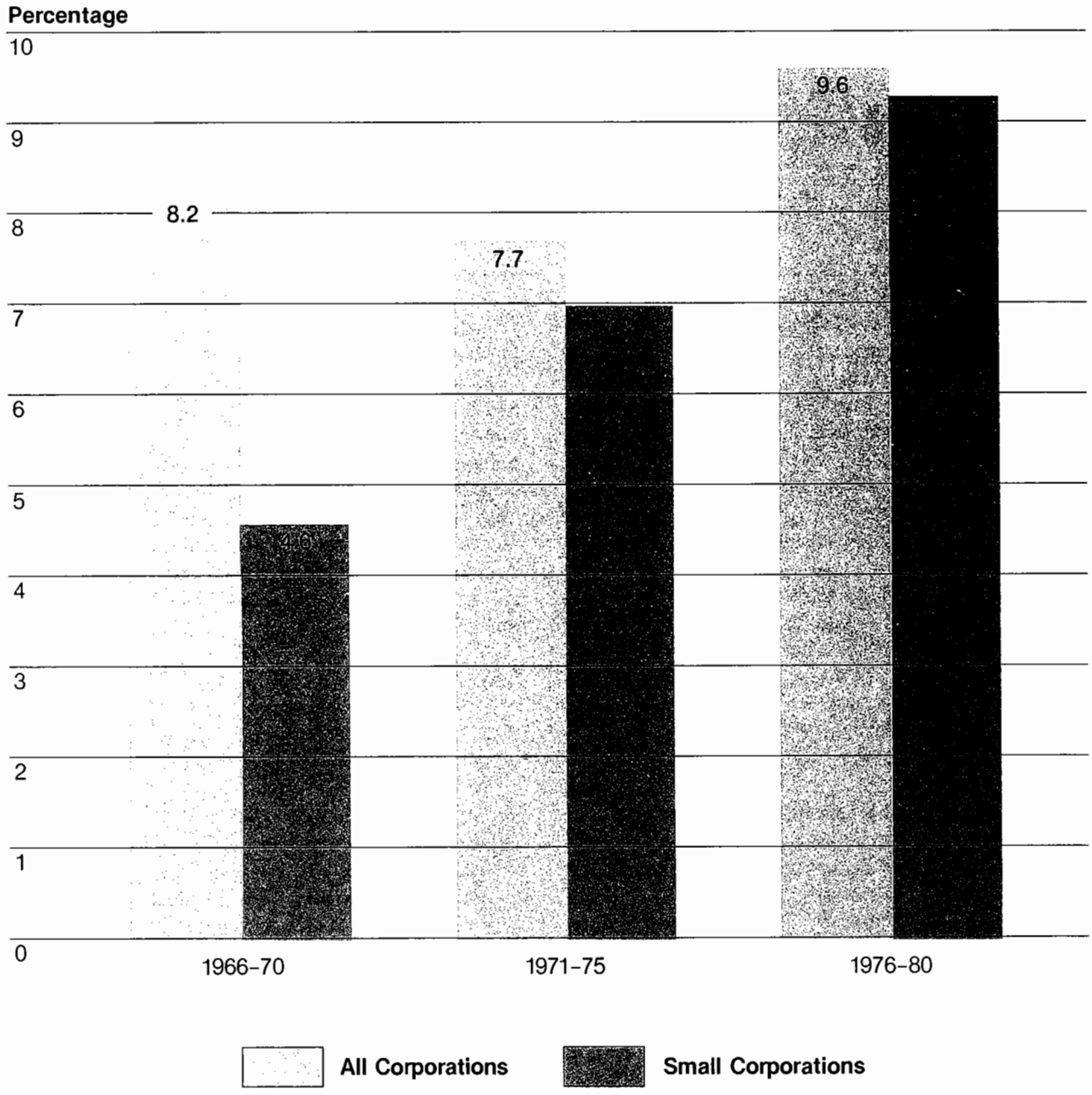
Annual Percentage Increase in Sales by Employment Size of Firm, 1976–82



Source: U.S. Small Business Administration, Office of Advocacy, Small Business Data Base.

FIGURE 3

After-Tax Return on Net Worth, 1966-80



Source: U.S. Small Business Administration, *The State of Small Business* (March 1984).

FIGURE 4

Status of Minority- and Women-Owned Business Enterprises, 1977
(In thousands)

	All firms		Minority-owned		Women-owned	
	No.	%	No.	%	No.	%
Firms	9,833.0	100.0	560.0	5.7	702.0	7.1
Business receipts	$633.1	100.0	$22.2	3.5	$41.5	6.6
Employees	81,924.0	100.0	499.2	0.6	894.6	1.1

Source: U.S. Department of Commerce, Bureau of the Census, "Status of Minority Business, 1977." Internal Revenue Service, "Preliminary Report, Statistics of Income, 1977."

as an economic force. Without a positive effort to foster their development, minority businesses often die as quickly as they are born, due to the effects of discrimination, insufficient capital, and a lack of access to major markets.

Recent Minority Business Development Agency (MBDA) statistics indicate that minority firms have had far higher bankruptcy rates than comparable nonminority firms. Since 1980 the failure rate for minority firms has been as much as 60 percent higher than for similar majority firms (figure 7). Such data strongly imply that the risks inherent in operating a minority-owned business are far greater than those of small businesses in general. It is true that minority business is small business; however, the converse is not true. The profile of minority- and women-owned businesses is unique, and it has been formed by a unique set of circumstances that continue to affect and hamper their development.

Minority Business Is Service Business

The largest category of business entities, as defined by the Census Bureau, is "Selected Services," which consists of businesses such as hotels, cleaning services, hair care, laundry, auto repair and maintenance, and educational, medical, and other services. Over 40 percent of all enterprises owned by minorities and women are engaged in selected service businesses, which tend to be smaller, low-capital enterprises serving local markets (figure 8).

These primary markets for minority and women's businesses tend to be slower growth markets, marked by low rates of innovation, low barriers to entry, and a strong reliance on a healthy consumer market to fuel a basic level of market growth. Both minority and women entrepreneurs are starting businesses at increasing rates, although this activity is concentrated primarily in the service sector. On average, the number of self-employed females increased 6.5 percent per year from 1977 to 1983, compared to 3.8 percent per year for minorities and 3.5 percent per year for all individuals. However, for both minority- and women-owned enterprises, service business starts grew at a much faster rate than the average, with women's firms growing at a rate of approximately 8.6 percent and minorities' firms at a rate of 4.6 percent.

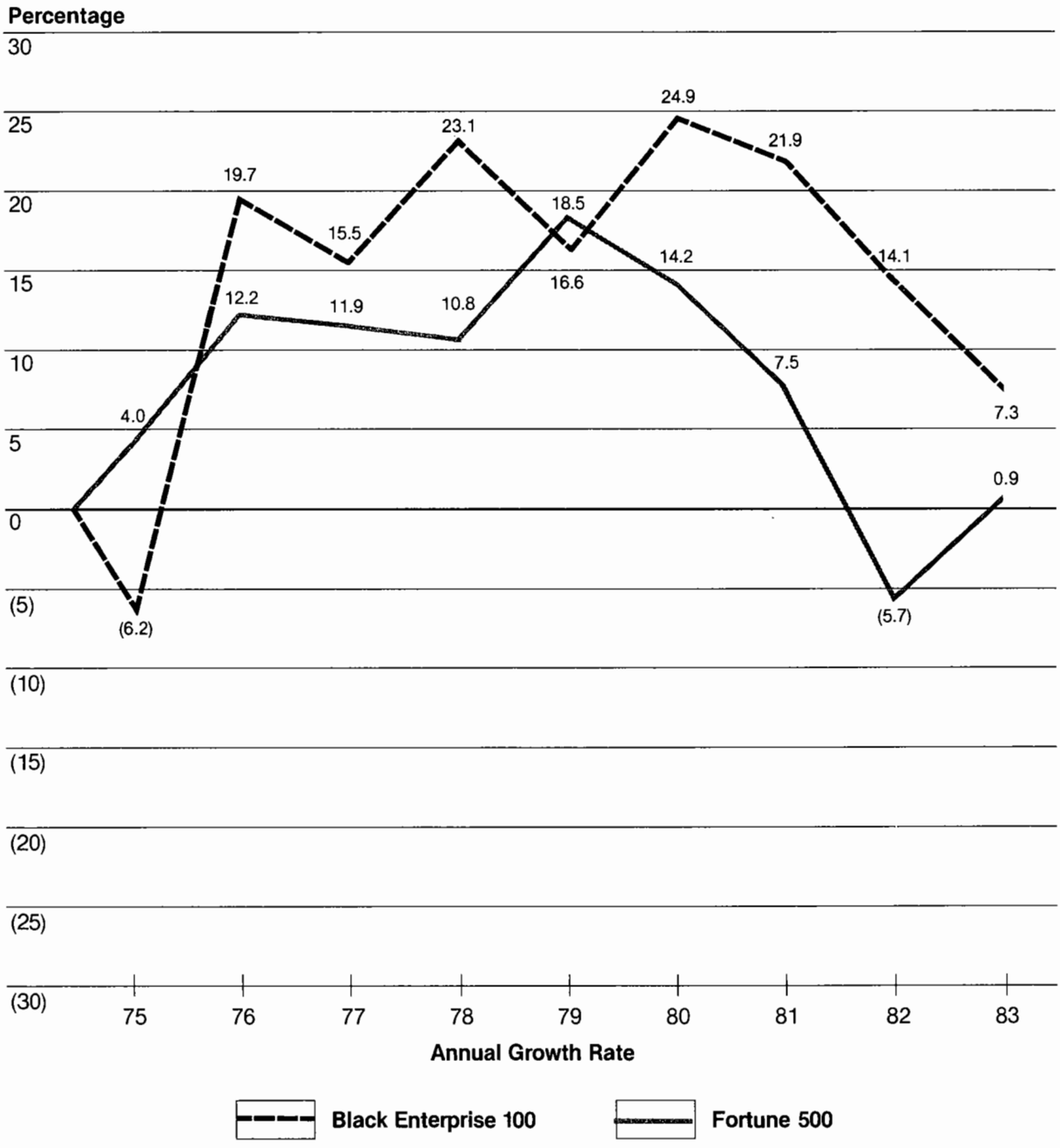
Minority Business Is Urban Business

Another characteristic of minority businesses is that, like their primarily minority customers, they are clustered within the Nation's major urban areas. Although 74 percent of white Americans live within major metropolitan areas (SMSAs), 82 percent of all blacks, 88 percent of all Hispanics, and 91 percent of all Asians and Pacific Islanders reside within the Nation's major SMSAs. More dramatically, only 27 percent of white Americans actually reside within the central cities, as opposed to the suburbs, compared to 60 percent of all blacks and 53 percent of all Hispanics.[2] Given this distribution, it is not surprising that minority enterprises are also concentrated in the major urban areas. In fact, almost one-third of all minority firms, representing almost one-half of gross minority business receipts, are located in 10 cities (figure 9).

[2] U.S. Department of Commerce, Bureau of Census.

FIGURE 5

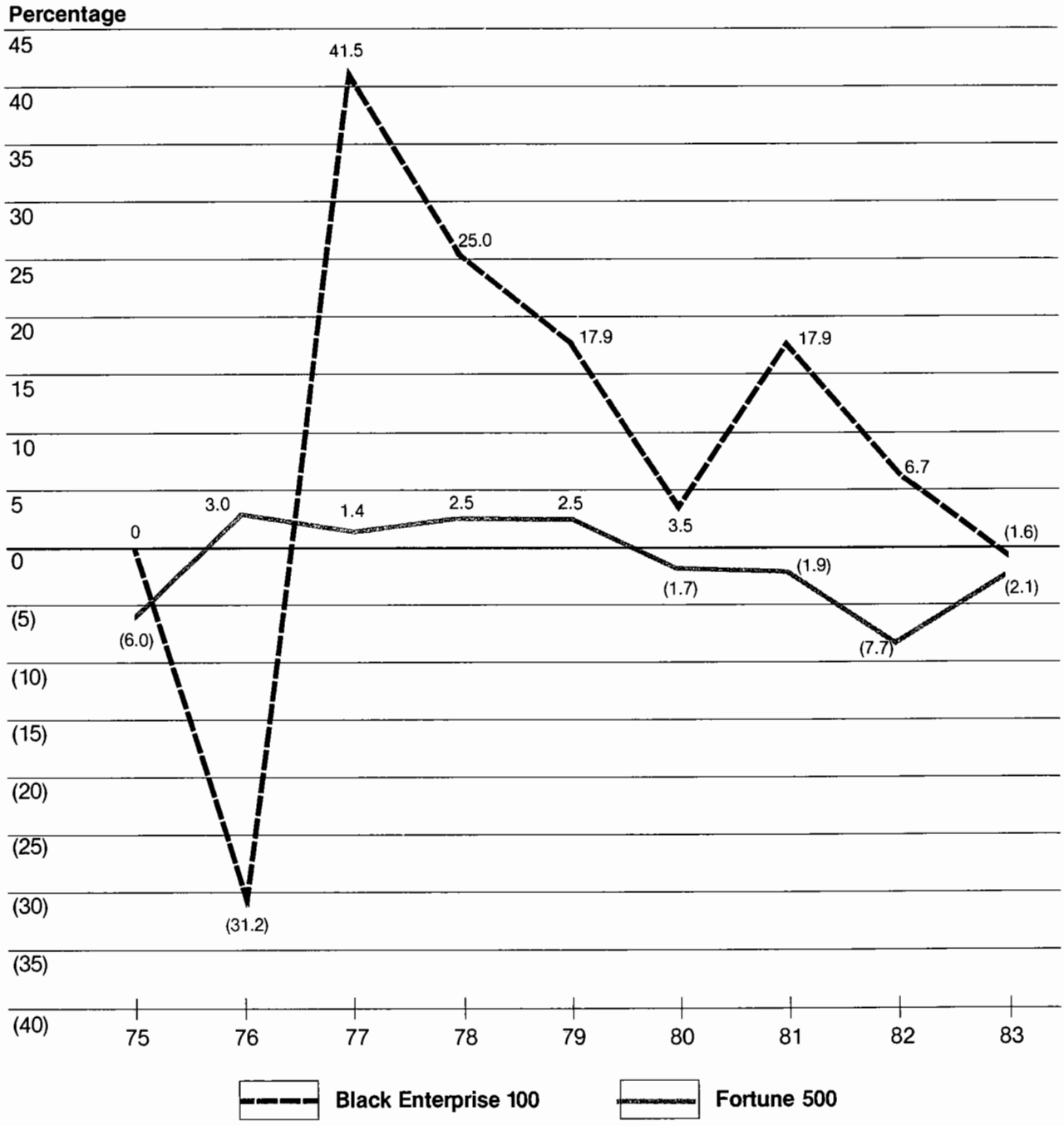
Comparison of Growth Rate in Sales—Percentage Change from Prior Year



Source: Annual "Top Firms" issues of *Fortune* and *Black Enterprise.*

FIGURE 6

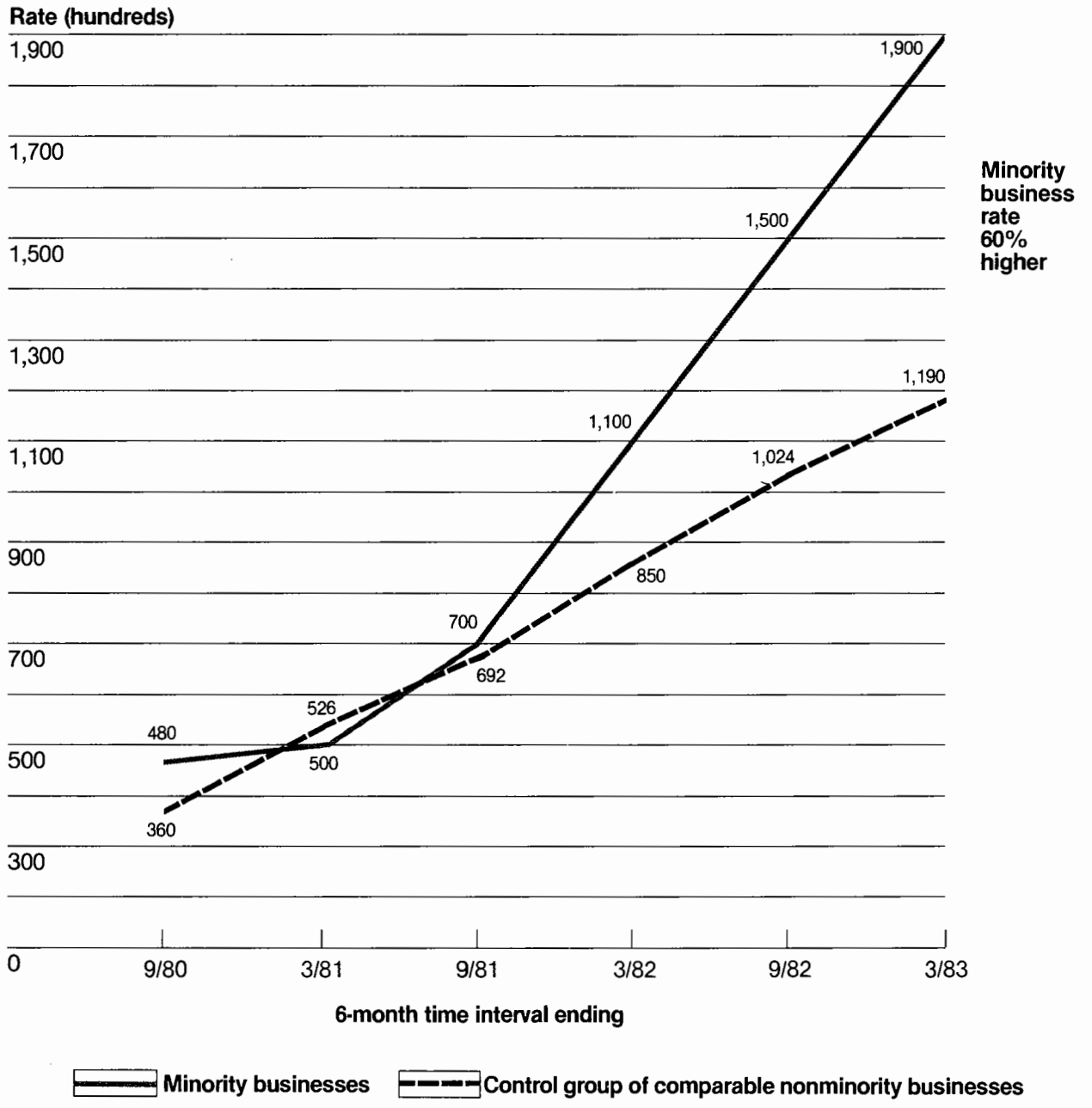
Comparison in Growth Rate, in Employees, 1975–83—Percentage Change from Prior Year



Source: Annual "Top Firms" issues of *Fortune* and *Black Enterprise.*

FIGURE 7

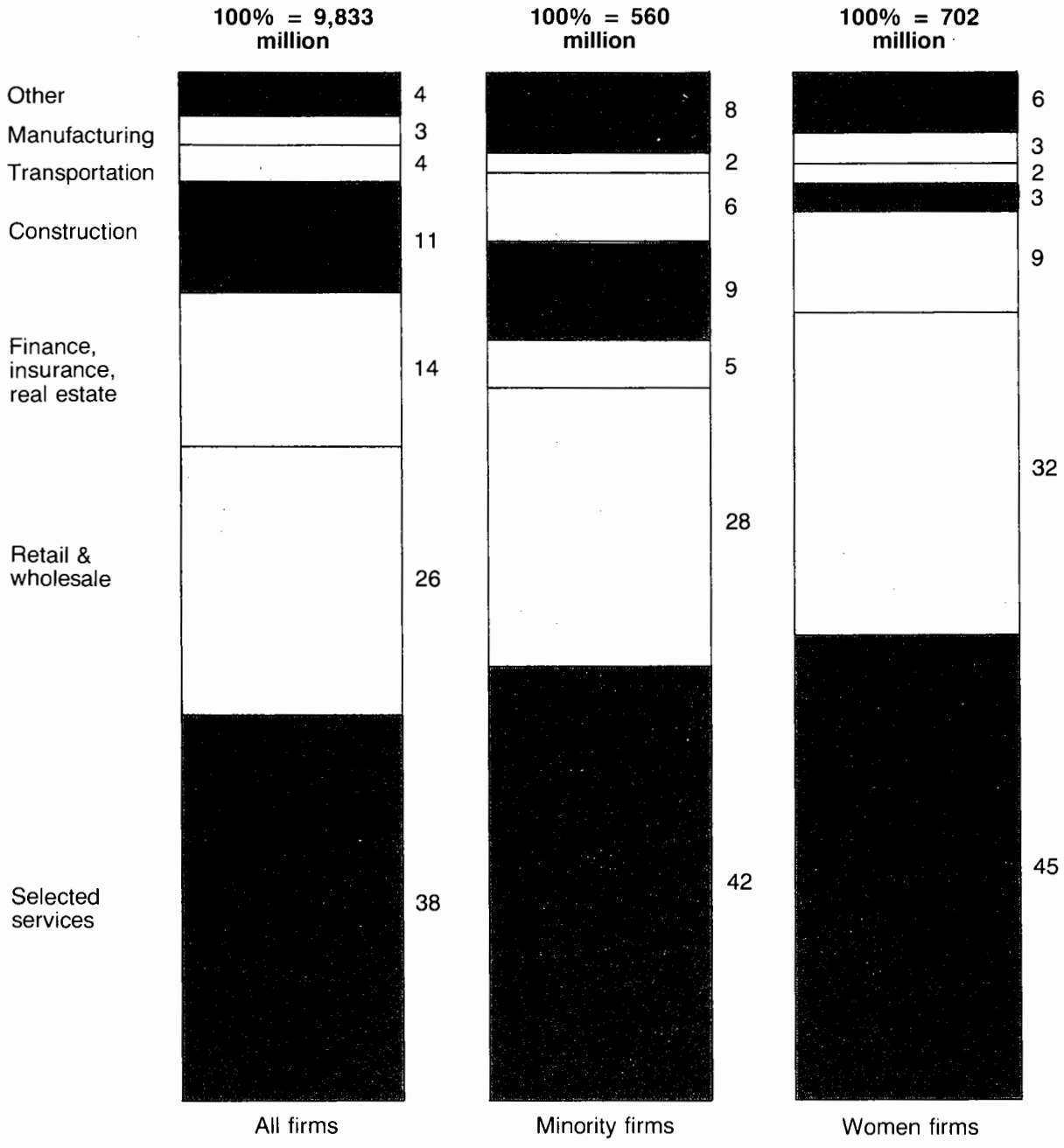
Minority Business Failure Rates—Number of Failures per 10,000 Firms



Source: U.S. Department of Commerce, Minority Business Development Agency, February 1984 Internal Study Memo.

FIGURE 8

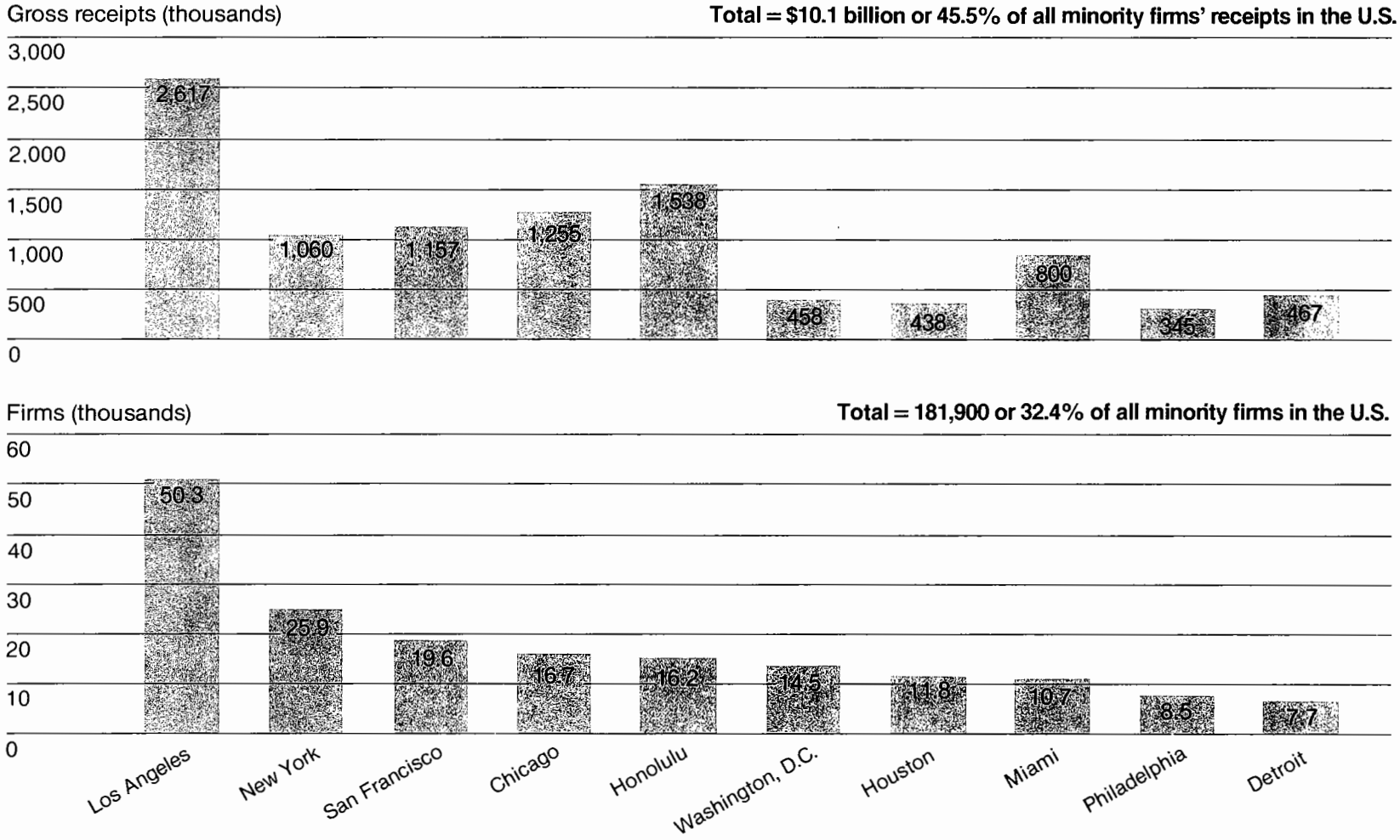
Distribution of Businesses by Type, 1977



Source: U.S. Department of Commerce, Bureau of the Census.

FIGURE 9

Comparison of Minority Businesses in 10 Largest SMSAs, 1977



Source: U.S. Department of Commerce, *Survey of Minority-Owned Businesses* (1977).

Women-owned businesses, understandably, do not show the exact same geographic pattern as the minority businesses. Women's firms are more evenly dispersed, as are women, throughout the economy. Only 25 percent of the women-owned businesses are located in the top 10 urban centers, representing 24 percent of the gross receipts for these enterprises.

Discrimination Inhibits Minority and Women's Business Development

Minority businesses operate in a environment of both implicit and explicit discrimination, which impedes their growth. They face several types of obstacles as they seek to establish themselves or increase their volume of business, and they are hampered in their efforts to grow, as are many small businesses in a "big business culture." Somehow, small businesses are often ignored by policymakers, despite the fact that most of our direct contacts with businesses are with small businesses. Most important, unlike other small businesses, minority businesses must overcome barriers based largely on social and economic discrimination.

Social and Cultural Limitations

First, minority business enterprises are at a disadvantage because they are different, socially and culturally, from other businesses and potential clients. Such differences create obstacles, which may be based on factors such as racial prejudice, but can also be due strictly to unintended discrimination based on cultural norms and values that differ across races. Historically, of course, minority business development has been hampered by explicit, illegal racial discrimination. Today, although most racially motivated legal barriers have been removed, the residual effects of historical discrimination remain, causing minority enterprises to face a type of implicit discrimination based on differences in cultures, history, and values. At one level, this is merely the big business versus small business gap applied to minority versus majority business. Less obviously, however, minority businesses face a discrimination based on conflicts in culture and values across races and ethnic groups.

As an example of the cultural differences between the majority and minority business communities, consider the formation rate of businesses within each group. Minorities simply do not even attempt to form businesses at the rate majorities do. On a population basis, minorities form businesses at only 22 percent of the rate of nonminorities. In terms of actual business units, this translates to only 14 minority businesses per 1,000 minority individuals versus 631 businesses per 1,000 people for nonminorities. Combined with the high failure rate of minority firms, the low startup rate yields a low total population of minority businesses.

The second major set of obstacles facing minority enterprises is primarily economic in nature, although it might be ascribed to the "culture" of small business in general, and it is also directly related to the racial discrimination issue. The economic difficulties confronting minority firms are due principally to the minority business community's limited access to capital, markets, and highly skilled managers. All small businesses face such difficulties to some extent, but minority businesses suffer from their effects disproportionately, often because the race issue magnifies the intensity of the problem. Moreover, the effects of capital, market, and management problems tend to feed on each other, leaving minority businesses in a situation where obstacles in one area make it increasingly difficult to solve the problems in other areas. The elements of this vicious circle are discussed below.

Limited Access to Capital

Minority business enterprises, like all small businesses, find it difficult to raise enough capital to manage their businesses efficiently. For minority firms, the capital problem is exacerbated by discrimination, limited markets, and often the firms' physical location, often in the inner city. At one level, the capital issue is a generic one; most small business owners find it more difficult to raise capital than their larger counterparts. Minority businesses, however, must deal with the problems of all small businesses, plus discriminatory factors such as bank redlining of inner-city loan requests.

Minority business enterprises have difficulty raising capital because of their small size and the relatively young age of most of these firms. The average age of the top 100 black firms is approximately 13 years, while many of the top 100 firms of the *Fortune 500* have their roots firmly planted in the last century. Justifiably or not, banks and other sources of capital tend to shy away from young firms with limited credit histories. In addition, banks are leery of small firms that have limited assets for collateral purposes. Furthermore, minority firms have few natural allies in the Nation's financial

markets. It is precisely for these reasons that comprehensive minority business development programs often contain explicit provisions for loan assistance or special credit terms for minority enterprises.

To the extent that minority businesses can raise capital at all, they have a particularly weak capital structure. The nature of their businesses, generally service oriented as opposed to manufacturing or hard goods, further hampers the ability of minority enterprises to raise capital. There are few, if any, hard assets in service firms to use for collateral or as the basis for a sale of equities. Very few minority firms are able to sell stock and thus raise capital in the equity markets, leaving them dependent on their owner's resources or the willingness of banks to provide them with loans. Minority business owners, or course, are rarely able to provide substantial capital resources of their own to their firms. This is illustrated by the fact that the average net worth of black households is only 35 percent of the average white household's net worth (figure 10).

Finally, the exceptional minority business enterprise that is able to enter the equity market often does so only after substantial success as a private firm and at a point when the minority owners are willing to release much of their control of the firm. It is an ironic paradox, then, that the most successful minority firms in many cases essentially become majority firms. Minority businesses, therefore, are rarely financed through anything but debt and the owners' capital.

The issue of insufficient capital is a critical one, particularly in light of the bonding and deposit requirements that must frequently be met in order even to attempt to qualify for governmental contracts. Given their capital structure, minority businesses often find it difficult to meet bond and deposit requirements and still maintain an adequate cash flow position.

Limited Access to Markets

Aside from their difficulties raising capital, minority business enterprises often face artificially limited markets for their goods and services. As local service firms, these businesses are often unable to develop markets outside their own minority communities. Thus, because they are minorities, the businesses are frequently constrained to serving the minority community as their primary clients. In part this is natural; minority businesses logically serve minority clients as a key market; but it is also discriminatory, as majority firms stereotype minority firms as only fit to serve minority markets.

Although perhaps unintentional, even the purchasing procedures of big businesses and government serve to block market access to minority businesses. Such systems are typically designed to accommodate the needs of vendors who are on a near-equal footing with the purchasing firm, and are thus quite inaccessible to small and minority business vendors. Again, credit policies are a major stumbling block. Often, minority enterprises cannot even begin to compete when the barriers to market entry are so insurmountably high. Without set-asides, in many cases, these barriers would never be surmounted.

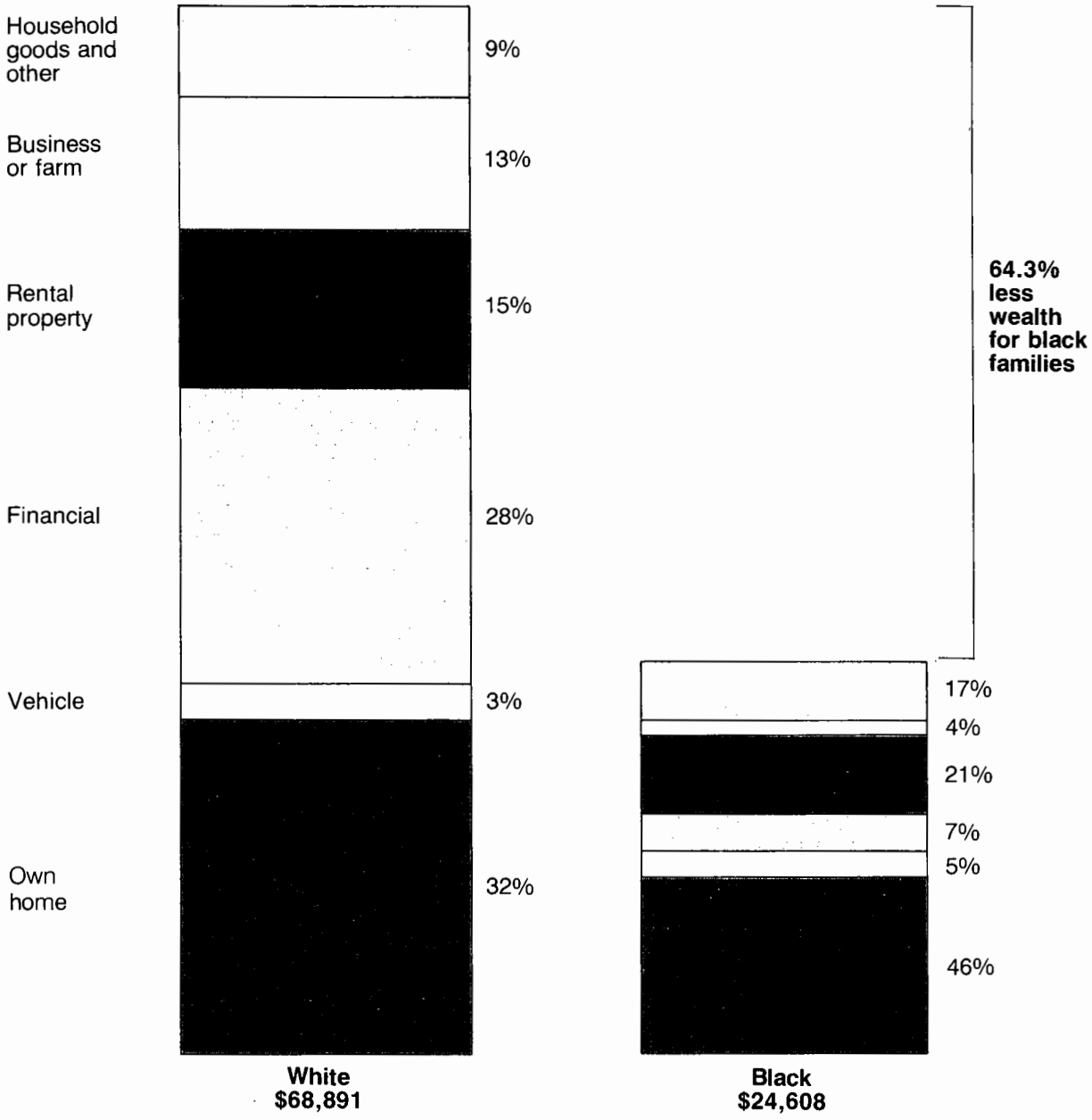
Although affecting both small and minority businesses, limited market access is especially damaging to minority businesses, since it prevents them from growing to a point where they can effectively discard the "small, local firm" image and successfully pursue large markets and capital sources. In essence, a firm needs to reach a certain "critical mass" to grow and become competitive in major markets. Technically known as experience curve effects, it is an economic fact that firms cannot produce most types of goods efficiently and competitively at very low volume levels. Gaining a sufficient market base to ensure future growth is directly related to the geographic market served. Although almost all of the *Fortune 500* operate on a multinational basis, most minority businesses find it difficult to consider marketing on a multi-State basis, and many would be content to develop multicounty markets. Only 10 percent of the *Black Enterprise 100* are in necessarily wide market area industries, such as publishing and broadcasting and cosmetics, while 34 percent are in auto sales and service, serving necessarily local markets.

Limited Access to Highly Skilled Managers

Minority enterprises have limited access to highly skilled managers, and this further constrains their ability to grow and compete. The most talented minority managers and potential managers often opt for far more lucrative and secure careers at large, majority-owned firms. As a result, potential recruits for the management ranks of minority businesses are lost to "big business," and the problem is perpetuated by lack of role models.

FIGURE 10

National Average Household Wealth, 1979



Source: U.S. Census Bureau as reported in *Wall Street Journal*, June 30, 1983.

The management issue is basically one of perceived opportunity. Minority students and youth looking at career options see few role models in minority- and women-owned businesses. The best known people in the minority community are often politicians and entertainers. In an *Ebony* survey of the most influential black Americans, most of those listed were politicians, entertainers, or leaders of religious, fraternal, or civil rights organizations, while only 10 percent had predominantly business backgrounds. Such statistics do little to encourage young minorities to pursue careers in minority-owned businesses.

Finally, many members of minority groups do not see business careers, particularly within the minority community, as sufficiently rewarding. Even those who are otherwise motivated to pursue business careers in minority enterprises are often lured away from the minority business enterprise community by the greater security and, perhaps, prestige of jobs and salaries in large majority corporations. Although majority business hiring of talented minority managers is itself laudable, it can be damaging to the minority business enterprise community. Such hiring does, however, point out the weakness in the argument that minority business development cannot succeed because there are no capable minority managers. Clearly, there are capable minority managers, but the stacked odds against success in the minority business enterprise community discourage many of the most talented minorities from pursuing minority business-oriented career options. Just as "success breeds success," the perceived obstacles to a career as manager of a minority enterprise cause the best talent to go elsewhere, and thus the perception of difficulty breeds failure. Successful minority businesses, however, will attract capable managers, and they, in turn, will encourage others to join the ranks of minority business.

Forgive me for being so expansive in describing the past and present status of minority business development, but I strongly feel that unless one views the overall state of conditions, one cannot answer the questions of: "Are they justified or not?" If I was an owner of a small majority-owned business in Waterloo, Iowa, and I did not receive a government contract because of a set-aside program, I would be upset, discouraged, and possibly hostile if I viewed my nonselection only as a one-time event. However, if I viewed my nonselection in an historical perspective, accepting the current situation as one based on past injustices and the dire need to develop a minority business base in my city, I would accept the action as a needy but painful immediate injustice.

In sum, these programs and what they are trying to accomplish cannot be viewed from a microeconomic perspective. In this context they are unfair. However, if we accept them as one component of a larger macroeconomic struggle, they then appear to be necessary and too limited in scope.

Steps for Minority and Women's Business Economic Parity and Development

Focus on Growth Industries

Instead of attempting to support a large number of small retail and service firms with inherently limited growth prospects, the government should focus on larger minority- and women-owned operations with the capacity to create jobs and generate financial assets. In general, these will be manufacturing firms that compete in growth industries such as telecommunications, communications, health care, electronics, chemicals, and transportation.

Although these high-technology industries have historically been difficult for minority and women's businesses to penetrate, there are certain sectors of opportunity within these industries where aggressive minority and women's business can penetrate and compete. Much of the Federal minority and women's business development initiatives should be focused to assist minority and women's businesses in gaining a foothold in these promising high-growth sectors.

Provide Incentives for Private Sector Involvement

I have been fortunate enough to work with some of the most outstanding major corporations in developing minority business development programs across the country. Our clients include Time-Life, Frito-Lay, Pepsi Cola, Stroh, Consolidated Foods, and others. Within each of these companies, money, commitment, and imagination provided by the chief executive officer made the difference between success and failure. Unfortunately, Don Kendall, Peter Stroh, Michael Jordan, and Richard J. Munro are the exceptions and not the rule. Thus, we strongly urge that such programs as enterprise zones be supported and expanded.

Private sector involvement is essential, and if we have to help subsidize minority and women's business development, then that is what we have to do. Private sector involvement is not predicated upon good will alone. The private sector must be given the appropriate incentives and guidance to participate in minority and women's business development. Therefore, any Federal initiative in this area that expects to attract private sector support must have incentives in the form of tax breaks, training subsidies, or infrastructure development. Federal minority business development planners must look to the private sector, just as Federal economic planners did with their New Beginning package, to incorporate the help of major private sector corporations, financial institutions, and private investors in the development of minority business. Their aid is essential because they have capital to invest and because they represent the largest potential market for the products of minority businesses. Their participation compounds the resources available for minority and women business development and transfers much of the responsibility away from the government and into the hands of the free enterprise system.

Past experience has shown that a successful partnership can be forged between government, business, and the minority community, provided that there are tangible benefits for cooperation and that there is strong leadership behind the effort.

Three particular public-private partnership programs are indicative of the kinds of vehicles that actually work:

- *National Minority Supplier Development Council:* promotes purchases of goods and services from minority-owned and controlled companies.
- *Urban Coalitions:* promote redevelopment of economically depressed neighborhoods.
- *Local Initiatives Support Corporation:* encourages banks, insurance companies, and businesses to fund commercial ventures and housing rehabilitation projects proposed by community groups.

Each of these efforts has produced substantial benefits for the participants and all have been inspired by strong leadership. Although these initiatives are by no means perfect, they clearly demonstrate that, given the incentives and the guidance, the private sector is ready, willing, and able to assist in the effort to develop minority and women's businesses.

Phase the Federal Government out of Minority and Women's Business Development

An alternative approach to stimulating development of minority and women's businesses is built around phasing the Federal Government out of this sector and phasing the private sector in over a 20-year period. The rationale for private sector leadership, as opposed to public sector management, has already been documented. But it might be appropriate at this time to discuss the 20-year time frame.

The 20-year time frame has been chosen for a number of reasons. First, I think that our goal is economic development and not social change. Social change can often be achieved in a very short period of time once there is momentum behind the movement, but real economic change is a much greater challenge. It will take at least 20 years to *create* wealth, income, and assets in minority communities in an amount consistent with their populations. Continuing to *transfer* wealth to minorities will only exacerbate present socioeconomic problems. Minorities, whether they be unemployed youth or six-figure corporate executives, are tired of "handouts."

This was clearly articulated by a group led by Sister Falaka Fattah from the inner city of Philadelphia, and founder of the House of Umoja, when they met with President Reagan. They voiced strong opposition to the continued funding of programs that do not work. It will take 20 years to solve this problem as well as to destroy the myth perpetrated by the American press, political interest groups, and insensitive individuals that, "All minorities want is a handout."

The 20-year period has also been chosen because I think that this amount of time, at a minimum, is required for a true reversal of roles between the private and public sectors. Bureaucracies, by definition, do not move quickly. It will take a significant amount of time for the government to begin acting in a manner that is consistent with its new role. There will also be a number of individuals who resist the change due to the previous minority business development failures, and it will take time to convince them of the merits and potential success of the new approach.

The minority community will also need a significant amount of time to straighten out some of its internal problems so that it is ready to move. Minorities will have to change how they perceive themselves. There will be a demand for new leader-

ship. Black universities and Hispanic organizations that have been forgotten during the period of integration will have to be strengthened and supported once again. Despite the failures of the past, minority communities will have to take responsibility for seeing that their institutions are upgraded, their officials are held responsible, and their members invest in minority economic development. This process will take time.

Finally, even though 20 years is not long in terms of the amount of time it took to create the problem, and of what has to be accomplished to effect real change, we believe that we cannot put it off any longer. Twenty years is long enough to determine whether the process is working or not. Minority youth, institutions, businesses, and communities cannot afford to wait much longer.

Enlist and Support a New Cadre of Minority Leaders

Recently, my firm conducted a survey of minority entrepreneur-managers for the Department of Commerce, MBDA. The professionals we interviewed and surveyed were often characterized as the "invisible people." They do not make newspaper headlines, they are not antisocial in behavior, and day in, day out, they get jobs done in their own or others' businesses and organizations. In many ways they are the ones who truly hold the communities together without receiving proper credit or support. We believe the Federal Government should leverage this group's unique skills and strengths; reach out to involve this leadership group in major decisions prior to "crises," rather than after they occur; and assist them to develop individual businesses that would shelter and train the leaders of tomorrow.

We think this reality was best expressed by Roger J. Vaughn in a paper presented in the spring of 1984 at a conference organized by the New Enterprise Development Institute when he stated:

> We have a million potential entrepreneurs who are denied access to capital because of the color of their skin or because of an unfortunate address. We do not need to guarantee them from failure; we need to offer them the same opportunity to fail afforded to other members of society. It is not Washington's job to underwrite every mismanaged enterprise from Bethlehem Steel to Beth's Take Out. It is Washington's job to destroy the barriers to economic opportunity—barriers that have been certified in the nation's capital.

Across the country this cadre of professionals and paraprofessionals is starting to organize and form alliances to effect change in America. The leaders of government, the press, and private industry should seek to understand them in greater depth.

Alternatives: Minority Communities Must Create Their Own Vehicles for Change

In the end, if a strategy for minority and women business development is to be successful, minorities will have to take control over their own destiny. To assume that government and large majority firms will do it is *unrealistic, wrong, and self-defeating.* However, taking control will not be easy for the reasons stated in previous paragraphs. Still, it can be done if the minority community creates new institutions that:

- Foster economic independence,
- Articulate the needs and desires of minority people,
- Control the flow of capital in and out of minority communities,
- Develop a strong minority professional class, and
- Encourage new alliances among and within large minority groups.

Foster Economic Independence

For the majority of the citizens in minority communities, the thought of economic independence is only a "concept"—one not readily understood or appreciated. At best, they feel that after addressing the needs of the poor in housing, education, social welfare, etc., the government and minority leaders should *also* focus on economic development. Unfortunately, they do not see that their poor economic status is the *core problem* and that problems such as bad housing, inferior education, and weak institutions are only related subsets of the larger problem. Until the minority community understands this subtle but important difference, its progress will be seriously impaired. One must isolate the real problem before a solution can be formulated.

Articulate the Indigenous Needs of Minorities and Women

Another major problem besetting minorities is their inability to articulate their basic economic needs except in the area of job creation. Once again, jobs are derivatives of economic development and

profitability, not vice versa. Minorities will have to accept that it is in their long term interest and the long term interest of society that they control their own "job-creating" institutions. They will have to articulate to those who perceive minorities as wage earners *only* that this belief is wrong. They will also have to articulate that there is a role for Hispanic multinationals exporting to South America, black multinationals creating jobs in Harlem, and Asian American multinationals importing capital from the Far East. To a great number of people, the advantages of the above situations are readily apparent; thus, it will be the role of minority institutions to convince the general business community of the benefits that will accrue to the entire economy if minority cultural advantages are properly leveraged.

Control the Flow of Capital in and out of Minority Communities

Within minority communities, it is estimated that a dollar turns over once and then flows out of the community. In certain majority communities, it turns over as many as 12 times. A capital turnover of 12 times is power. At this juncture, it would be unfair to blame the minority resident for capital flight because within many of the communities the minority business base is not attractive enough to secure the dollars. Capital flow imbalance has to be rectified by competitive minority institutions.

Develop a Stronger Minority Professional Class

The key factor for any business or economic venture is the people who manage it. As we stated in our 1978 report to the Department of Commerce, the minority community must develop a core group of minority businesses and business leaders that can have a significant impact on society. This group would provide direction and guidance not only to the minority business community, but to the economic community at large. Specifically, this group would be expected to

- Manage and develop businesses of size,
- Employ large numbers of minority workers in both urban and rural areas,
- Assume policymaking roles in government and on boards of *Fortune 500* firms, and
- Provide role models for subsequent generations of minority youth.

This cadre of leaders will have to be one to lead the minority community, speak on its behalf, and be respected as peers by *Fortune 500* CEOs and government leaders around the world. This group is being developed slowly. Instead of retreating, the government, educational institutions, and foundations should be increasing their efforts to increase this highly critical cadre of leaders.

Encourage New Alliances Among and Within Large Minority Groups

There are several myths circulating concerning minority business development. One of them is that the various ethnic groups are unable to work together. This is not the case. They will work together if they:

- *Establish common goals and objectives.* Once the different interest groups agree where they are headed, then, and only then, can they utilize strategies that have been successful for them on an individual basis to get there.
- *Understand their respective needs and responsibilities.* All minority business communities are not the same. They do, however, have the potential for complementing each other; i.e., the Hispanic community has a better capital base; the black community has more professionally trained managers; etc.
- *Transcend basic fears and misunderstandings.* When one stops to analyze what the stakes really are, and how far minority business as a totality has to go to reach parity, the petty differences and jealousies that separate different ethnic groups become insignificant.

Conclusion

In projecting what we could do differently to improve the Nation's minority business development programs, I think we should first establish where we hope to go, when, and by what means. In the previous major reports my firm authored for the Department of Commerce, we attempted to provide a holistic and comprehensive framework for change, with endless pages on new approaches. It is beyond the scope of this assignment to go over all of them here. As we pointed out in the last report, to solve the complex problems of the minority business community, the private sector, public sector, and minority community must work together in a new partnership.

In ending I would candidly state, although the temptation might be great at this juncture, do not throw the minority- and women-owned business communities to the vagaries of the *"free market"*

alone. Because as much as I hate to admit it, and as sad as it is, the free market is not yet *"free"* for minorities or women. As mentioned above, for the next 20 years I say let's build a true partnership between the private sector, minority- and women-owned businesses, and government.

I believe that my good friend Michael Jordan, of Frito-Lay, summed it up well in a speech before the Association of Private Enterprise Education:

> Think of your business community as a series of highways, roads and small streets, all forming the map of a city. In some areas the roads are in terrible condition; in others they are just a little worn. To make your city better for everyone, you try to fix the worst roads first. You make them your top priority. Naturally, some people who live along the slightly worn roads can't see past their own front doors and complain.
>
> Minority business communities are the crumbled roads. They must be the city's first priority. If people realize how important minority business development is for an entire city—both for the short-term and long-term future—they will support a program that encourages growth.

Thank you for the opportunity to address this distinguished Commission, and I look forward to our mutual efforts to address these important issues.

Minority and Women's Business Set-Asides: An Appropriate Affirmative Action Response to Discrimination?

By Peter G. Kilgore*

"Affirmative action" has been described as a concept with no single meaning.[1] Professor Thomas Nagel of New York University made a distinction between "weak affirmative action" (advertising, active recruitment, special training, etc.) and "strong affirmative action" (preferences to various groups).[2] Mechanisms used to implement affirmative action such as set-asides, quotas, preferences, and goals similarly escape consistent or uniform meaning.[3] Indeed, both the broader concept of "affirmative action" as well as these implementing tools have received such varied application that the only conclusion one can reach is that they mean different things to different people, ranging from simple diligence in ensuring against discrimination to conscious favoritism of persons based on race, ethnic status, or sex.[4]

Accordingly, a threshold necessity exists to define the specific affirmative action tool under examination here, the "set-aside." As long as an affirmative action mechanism is drawn on the basis of race, ethnic status, or sex with the object of a result-oriented approach rather than a nondiscriminatory procedure, the concept will fall within the issue being addressed irrespective if the term is labeled "set-aside," "goal," "preference," or "quota."[5]

Examples and Definition

Examples

Several illustrations highlight the major factors examined in this article: the mechanism used is in the form of set-asides, goals, quotas, or preferences; the type of discrimination they are intended to address concerns perceived societal or historical acts against certain classes; the groups and persons receiving the benefits did not actually suffer any identifiable harm;

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[1] Sowell, "Affirmative Action Reconsidered," *The Public Interest* at 1–2 (1976).

[2] *See* the testimony of T. Nagel before the Senate Judiciary Subcomm., No. 117 Daily Lab. Rep. (BNA), A-9 (June 18, 1981).

[3] *See* Sisneros, "Revisiting Affirmative Action Case Law," 34 *Lab. L.J.* 350 (1983).

[4] *See* "Statement of Assistant Attorney General Reynolds Before House Lab. Subcomm. on Employment Opportunities," No. 184, Daily Lab. Rep. (BNA) F-1 (Sept. 23, 1981).

[5] Justice Powell commented in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 288–289 (1978), that labels such as goals, quotas, or set-asides were nothing more than semantic distinctions.

and the implementation of the mechanism actually did or likely would injure innocent third parties.

The first case concerns a matter in which this writer was cocounsel involving preferences under Presidential Executive Order 11246, as amended.[6] In *United States Department of Labor* v. *Priester Construction Company,*[7] a small construction contractor in Davenport, Iowa, entered into a Federal contract covering work on a project for a 20-month period between 1975 and 1977. The contract was found to have incorporated a requirement to meet a 5–6 percent minority "goal" in *each* construction craft utilized on *all* projects (both Federal and non-Federal) during the 20-month period in the covered geographical area. This "goal" was derived from a so-called Hometown Plan formulated several years earlier by a group unconnected with this employer from a statistical base neither part of this contractor's Standard Metropolitan Statistical Area (SMSA) nor one from which it recruited workers. The Federal contract in question, as well as the other projects subject to the "goals," was also performed in a SMSA other than the one from which the "goals" originated.

Federal census statistics established that the goals far exceeded minority availability in the contractor's SMSA and recruiting area. For example, the 5–6 percent goal in the categories of brickmasons and ironworkers was imposed even though government figures revealed that no minorities existed in those trades. Testimony also revealed that, in fact, no minorities were even known to exist in these categories. Similarly, in the carpenters' trade, the 5–6 percent figure applied notwithstanding government data that revealed only a 1.2 percent minority availability. These "goals" were also imposed on Priester Construction Company even though the government had prescribed "goals" for a project in this contractor's SMSA 3 years *after* the Federal contract less than half the figure imposed on Priester. The trial judge accordingly found, which the government did not dispute, that the "goals" were unrealistic.

Nevertheless, the 5–6 percent figure was reimposed in 1983 in the categories the contractor failed to obtain statistically during the contract period in order for the company to bid again on Federal projects. This result occurred by order of the Department of Labor (DOL) even though *no* discrimination had occurred or was even charged in the case, the company had *never* been found to have discriminated in the past, and in fact, *no charge* of discrimination had ever been filed against it in any local, State, or Federal agency or court since its inception. Moreover, DOL reimposed these "goals" notwithstanding the fact that during the contract period the company had an overall minority hiring rate of 10 percent, which was almost double the goal if applied overall rather than to each craft; had actually met or far exceeded the 5–6 percent minority goal for the alleged deficient time in each of the crafts after completion of the Federal contract even though the company was not a Federal contractor during this period; and had made substantial efforts to implement the government's suggested affirmative action paperwork both during and after the contract.

The second example also involves a matter in which this writer corepresented a party, *Fullilove* v. *Klutznick.*[8] In 1977 Congress enacted a statute[9] authorizing billions of dollars in appropriation to State and local governments for use in local public work projects in the construction industry. A provision was inserted in the act imposing a "set-aside" for minorities on these projects.[10] Specifically, at least 10 percent of all articles, supplies, and materials used in a funded project essentially had to be procured from minority business enterprises (MBE). Several individual construction companies, as well as associations of construction contractors, challenged the enactment since they were being excluded from bidding on such portions not because they had discriminated or because those MBEs permitted to bid had been identifiable victims of actual discrimination, but simply due to the fact of each business' ethnic or racial identity.[11]

The third example concerns a county set-aside. As a result of a resolution passed by the Dade County Council in 1981[12] directing the county manager to develop programs to maximize black participation in

[6] 3 C.F.R. §339 (1965).
[7] 78-OFCCP-11 (1983).
[8] 448 U.S. 448 (1980).
[9] Public Works Employment Act of 1977 (PWEA), Pub. L. No. 95-28, 91 Stat. 116, 42 U.S.C. §6701 *et seq.*
[10] 42 U.S.C. §6705(f)(2).
[11] For a general discussion of MBE assistance programs, *see* Levinson, "A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs," 49 *Geo. Washington Univ. L. Rev.* 61 (1980).
[12] R-1672-81 (Nov. 3, 1981).

county contracts, a local ordinance was passed authorizing implementation of a "set-aside" for bidding on construction contracts exclusively for black contractors as well as to establish black subcontractor goals on any county contract.[13] Accordingly, a 100 percent black set-aside for bids on the general contract and a 50 percent black goal for the subcontract were imposed on a particular project.[14] However, unlike most set-asides or goals that give the benefits to various "minorities," these set-asides were limited *only* to black contractors.

A fourth example also concerns a local ordinance. The minority government contracting provisions in the District of Columbia provide that agencies shall allocate construction contracts to MBEs to reach a goal of 25 percent of the dollar volume of all contracts or such other goal as determined by the city's Minority Business Opportunity Commission.[15] To achieve such a "goal," the commission was authorized to include in any given construction program a "sheltered market" in which only MBEs were permitted to participate.[16] In addition, the prime contractor, which had to perform at least 50 percent of the contracting effort, was required to use MBEs for 50 percent of the subcontracting work.[17]

Finally, illustrations abound as to affirmative action plans (AAP) being implemented supposedly to balance statistically an employer's work force by race, ethnic status, or sex. For example, in 1978 the Santa Clara County, California, Transportation Agency implemented a voluntary affirmative action plan establishing a "goal." This goal was unlimited in duration and imposed to attain a work force percentage that approximated the distribution of women and minorities in the county labor market.[18] The AAP, which made no admission or mention of past discriminatory practices, was utilized as a basis to promote a female employee over a more qualified male who had been recommended for the position by the agency's examiners.

In Philadelphia, the city's Board of Education adopted a quota system in order to employ at each school's respective level (elementary, middle, and high school) between 75 percent and 125 percent of the existing proportion of black teachers employed citywide. This system, originally imposed in 1978 at the insistence of HEW's Office for Civil Rights (OCR) as a remedial device to desegregate school facilities,[19] was voluntarily reinstituted in 1982 even though OCR had informed the board that the faculties had been successfully integrated and that no further need existed to continue the 75–125 percent quota. The board, nevertheless, decided to continue the quota in order to *maintain* a faculty ratio based on race. Teacher transfers were accordingly made thereafter on this basis to the detriment of certain white instructors.

In another case, the Jackson Teachers Association (a union) and the Jackson, Michigan, Board of Education agreed in their collective-bargaining agreement that in the event layoff of teachers became necessary, seniority would dictate "except that at no time [would]. . .a greater percentage of minority personnel [be] laid off than the. . .percentage of minority personnel employed at. . .[the time of the] lay off." The agreement also required that callbacks would be made in order to "*maintain* the above minority balance."[20] (Emphasis added.) No finding of discrimination supporting the use of this set-aside had been made.

Another recent example concerned the city of South Bend. A preferential treatment system was established in hiring on the basis of the existence of a statistical disparity between the percentage of minorities employed in certain job categories and their class representation in the population of the city.[21] The plan, which was invoked voluntarily even though the city's hiring procedures previously in use were not considered discriminatory, had two separate lists to rank those minority and nonminority applicants achieving a certain base score on hiring tests. From each list a recommendation of hire was made. In 1980 a white male took the test and was ranked second on the nonminority hiring list, but was not hired even though several minority applicants with lower overall scores were employed.

Finally, in a case recently denied review by the Supreme Court, the State of New York raised

[13] Metropolitan Dade County Ord. No. 82-67 (July 20, 1982).
[14] Res. No. R-350-82 (Oct. 5, 1982).
[15] Sec. 1-1146(a) D.C. Code.
[16] *Id.* at sec. 1-1147(b).
[17] *Id.* at sec. 1-1147(c).
[18] See, Johnson v. Transp. Agency, Santa Clara County, Cal., —F.2d—, No. 83-1532, No. 239 Daily Lab. Rep. (BNA) D-1 (9th Cir., Dec. 12, 1984).
[19] Kromnick v. School Dist. of Philadelphia, 739 F.2d 894 (3d Cir. 1984).
[20] Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1154 (6th Cir. 1984), *cert. granted,* 53 U.S.L.W. 3727 (U.S. Apr. 16, 1985) (No. 84-1340).
[21] Janowiak v. City of South Bend, —F.2d—, No. 84-1321, 245 Daily Lab. Rep. (BNA) at D-1 (7th Cir., Dec. 6, 1984).

examination scores of minority applicants in order to promote more minorities to the position of "Correction Captain" in the New York State prison correctional system.[22] The basis for the affirmative action measure was that a statistical disparity existed between the promotion test's selection rate of minorities and nonminorities. Specifically, the test in issue was given to 275 candidates in 1982, 32 of whom were minority. Results indicated that 25 percent of the minorities passed the test, while nonminorities had a 48 percent passing rate. Notwithstanding the test's objectivity, relationship to job duties, and the lack of any discriminatory acts committed by the employer, a conclusion was reached that the minority passage rate of approximately 50 percent of the nonminority rate demonstrated adverse impact under EEOC guidelines.[23] A separate normalization curve was, therefore, established for minorities, resulting in eight more minorities passing the test, increasing the scores of minorities who had previously passed, and revising the highest minority score to become the overall highest score of all candidates.

Definition

These examples demonstrate the type of preferences that should not be utilized.[24] No specific discrimination charges existed against the employer; no beneficiary of the program established actual harm because of any discrimination; and statistical balance was either the sole or appeared to be the underlying objective. Three definitional considerations need emphasis in regard to such programs.

Discrimination

Absent some form of actual or historical discrimination, racial, ethnic, or sexual preference implemented *solely* to achieve a statistical balance constitutes discrimination for its own sake.[25] Presuming some indicia of discrimination forms the background for the preferential program no matter how remote or unconnected with the particular employer involved, the question becomes what *type* of discrimination warrants a set-aside.

The examples cited indicate that the entities implementing the program were not found to have discriminated against any individual, nor were the beneficiaries found to have been identifiable victims of any actual discrimination. The program was justified in each case either because of a perceived concept of historical discrimination committed in the past against the chosen classes by society in general or the fact that a racial or sexual statistical imbalance existed between the entity's work force and the population or labor market survey.[26] For purposes of utilizing set-asides, this is too broad a definition.

Nonvictims of any specific identifiable discrimination committed by an entity considering affirmative action should not benefit at the expense of innocent third parties. If, in fact, a discriminatory practice is identified, then appropriate measures such as an injunction can be obtained to eliminate the practice, and make-whole remedies, including perhaps a set-aside, should be considered.[27] However, unless there are identifiable victims such as, for example, applicants being denied hire or employees denied promotion due to race, sex, or ethnic status, the type that triggers as a *remedy* the possible use of a set-aside should not include societal or historical discrimination against classes or statistical disparities between various groups.

Thus, for purposes of considering whether a set-aside type of mechanism should be used, "discrimination" must be found and defined to mean: (1) The entity desiring to implement the device has committed actual discriminatory acts separate from statistical disparities; (2) identifiable actual victims exist against whom such acts were committed; (3) the degree and type of harm each victim suffered must be measurable. Only then should consideration be given to how to make whole the victims, including the possible use of a set-aside.

Groups

Depending on the statute, ordinance, or program under which the preferential treatment falls, various

[22] Bushey v. New York CSC, —U.S.—, No. 84-336, No. 5 Daily Lab. Rep. (BNA) E-1 (Jan. 7, 1985).

[23] 29 C.F.R. §1607.4(D).

[24] The issue here is *not* what legally can be or is implemented under existing court interpretations, but what *should* be the standard for use of these type of mechanisms.

[25] 448 U.S. at 529; 438 U.S. at 307.

[26] This report is directed only at remedies imposed after a finding of some form of discrimination. It does not address the separate question of whether statistical disparity alone is a justifiable basis to find discrimination. As to this issue, compare, e.g., Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983); Stetser v. Movack Investment Co., 657 F.2d 962 (8th Cir. 1981); Lehman v. Yellow Freight Sys., Inc., 651 F.2d 520 (7th Cir. 1981); and EEOC Chairman Thomas' statement, "EEOC Chief Cites Abuse of Racial Bias Criteria," *Washington Post,* A13 (Dec. 4, 1984).

[27] *Compare* "Statement of U.S. Commission on Civil Rights Regarding Utilization of Racial Quotas in Employment Policies," No. 12, Daily Lab. Rep. (BNA) D-1 (Jan. 19, 1984).

groups have been either included or excluded from favored treatment. If, however, benefits are to be expended to groups, a clear definition of each group needs to be made.

Illustrations from certain cases cited in the examples above emphasize the need for definitions. Under the Executive order program, references were directed towards blacks, Hispanics, Asian or Pacific Islanders, American Indians, or Alaskan Natives.[28] Under the Public Works Employment Act (PWEA) set-aside, Negroes, Spanish-speaking persons, Orientals, Indians, Eskimos, and Aleuts were included.[29] Dade County, on the other hand, only permitted blacks to be given the preference. It is readily apparent from these examples, however, that inclusion of groups was given little definitional consideration.

For example, although the groups appear at first glance to be the same, the names used are neither always facially identical nor necessarily fully interchangeable. To illustrate, "black" is a term used both under the Executive order program and by Dade County. However, "Negroes" is used under the MBE provision. Are the two terms identical? Similarly, are "Spanish speaking" persons, as used in MBE set-asides, identical to "Hispanics" as identified under the Executive order program? Also, are "Orientals" coextensive with "Asian or Pacific Islanders"? Are "American Indians" or "Alaskan Natives" the same as "Indians, Eskimos, or Aleuts"?

Even more complex problems arise in identifying subgroups under each of these classes. For example, in the only program that has apparently attempted to delineate the definition of groups,[30] "black" means any racial group of Africa (except North Africa); "Hispanic" includes persons of Mexican, Puerto Rican, Cuban, and Central or South American *origin* or other Spanish culture; "Asian" or "Pacific Islanders" refers to the *original* peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands; and "American Indian" or "Alaskan Native" signifies the *original* peoples of North America who maintain identifiable tribal affiliations. These so-called definitions, however, raise separate identification questions, such as what African racial groups are "black"? Does "other Spanish culture" include persons from Spain or Portugal? How far "east" should one look to define the scope of the subgroups for Asian or Pacific Islanders? Indeed, what areas are included in the "Pacific Islands"? Are all citizens of Hawaii and Alaska included? What is meant by "identifiable tribal affiliations"? Does "Spanish speaking" mean *any* person who speaks Spanish, irrespective of his or her "heritage" (PWEA provision)? Is a college language major of American parentage who speaks Spanish included? What is meant by the term "Indian" (PWEA provision)? Does this refer only to American Indians, or does it also include American citizens from India?

Individuals

In addition to group identification, classifying a person into (or excluding a person from) minority groups necessitates a determination of that person's racial or ethnic makeup. The problem is, of course, that such classifications under existing standards appear inherently ambiguous and open ended.[31]

The difficulty in defining racial or ethnic characteristics for any of the chosen groups is highlighted by the so-called guidelines utilized under the Executive Order 11246 program. The focus, as indicated earlier, is on an individual's "origin."[32] The immediate question, however, is what is meant by "origin"? Taken literally, it could be argued that all humans originate from the same source. If "origin" means something different or to a lesser extent than the same source, is it based on a certain blood percentage? If so, Justice Stevens' comment in *Fullilove* is appropriate: "What percentage of. . .blood. . .is required for membership in the preferred class?"[33] Assuming "origin" relates to blood percentage, must the candidate's parents, grandparents, great-grandparents, and so on be considered to determine eligibility? If so, how far back must one go, and how can the race or ethnic status of relatives be traced? Indeed, identifiers could find themselves in the dilemma where a "black" was deemed in one State to be a person with one-eighth or more African blood while an American Indian was not a "col-

[28] *See* 41 C.F.R. §60–4.3(a).
[29] 42 U.S.C. §6705(f)(2).
[30] *See* 41 C.F.R. §60–4.3(a); *also see* EEO–1 Reports, 1 CCH–Employ. Prac. para. 1881 at 1322 (1981), submitted under Title VII of the Civil Rights Act of 1964, 42 U.S.C §2000e *et seq.* For a discussion of the lack of definitions in this area, see Kilgore, "Identifying Employees for Purposes of EEO Compliance: Opening Pandora's Box," 30 *Fed. B.J.* 445 (1983).
[31] *See generally* Nugan, "Conflict of Laws: Group Discrimination and the Freedom to Marry—A Policy Science Prologue to Human Rights Decisions," 21 *How. L.J.* 30–34 (1978).
[32] 41 C.F.R. §60–4.3(a).
[33] 448 U.S. at 552 n.30.

ored" person if he or she had only one-sixteenth or less of such blood.[34]

Identification may also be made under government programs by using a threefold standard:[35] appearance, whether he or she professes to be a minority, or whether the community regards the individual as belonging to a particular minority group. As to "appearance," one must first determine whether it pertains to color of a person's skin, some other physical characteristic, or both. If skin color is a gauge, Caucasians have been judicially recognized to range from white to olive brown.[36] Yet, some persons who would likely be acknowledged as members of minorities under the government's "origin" test ("Asian") have, nevertheless, been determined "light skinned" in appearance.[37] If "appearance" involves physical traits other than skin color, what physical characteristics should be examined? Would the factors vary depending upon whether the group is black, Hispanic, American Indian, Asian, or Pacific Islander? Should the shape of a person's lip seam, eye fold, the size and shape of his or her ears, the concentration of pigments in certain anatomical positions (such as hands and feet) be inspected?[38]

With respect to whether the individual "identifies with the minority group" or is "regarded by the community," obvious problems exist. For example, a self-labeling (or even employer-labeling) analysis surely could defeat the purpose of classification. Factual questions will arise as to whether a particular person can rightly claim minority status. What mechanism is provided for determining such issues? There may be a desire on the part of many persons to be recognized as minority-group members in order to receive preferred treatment or governmental benefits or protections flowing from such a determination.[39] Furthermore, if a person is "regarded in the community" as being a minority, one must ask "regarded" by whom? What constitutes "the community"? Is a poll required? Does "one person, one vote" apply? What happens when there is a split of opinion? How recently and under what circumstances is the "criterion" satisfied?

It seems apparent that much difficulty exists in defining characteristics by which persons are labeled as being of a particular race or ethnic group. Indeed, a United Nations UNESCO study concluded that the division of the human species into races is arbitrary and invites abusive generalization, depending entirely upon the classifier, circumstance, and purpose.[40] However, if entities are to be in the business of establishing set-asides based on race or ethnic status for persons other than actual identifiable victims,[41] studies need to be undertaken to determine definitions of the terms used to define the class in order to remove, to the extent possible, arbitrary determinations where such important rights will be affected.

Basis/Justification for Affirmative Action

Illustrated Cases

Many of the examples described above touched on the basis for each particular entity's imposition of

[34] *See* Loving v. Virginia, 388 U.S. 1, 5 n.4 (1967); McLaughlin v. Florida, 379 U.S. 1984 n.6 (1974). Recently, such legal battles over racial designation continued. *See* May 21 and June 10, 1983, *Washington Post* ("Louisiana Sees No Shades of Gray in Woman's Request," and a corresponding bill introduced is the Louisiana Legislature to repeal the law declaring a person to be black if he or she has 1-32d black blood).

[35] *See* EEO-1 Reports required under Title VII to the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.;* also see 41 C.F.R. §60-4.3(a).

[36] Trehean v. IBM Corp., 24 FEP Cases 443, 445 (S.D.N.Y. 1980).

[37] Ali v. National Bank of Pakistan, 508 F. Supp. 611 (S.D.N.Y. 1981).

[38] Green v. New Orleans, 88 So. 2d 76 (Ct. App. La. 1956).

[39] N. Glazer, "Affirmative Discrimination," at 200 (1975).

[40] UNESCO "Statement on Race and Prejudice" at 467 (1967).

[41] Although this writer makes no conclusion on the success of attempting to define characteristics identifiable for each race or ethnic group, the reader is directed to certain revealing comments. For example, one scholar commented: "It is unlikely that the species homo sapiens was ever divided into 'pure' races; but if it was, the fact that members of the species are both cross-fertile and migratory unquestionably means that virtually all of us would prove to be of mixed blood if the geneticists were to discover an infallible means of tracing the racial [or ethnic] inheritance of individuals." Bittker, "The Case of the Checker Board Ordinance: An Experiment in Race Relations," 71 *Yale L.J.* 1397 (1962). Studies utilizing U.S. Census Bureau surveys have also pointed out that a substantial portion (one-half) of the American population cannot identify with any degree of certainty their own ethnicity, presumably because of generations of intermixtures. *See* Sowell, "Myths About Minorities," 68 *Commentary No. 2* at 33 (1979). Also see "Cape Verdeans Face Identity Problems in U.S.," *Washington Post,* July 6, 1980, at A1, col. 1 (recounts experiences of Cape Verdean Americans who are descendants of white Portuguese and black Africans, which "confound[ed]. . .American social conditioning and bureaucratic pigeon holers"). The difficulty in identification has also been acknowledged in the judicial setting. *See* Aponte v. National Steel Serv. Center, 500 F. Supp. 198 (N.D. Ill. 1980); and Fullilove v. Klutznick, 448 U.S. at 534 n.5 and 552 n.30.

preferences. Thus, simply a statistical disparity between the employer's racial and ethnic work force composition and either census or SMSA statistics justified Santa Clara County, the Jackson Teachers Association and Board of Education, the Philadelphia Board of Education, the city of South Bend, and the State of New York giving benefits to certain classes at the expense of actual nonminority victims. However, as to the other referenced cases, further comment is warranted.

In *Priester Construction Company,* the trial judge found the "goals" justifiable simply because the company contractually had agreed to them notwithstanding the following factors: (1) The contractor's business and employees were derived essentially from the Davenport-Moline-Rock Island SMSA while the goals the government imposed were based on the minority representation in a much more industrialized SMSA (Peoria, Illinois), some 90–100 miles away; (2) its employees, due to being unionized, were hired *exclusively* through a hiring hall arrangement in the Davenport SMSA; (3) the goals were imposed in job categories where either no minorities existed in census statistics for the relevant labor market or far fewer than the 5–6 percent figure required.

Furthermore, the "goals" were reimposed in deficient categories in 1983 even though the deficient minority hours identified by the government had been *made up* after the Federal contract ended. These goals were also reimposed notwithstanding the fact that *no* alleged discrimination existed or was charged. Indeed, during the entire history of the company, no charge or allegation of discrimination had ever been made. So what justification existed for imposition of these preferences? The company was found to have agreed to these figures by signing the government's form contract incorporating goals by reference to another document the contents of which were unknown to the company, and of which it never received a copy.

In *Fullilove,* Congress imposed affirmative action quotas to eliminate the effects of past societal discrimination resulting in a negligible percentage of public contracts awarded to minority contractors. Thus, Congress' purpose in imposing the set-aside was to counteract the perceived effects of past and present discrimination generally thought to have existed in the construction industry, to assure MBEs a certain percentage of federally funded public work contracts, and to compensate minorities bidding on contracts under the program at the time of passage of the act for the effects of social, educational, or economic disadvantage.[42] However, no evidence existed of discrimination by Congress in disbursement of Federal contracting funds, by the State and local government bodies implementing the disbursement, or by companies to whom contracts were granted.[43]

Finally, both county ordinances referenced above in the examples were primarily based on conclusions about past societal discrimination. For example, Dade County's 100 percent set-aside stemmed from reports about the 1980 race riots in Miami, which attributed the civil disturbances to the effects of past societal discrimination.[44] Statistical investigations based on 1977 census data also demonstrated disparities between the number of black contractors and the county's black population. With respect to the District of Columbia MBE provision,[45] the set-aside was based on certain "findings," including that a *societal* pattern of racial discrimination existed to prevent MBEs from gaining a "fair share" of contracts, that a disparity existed between the number of MBEs operating in the community and those participating in public contracting, and that "other impediments" such as financing and bonding kept MBEs from full participation. However, no specific examples of discriminatory acts were referenced as to either the Dade County or D.C. provision.

The justification for preferential treatment must also be examined as to group and individual beneficiaries. Although little argument can be made that class-based discrimination against blacks is part of America's history,[46] that certainly cannot justify classwide conclusions of discrimination against other groups preferred under the set-asides.

Estimates have been given that over 100 separately identifiable ethnic groups exist in the United

[42] 448 U.S. at 527–529.

[43] *See* 123 Cong. Rec. 5327 (1977) (Rep. Mitchell) ("all this attempts to do is to provide that. . .[MBEs] get a fair share of the action"). *See also id.* at 5331 (Rep. Biaggi); *id.* at 7156 (Rep. Brooke); *id.* at 5330 (Rep. Conyers).

[44] *See, e.g.,* report of the U.S. Commission on Civil Rights, *Confronting Racial Isolation in Miami* (June 1982).

[45] Subch. II, "Minority Contracting," §1–1141.

[46] *See* Justice Marshall's separate opinion in Regents of Univ. of Calif. v. Bakke, 438 U.S. at 387.

States, all of which could be considered "minority."[47] Justice Powell acknowledged in *Bakke* that the United States became a nation of minorities, each of which:

> had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said. . .that a shared characteristic was a willingness to disadvantage other groups.[48]

This being so, one must ask: "What justification exists to single out certain groups for benefits to the exclusion of others?" In a pluralistic society, such as the United States, a list of any groups that excludes some seems to be inevitably underinclusive. As pointed out in *Fullilove:*[49] "How does the legacy of slavery and history of discrimination against the descendants of [blacks]. . .support a preference for Spanish-speaking citizens. . . ."

Furthermore, even if one assumes a particular group should be given some preferential treatment,[50] justification does not seem to exist to extend benefits solely on the basis of a racial or ethnic characteristic if, in fact, no identifiable discrimination and harm has actually occurred against the specific beneficiaries of the program. Yet, under the preferential treatments referenced, innocent third parties (nonminorities) were asked to accept the harm imposed—be it failure to be promoted, hired, or to receive or bid for a contract—on the *basis* that the minority or female receiving the benefit should obtain the advantage *solely* because he or she belonged to a class against which some form of historical discrimination was perceived to have been practiced or in which a statistical imbalance was determined.

Is the Number of MBEs Caused by Discrimination?

In the examples cited, no discrimination was committed specifically by the entity imposing the affirmative action. For example, Priester Construction Co. was neither found to have discriminated nor charged with discrimination. In fact, no charge of discrimination had even been filed against the employer with anybody (Federal, State, or local) in the history of the company. In *Fullilove,* no evidence existed in the legislative history of the PWEA that Congress had engaged in past discrimination in the disbursement of Federal contracting funds.[51] As to the county set-asides, findings were made in Dade County that black contractors had been awarded only 1.4 percent of the dollar value of nonfederally assisted county construction contracts for the period 1977–80.[52] Reports also demonstrated that black businesses lagged behind other minority businesses (i.e., Hispanic) due to the black community's "lack of tools" for economic development, including lack of capital and entrepreneurial development.[53] However, the resolution[54] did not identify any specific artificial barrier or past discrimination against black construction contractors. As to the District of Columbia MBE provision, certain "findings"[55] included a statement about a "societal pattern of racial discrimination."[56] Finally, each of the AAPs referenced were based not on specific discrimination, but historical discrimination by society and statistical imbalances.

Thus, no evidence connects the number of MBEs or minorities in each case to any identifiable act of discrimination by the employers involved. Nevertheless, whether connected to specific discrimination or not, or whether the number somehow reflects a shortage due to this country's history, misses the point. Actual victims should not be created as a remedy for society's past wrongs unless actual victims are established as being discriminated against by the entity desiring to implement the program. To do otherwise rewards nonvictims over innocent third parties solely on account of a person's race, ethnic status, or sex.

Fairness

The examples illustrate the fact that awards of specific benefits are made to certain individuals because of race, ethnic status, or sex. On the other hand, persons are denied the identical benefits because of the same immutable characteristics. This

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[47] Thernstrom, *Harvard Encyclopedia of American Ethnic Groups,* at vi (1980).

[48] 438 U.S. at 292.

[49] 448 U.S. at 552 n.30.

[50] If justification for group preferences is based on discrimination against each class in the past, it seems the benefits given each class somehow should correspond only to the magnitude of discrimination each class suffered in comparison with other groups. Otherwise, both under and overinclusive remedies would result.

[51] 448 U.S. at 528.

[52] *See* references to reports at 552 F. Supp. 909 (S.D. Fla. 1980).

[53] *Id.*

[54] Res. No. R-1672-81.

[55] Subch. II, "Minority Contractors," §1-1141, D.C. Code.

[56] Although §1-1141(4) does refer to "discrimination," no specific examples were given, and indeed the reference appears to be to the statement about "societal discrimination under (1)-(3)."

detriment, however, is summarily dismissed as the price nonminority individuals must pay for the acts of our forebears.

For example, the Jackson Board of Education set-aside was justified as being fair to the white teachers being displaced on the basis that "[w]hen effectuating a limited and properly-tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' is not impermissible."[57] The Philadelphia School District plan was deemed fair to foster racial balance because it did not "unnecessarily trammel" the rights of reassigned nonmminority teachers.[58] The Santa Clara AAP was found fair because the excluded white happened to be only one person or, at most, the nonminorities directly harmed were low in numbers.[59] Such justification was similarly used for the MBE set-aside in *Fullilove.*[60]

Essentially, these bases reduce to the conclusion that remedies for *nonvictims* are deemed acceptable because the burden imposed on the *class* of innocent third parties is perceived as "necessary" even though *specific* individuals are totally trammeled. The focus for justification is on the detriment to the *class* of nonminorities rather than the *individuals* actually suffering the harm.[61] This perception, however, fails to acknowledge that rights should be construed to inhere in individuals, not groups.[62] Race, gender, or ethnic status should be an improper basis to reward or penalize any person who has not suffered identifiable harm. The beneficiaries in each of the examples cited have no claim to a "rightful place" in the work force or to competitive advantages in bidding.

Indeed, preferential treatment accorded to nonvictims, or even to actual victims beyond measures necessary to make them whole, deprives innocent individuals their rightful place. The question of fairness does not concern the condemnation of historical or actual discrimination by a specific entity or even reparations for actual harm caused identifiable victims. Rather, the issue in using such programs narrows to what remedy is appropriate to improve the status of disadvantaged groups. Should an employer or any other entity give benefits to nonvictims at the expense of innocent third parties because of a perceived guilt of our forefathers?

Set-asides may be warranted, but only in the narrowest of circumstances. When specific persons are identified as having suffered actual harm because of an entity's discrimination, all forms of relief, including set-asides, should be considered to "make whole" such victims. Even then, however, a balancing must occur as to the burden imposed on innocent third parties against alternative, less harmful means to "make whole." This concept, although admittedly in a more narrow context, was recently judicially articulated:[63]

> If individual members of the [preferred]. . .class demonstrate that they have been actual victims of the discriminatory practice [of a particular entity], they may be awarded [reparation for actual harm suffered]. . . .[H]owever,. . .mere membership in the. . .class [should be] insufficient to warrant. . .award; each individual must prove that the discriminatory practice had an impact. . . .Even when an individual shows that this discriminatory practice has had an impact. . .automatic [entitlement does not follow, for a]. . .balance [of] the equities in[volved must occur]. . . .

No one can dispute the laudable objective to end discrimination wherever found or to make whole and improve the opportunities of minorities and females actually suffering the effects of such acts. If discrimination is found to exist in any entity, proper judicial channels are available to eliminate its continuation under the civil rights acts, Constitution, or State laws. However, that does not mean in regard to the remedy for any specific discrimination committed that *all* persons of a particular racial, ethnic, or sexual class should benefit. One of the leading advocates of civil rights in this century eloquently articulated this distinction:[64]

> The relief [for findings of discrimination against an entity calls for] an injunction against future acts or practices of discrimination. . . .[However] affirmative relief, such as hiring, reinstatement. . .or back pay. . .for anyone [not an actual victim should be] *forbidden*. . . .

The concept of equality and fairness commands the elimination of racial barriers, not their creation in

[57] Wygant v. Jackson Bd. of Educ., note 20 above, at 1157 (quoting Fullilove v. Klutznick, 448 U.S. 448, 484 (1980)).

[58] 739 F.2d at 911.

[59] Johnson v. Santa Clara County Transp. Agency, note 18 above at D-4.

[60] 448 U.S. at 484.

[61] *Compare* Vanguards of Cleveland v. City of Cleveland, — F.2d—, No. 83-3091, No. 21 Daily Lab. Rep. (BNA) E-1 at E-3 (6th Cir. 1985).

[62] See "Civil Rights Comm. Praises Supreme Court's *Stotts* Ruling," No. 125 Daily Lab. Rep. (BNA) A-4 (July 13, 1984).

[63] Firefighters Local 1784 v. Stotts, 105 S.Ct. at 2576 (1984).

[64] 110 Cong. Rec. 6549 (1964) (Senator Humphrey).

order to satisfy a theory of how society ought to be organized.[65]

Effect of Set-Asides

The effect of preferential treatment is not a settled question. Certain studies suggest that the implementation of preferential treatment such as exemplified here increases the percentage of minorities and females in the work force or in the award of contracts. For example, under the PWEA set-aside, progress reports during the implementation of the program indicated that 16–17 percent of the funds expended went to MBEs.[66] Under the Executive order program, a study by the University of California[67] indicated a strong increase in blacks and females.

Argument also exists, however, that such programs have either little substantial effect or that they demean the beneficiaries of the preferences.[68] For example, studies have indicated that Title VII class action litigation against actual discriminators has a greater impact than affirmative action goals for increasing minority levels.[69] Set-asides have also been looked upon as the granting of special benefits to groups that are somehow less qualified,[70] or that these programs imply that the persons benefited cannot compete successfully in the open marketplace.[71] Dr. John Bunzel of the Hoover Institute remarked that imposition of set-asides and quotas will fail to improve the economic and racial position of the disadvantaged and, in fact, will damage minorities' motivation, self-respect, and capacity.[72] Professor William Van Alstyne of Duke University indicated that racial set-asides stamp their recipients with a badge of inferiority and put pressure on minority groups to subdivide themselves against each other.[73] Numerous problems such as nonminority "front" companies have also been found to dilute the objectives of such programs.[74]

Whichever side presents the stronger case, however, is beside the point. Quotas, preferences, and set-asides are opposed by most Americans, including blacks.[75] History cannot be rewritten. To perceive that somehow the use of set-asides will balance this society or cure the perceived effects of historical discrimination in employment, contracting, education, etc. defies reality. Our objective should be equal treatment, not equal results.

Alternatives

Because set-asides are an improper social mechanism to improve the status of disadvantaged groups does not mean other alternatives are unavailable. This Commission indicated that affirmative action techniques such as training, education, counseling, and recruitment programs certainly warrant encouragement.[76]

In this regard, for example, the Commerce Department's MBDA established a National Automated Minority Business Source List for use by companies to do business with MBE firms.[77] Similarly, DOL last year signed a contract under the Job Training Partnership Act (JTPA) with the National Puerto Rican Forum for programs designed to help Hispanic workers, including programs aimed at developing job search skills, etc.[78] JTPA has also been used to teach such groups business training courses and technical assistance for persons starting a small business.[79] As to alternatives

[65] DeFunis v. Odegaard, 416 U.S. 312, 337–44 (1974) (Douglas, J.).

[66] See Department of Commerce "News" Release, the *LPWP "Interim Report"* (1978).

[67] Leonard, "The Impact of Affirmative Action" (The "Crump Study") No. 113 Daily Lab. Rep. (BNA) A-8 (June 10, 1983).

[68] *See, e.g.,* "Small/Minority Business: OFPP Says Agencies' Automatic Doubling of MBE Goals Ineffective," No. 868 Fed. Contracts Rep. (BNA) A-19 (June 15, 1981).

[69] *See* note 67.

[70] *See* United Jewish Organization v. Carey, 430 U.S. 144, 173–74.

[71] Patterson, "The Moral Crisis of the Black American," *The Public Interest,* Summer (1983).

[72] *See* No. 117 Daily Lab. Rep. (BNA) A-9, A-10 (June 18, 1981).

[73] No. 85 Daily Lab. Rep. (BNA) A-5 at (BNA) A-7.

[74] *E.g.,* "Nearly One-Fourth of MBE-WBE Highway Contractors Decertified in New Jersey," Constr. Lab. Rep. (BNA) 1110 (Dec. 5, 1984).

[75] *See, e.g.,* Statements by U.S. Civil Rights Commission Staff Director Chavez, No. 194 Daily Lab. Rep. (BNA) A-7 (Oct. 5, 1984).

[76] See Policy Statement of the U.S. Commission on Civil Rights, No. 12 Daily Lab. Rep. (BNA) A-3 (Jan. 14, 1984). See also Comments of G. Banks, a psychologist with Human Technology, Inc., No. 189 Daily Lab. Rep. (BNA) A-3 (Sept. 28, 1984); and "Analysis of E.O. 11246 Contract Compliance Programs by Staff of Senate Labor & Human Resources Comm.," No. 82 Daily Lab. Rep. (BNA) D-1 at D-2 (Apr. 28, 1982).

[77] No. 875 Constr. Lab. Rep. (BNA) C-2 (Mar. 30, 1981).

[78] "Labor Dept. Enters Contract to Assist Hispanic Workers," No. 18 Daily Lab. Rep. (BNA) A-5 (Jan. 27, 1984).

[79] No. 73 Daily Lab. Rep. (BNA) A-3 at A-4 (Apr. 16, 1984). Indeed, the SBA reported that small firms provide greater employment opportunity for female and minority workers. *See* "Job Creation in Economic Recovery Led by Small Businesses,

that should be explored specifically in regard to business enterprises, the following are suggested.

Joint Ventures

Programs could be established that encourage contractors to enter into joint ventures with individuals who own minority, female, or any disadvantaged business enterprise by providing tax incentives. The joint venture could be on a project basis or for a fixed period of time (hours, months, etc.). The advantage of the joint venture is that this would enable the business enterprise entrepreneur to work with the contractor over a period of time in a "partnership-type arrangement." This arrangement would assist individuals in the development of general management skills and specific expertise in such areas as finance, labor, bidding procedures, marketing, and bonding.

Joint ventures also allow for flexibility. The level of participation in the joint venture could hinge on the disadvantaged individual's experience, with participation on a 90-10, 80-20, or greater basis. If the joint venture extended over a substantial period of time, a greater share of the joint venture could be given to the disadvantaged individual as he or she acquired more experience. This concept would serve to improve the skills of these businesses and thereby provide greater guarantees that they will be able to compete without depriving nonminorities of opportunities to bid competitively on a portion of any project or grant.

Technical, Financial, and Educational Assistance Programs

Another less drastic means, as referenced earlier, is to redirect the efforts of government agencies to provide for greater availability of realistic programs and services in the areas of managerial, technical, financial, and educational assistance to disadvantaged business enterprises. Such programs could provide groups with the help they need to achieve stability and self-reliance. Specifically, the following are suggested:

Technical Services

Technical services could include assistance in: taking steps to become prequalified or licensed as a contractor, subcontractor, vendor, or supplier or whatever requirements exist in a particular industry; understanding bonding requirements; understanding how to obtain loans and working capital, or any other matter related to a particular industry. These services could take the form of either a toll-free number that would furnish information on bidding solicitation and answer questions, or assistance by support personnel who would visit minority, female, or disadvantaged business owners at their place of business to provide technical services. Another support service would be to compile a directory of interested MBEs, WBEs, or other disadvantaged enterprises.

Financial Assistance

A problem in starting any business or in making it grow is obtaining working capital. Financial assistance programs, either individually or collectively with other programs, could greatly assist in increasing the number of viable minority, female, and disadvantaged business enterprises. Although numerous types of financial assistance are conceivable, one program could be direct loans similar to those that the Department of Health, Education, and Welfare provides to students at a reduced rate of interest.[80] Such a program applied to individuals owning or operating business enterprises could furnish needed capital at an extremely low rate of interest. Repayment would be based on a sliding scale of interest, thereby not placing any undue burden on the enterprise just as it is becoming viable.

Educational Training

Many individuals who are socially and economically disadvantaged would perhaps like to get into a business of their own but cannot afford to abandon current employment in order to attend school and acquire the necessary skills. Thus, there exists a gap that could be filled by a program similar to the program that provides direct educational grants to veterans. This program enables veterans to make up for lost time and return more quickly to the "mainstream." Additionally, money could be channeled to the universities to establish work-study programs that would assist individuals who own or operate disadvantaged business enterprises to acquire skills needed to operate a business effectively.

SBA Reports," No. 57 Daily Lab. Rep. (BNA) B-3 (Mar. 23, 1984).

[80] Title IV, Part B, Higher Education Act of 1965 (Pub. L. No. 89-329), 20 U.S.C. §§1071-1087.

Such individuals would learn these skills and also apply them in a realistic business situation.

Assistance Through Trained Workers

One of the greatest sources of training for persons entering the business market for the first time is to learn from the experience of those already there or who have been there. A type of program that could be established with minimal financial assistance from the government would be a "pool" of trained individuals, e.g., business executives, familiar with the particular industry, who would be loaned to minority, female, or disadvantaged business enterprises. Another source of expertise would be the utilization of retired personnel who would be willing to share with such "would be" entrepreneurs the knowledge and experience gained from their prior employment. Another method of learning from experienced individuals would be to establish an internship program to allow individuals who own or wish to own enterprises to spend time (6 months, 1 year) with a "host" company. The purpose of the internship would be to allow the intern to acquire experience in business administration, management, estimation, bidding process, bonding, banking, or whatever would be applicable depending on the industry, and thereby the intern would be able to operate a business.

Bonding

A major difficulty of any enterprise entering the market is obtaining bonding. Many projects, particularly those involving the government, require companies to post bonds covering the completion of work and payments to their employees for work performed. For a viable company, this may not present any real problem. However, where a person is entering the market, he must face the possibility that bonding companies will not provide a bond at any price or will only be willing to provide a bond at a very high cost. Thus, in a competitive bid situation, an MBE, WBE, or other disadvantaged group might not be able to compete because it cannot obtain a bond. Greater assistance could be provided to such enterprises to ensure that there exists a source of bonds at a fair rate.

Conclusion

Where an entity has discriminated, appropriate action should be taken to eliminate the discriminatory acts and make whole those victims who have suffered actual harm. In addition, affirmative action in the form of training, education, joint venture programs, bonding, etc. should be encouraged and explored in order to assist all disadvantaged groups, including minorities and females. However, set-asides or preferences should not be used to remedy the effects of discrimination, whether actual discrimination towards nonvictims or the broader historical discrimination based solely on a person's race, sex, or ethnic status. We should not, as Justice Blackmun suggested, use race "in order to get beyond racism."[81] Such a concept is as onerous in historical perspective as "separate but equal" and is certainly alien to our constitutional objective of equal protection for all citizens. One gets beyond racism by getting beyond it now.[82] Racial, ethnic, or sexual barriers should be eliminated, not created in an attempt to rewrite history by parceling out benefits to nonvictims at the expense of innocent third parties. Hopefully, with the continued urging of this Commission,[83] one day it can truly be said that set-asides, quotas, goals, and preferences, in fact, are a "dead issue," and that progress of any historically disadvantaged group will be measured only by ability.

[81] 438 U.S. at 407.

[82] *See* W. Van Alstyne, "Rites of Passage: Race, the Supreme Court, and the Constitution," *Chi. L. Rev.* 775.

[83] "Statement of U.S. Commission on Civil Rights Regarding Utilization of Racial Quotas in Employment Policies," No. 12 Daily Lab. Rep. (BNA) D-1 (Jan. 19, 1984); *see also* "Rights Panel Rips Affirmative Action," *Washington Post* A4 (Feb. 1, 1985).

Minority Business Set-Asides: Theory and Practice

By Timothy Bates*

Introduction and Overview

Two broad sets of goals have been used to rationalize minority business set-asides:

1. Assist the economically disadvantaged minority entrepreneurs; use preferential loan and procurement policies to upgrade the marginal enterprise to a level sufficient to allow the business to compete successfully in the overall economy.
2. Utilize minority business expansion as a tool for promoting economic development; increase employment opportunities for minorities, particularly in ghetto areas of high unemployment; create role models and success stories that can lead the way to economic progress.

These two lines of justification for minority business set-asides, however, contain important inconsistencies. The most fundamental conflict concerns the question of who should be the target recipients—the most deprived minorities versus those whose prospects of business success are greatest. The first approach entails using minority business aid as a redistributive poverty program for assisting entrepreneurs who are in dire economic straits. The second approach entails encouraging business creation and expansion by those who already possess the traits of successful entrepreneurs, such as managerial experience, strong education credentials, and generally above average incomes.

The section 8(a) procurement program, administered by the Small Business Administration (SBA), typifies utilizing business set-asides as a tool for helping deprived and backward minority businesses. The 8(a) contract recipient is protected from the normal competitive bidding process through which government contracts are normally awarded. Highly capable minority entrepreneurs are likely to be denied the right to participate in the 8(a) set-aside program.

The 8(a) approach to minority business assistance has generally been unsuccessful, as have been all other minority business assistance programs that have focused on helping the truly deprived minority enterprise. Participants have rarely "graduated" from the 8(a) program and become self-sufficient entities. The most successful minority businesses in the 8(a) program are run by individuals who are not particularly disadvantaged; the truly disadvantaged entrepreneurs who receive assistance, in contrast, fail in droves.

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Unlike the 8(a) effort, successful minority business set-aside programs award contracts through competitive bidding processes whereby the more viable and efficient minority concerns are most likely to receive contracts (and/or subcontracts). Over time, the minority-owned firms that can successfully meet their procurement contract obligations (on a profitable basis) are the ones that expand and prosper. Firms that cannot perform adequately, in contrast, tend to perish.

The last section of this report examines a group of over 1,000 minority firms that are either actual or potential participants in government- and corporate-sponsored minority set-aside programs. Their median annual sales and after-tax profits are, respectively, $741,000 and $32,500, and they are nearly as profitable as nonminority businesses of comparable size. These larger scale minority enterprises are the ones that have benefited most from set-asides, and they cannot—as a group—be accurately characterized as "deprived." However, these are precisely the kinds of minority businesses with the potential for achieving goal no. 2—promoting economic development.

The question that invariably arises when government assistance accrues to higher income minority entrepreneurs is this: Why help those who are already successful? The response to this objection is straightforward. These rapidly growing, economically viable firms promote economic development by creating jobs in minority communities. Their profits support investments that, in turn, permit further business expansion and job creation. The presence of business success stories lures younger, better educated minorities into self-employment, and this further promotes the economic development thrust of minority entrepreneurship. Similarly, existing minority-owned firms in less profitable lines of business are induced—by the success story phenomenon—to reorient their operations to areas that offer greater profit potential; once again, economic development is promoted. All of the above describes the process whereby the vestiges of discrimination are gradually overcome, allowing minority enterprise to approach parity with the nonminority entrepreneur universe.

Since the 1960s, the traditionally backward minority business community has started to diversify and expand in response to an influx of talent and capital. Opportunities created by set-asides and the like have induced better educated, younger minority entrepreneurs to create and expand firms in areas such as wholesaling and construction. Although the traditional minority business community consisted of very small firms serving a ghetto clientele, the lure of market opportunity in recent years has induced entrepreneurs to create larger firms that are oriented more toward a corporate and government clientele. These developments are the crux of what economic development is all about.

Definitions and Examples of Set-Aside Programs

Minority business set-aside programs have their roots in longstanding government policies designed to strengthen the viability of small business. Notable among the programs designed to increase small business participation in government contracts was the set-aside procedure established under section 8 of the Small Business Act of 1953. Under section 8 the Small Business Administration (SBA) was authorized to enter into contracts with government agencies having procurement powers and to arrange for fulfillment of these contracts by letting subcontracts to small businesses. In the mid-1960s congressional concern for small business assistance focused increasingly upon economically disadvantaged segments of the population. The 1967 amendment to the Economic Opportunity Act directed SBA to pay "special attention to small business concerns (1) located in urban or rural areas with high proportions of unemployed or low-income individuals, or (2) owned by low-income individuals."[1] The act authorized using government's procurement process to assist these types of businesses.

After enactment of the 1967 amendment to the Economic Opportunity Act, SBA established a new program under section 8(a) that expressly directed Federal contracts to firms owned by socially or economically disadvantaged persons. Under the 8(a) program, government contracts normally awarded through competitive bidding are set aside specifically for firms owned by disadvantaged businessmen. Section 8(a) procurement contracts—amounting to a modest $8.9 million in 1969—have grown by leaps and bounds: $208 million in 1973, $768 million in 1978, $2.3 billion in 1983. Although SBA is not required to award 8(a) contracts exclusively to

[1] Daniel Levinson, "A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs," 49 *Geo. Wash. L. Rev.*, 61, 64–65 (1980).

minorities, the program has largely operated as a minority set-aside operation. A report in 1978 from SBA indicated that 96 percent of the 8(a) companies were owned by members of minority groups.[2]

A second type of minority business set-aside program has developed at the level of individual Federal departments and agencies. Although these programs differ from agency to agency, their common reason for being is found largely in a series of presidential communiques mandating agency purchases from minority business vendors. The initial order of this type was issued by Richard Nixon in 1970, calling for increased representation of small businesses—especially minority business concerns—within Federal departments and agencies. In addition to Executive orders, legislation has sometimes directly shaped agency programs that seek to funnel procurement dollars to minority-owned firms. In the case of the Department of Transportation (DOT), the Railroad Revitalization and Regulatory Reform Act of 1976 authorized creation of a Minority Resource Center. One of the Center's duties was to assist minority businesses in securing government contracts. This piece of legislation was interpreted by the Secretary of Transportation as a mandate for minority business set-asides: Minority subcontracting rose from practically nothing in 1976 to roughly $85 million by May 1978.

A third type of minority business set-aside is typified by the 1977 Public Works Employment Act, which earmarked $400 million worth of local public works for minority firms. A major feature of this act was its minimum 10 percent set-aside provision favoring minorities. The 8(a) program, in contrast, does not automatically rule out nonminority firms, while the agency specific set-aside procurement programs typically do not target rigid percentages of expenditures to minorities. Of tremendous significance is the fact that the 1977 Public Works Employment Act was challenged, leading to the 1980 Supreme Court decision (in *Fullilove* v. *Klutznick)* upholding government enforcement of a minority business set-aside. The use of racial classifications was found justifiable in light of the government objective: remedying the present effects of past discrimination. According to the decision, "Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination."[3]

In addition to the three types of set-asides discussed above—8(a) set-asides, agency specific set-aside programs, and set-asides created by Congress that explicitly establish percentages of expenditures to be expended for minority businesses—other types of set-asides for minorities are common. Two examples of such set-asides are briefly described below, but my description is meant to be illustrative rather than exhaustive. First, a new subcontracting program was created in 1978 through an amendment to section 8(d) of the Small Business Act. For Federal contracts exceeding $500,000 ($1 million for construction), this new program *requires* that prime contractors submit a subcontracting plan for the benefit of small firms generally, and for firms owned by socially and economically disadvantaged individuals particularly. Second, government agencies often encourage and subsidize private groups, such as the National Minority Supplier Development Council, which, in turn, encourage minority business set-aside programs in the private sector. In 1982, for example, $5.3 billion in goods and services were purchased from minority-owned firms by corporate members of the National Minority Supplier Development Council.[4]

Justifications for Minority Business Set-Aside Programs

Despite recurring problems, the concept of minority business set-asides has wide appeal across the political spectrum, as Republicans and Democrats alike have expanded procurement programs for minority entrepreneurs. To some extent, the breadth of this appeal is itself at the root of program difficulties, because it reflects widely differing and sometimes inconsistent goals. Back in 1953 under section 8 of the Small Business Act, small business set-asides were established under the justification of explicitly assisting small businesses in general. The notion of focusing assistance specifically on minority entrepreneurs arose during the War on Poverty years of the mid-1960s. Since minority business set-asides were first formulated in the War on Poverty

[2] 8(a) Review Board, Small Business Administration, *Report and Recommendations on the Section 8(a) Program for A. Vernon Weaver, Administrator,* 1978, p. 23.

[3] Levinson, "Preferential Treatment. . .," pp. 78–79.

[4] Roy Betts and Lewis Giles, "McDonald Sees Increased Private Sector Participation in Minority Business," *Minority Business Today* (December 1983), p. 6.

milieu, the program logically focused initially upon very low-income entrepreneurs. The language of "socially or economically disadvantaged" entrepreneurs being eligible for 8(a) program assistance, however, opened the door to participation by minority entrepreneurs whose incomes actually exceeded those associated with a poverty level of existence.

During the 1970s, minority business set-asides were increasingly targeted to entrepreneurs in middle and high-income brackets, including many who were obviously neither socially nor economically disadvantaged. Broadly speaking, justification for minority business set-asides in the 1970s was seen as remedying the effects of past discrimination; the explicit War on Poverty goal of assisting the impoverished entrepreneur, however, remained. In 1970 an explicitly stated goal of SBA was to increase the number of minority-owned businesses. The notion of an "ownership gap" was introduced as a rationale for assisting minority entrepreneurs: Minorities, according to one influential source, constituted 17 percent of the Nation's population, but only 4 percent of the total number of the Nation's self-employed persons.[5] A strategy of increasing the number of minority-owned firms was justified by the goal of narrowing this ownership gap.

By the late 1970s, justifications for minority business set-asides were once again shifting, acquiring a more qualitative focus. At the Minority Business Development Agency, for example, the goal of simply increasing numbers of firms was supplanted by the goal of creating and assisting more substantive firms, especially those having future growth potential. Assisting manufacturers or wholesalers was viewed as far more important than assisting a like number of barbershops or beauty parlors. When introducing a minority business set-aside provision in the Senate in 1977, Senator Brooke stressed the need to alleviate the chronic unemployment in minority communities; minority-owned firms, he claimed, draw their work forces primarily from such areas.[6] Justifying minority business set-asides on economic development grounds—particularly for creating jobs in high unemployment areas—possesses wide political appeal. A final justification for minority business assistance in general (including set-asides) is the goal of creating an expanding middle class to serve as a role model for minority youth.[7]

The above discussion of justifications for minority business set-asides reveals important inconsistencies. The most fundamental conflict concerns the question of who should be the target recipients—the most deprived minorities who (for that reason) need help most or those who need help less, but have much better prospects for business success. Contrasting these different kinds of potential beneficiaries highlights contrasting objectives: the first, to use aid to minority business as a kind of redistributive poverty program designed to help entrepreneurs who desperately need help; the second, to generate ghetto economic development, create jobs, to encourage success stories and role models that can serve as a leadership class to show the way to economic progress for minorities.

These conflicting objectives run through the various minority business set-aside program initiatives. Although some of these objectives are critically important, others are entirely inappropriate for assisting minority business.

Discrimination's Role in Shaping Minority Business

Capital Access

History suggests that the minority business community has been shaped by limited access to credit, limitations on educational and training opportunities, and dominant attitudes about the roles that minorities should assume in society. In his landmark work, *The American Dilemma,* Nobel Prize-winning economist Gunner Myrdal observed that:

> The Negro businessman encounters greater difficulties than whites in securing credit. This is partially due to the marginal position of Negro business. It is also partly due to prejudicial opinions among whites concerning business ability and personal reliability of Negroes. In either case a vicious circle is in operation keeping Negro business down.

In the same year (1944) that Myrdal's *The American Dilemma* was published, a milestone study by Joseph Pierce provided the first detailed view of a

[5] Timothy Bates and William Bradford, *Financing Black Economic Development* (New York: Academic Press, 1979), pp. 131–32.

[6] Levinson, "Preferential Treatment. . .," p. 76.

[7] Timothy Bates, "Black Entrepreneurship and Government Programs," *Journal of Contemporary Studies* (Fall 1981), pp. 59–62.

large segment of minority business. Pierce analyzed the state of the black business community through an extensive survey of 3,866 black firms in eight southern, two midwestern, and two eastern cities. Six types of businesses that appeared more than 100 times in the sample accounted for over 70 percent of the sampled firms: beauty parlors and barbershops, 1,005; eating places, 741; groceries, 293; cleaning and pressing, 288; shoeshine and repair, 183; funeral parlors, 126. When asked to rank the most significant obstacles to entrepreneurship among blacks, the businessmen cited lack of capital most frequently. For most of these firms, the amount of initial capitalization was less than $1,000; the median value of initial capitalization was $549. The most common source of initial capital (86.3 percent of the firms) was personal savings only; the second most common source was help from relatives.[8]

Personal wealth holdings are traditionally a major source of capital for small business creation and expansion. Herein lies an essential element for comprehending minority business development patterns. A 1971 study of nationwide wealth holdings shows that, on average, black families have less than one-fifth the wealth accumulation of white families.[9] The forms in which wealth is held also differ dramatically:

(a) 64.4 percent of aggregate black wealth holdings represent equity in homes, cars, and trucks; the corresponding figure for whites is 37.4 percent.

(b) 10.2 percent of aggregate black wealth holdings are in the form of financial assets (versus 30.1 percent for whites).

(c) Finally, 5.7 percent of aggregate black wealth holdings represent equity in small businesses (versus 9.4 percent for whites).

If we exclude blacks in low-income brackets and focus only upon those earning over $20,000 annually, we find that their average wealth holdings are $30,195 per household—roughly 30 percent of the average wealth holding of $101,009 reported by all whites earning over $20,000 per year. Overall, blacks collectively (as well as those earning over $20,000 annually) have very small wealth holdings relative to whites. Furthermore, most of their wealth is held in nonbusiness and nonfinancial forms. White households not only hold, on average, over five times as much wealth as blacks, they also hold 39.5 percent of their aggregate wealth in the form of business equity and financial assets (versus 15.9 percent for blacks).

Comparable detailed studies on the wealth holdings of Hispanics, Asians, and other minorities are unavailable, but partial data show very interesting patterns. Data from 1977 on 16 types of wealth (but not total wealth) indicate that Asian wealth holdings, on average, are roughly equal to the wealth holdings of nonminority households. Hispanics, in contrast, lag far behind nonminorities in terms of mean wealth per household, but they are slightly ahead of blacks. Except for Asians, it is clear that minorities collectively have very little aggregate wealth—relative to whites—available for investment in business creation and expansion. The important ramification of this fact for comprehending minority business development is the following:

> The larger scale minority businesses rely much more heavily upon long term debt as a source of funds for their firms; whites, in contrast, rely much more heavily upon owner's equity. In periods of high interest rates, the highly leveraged minority businesses face stiff debt servicing requirements that depress their profitability relative to their nonminority cohorts.

The debt-burdened capital structure of larger scale minority businesses is the single trait that most clearly delineates them from nonminority firms of similar size and scope. Historically, lack of access to capital in any form was a severe constraint to minority business expansion. Today, in contrast, the *form* of capital accessible to minority entrepreneurs—long term debt—is a severe constraint on their profitability and, hence, their ability to expand. Further data on this phenomenon are presented in the next section of this paper.

Reductions in Discrimination Shape Minority Business

Past limitations on educational and training opportunities available to minorities, as well as capital access for minority entrepreneurs, have changed dramatically in the past two decades. As discussed above, access to long term debt has increased for

[8] For a full description of this study, see Timothy Bates, *Black Capitalism: A Quantitative Analysis* (New York: Praeger, 1973), pp. 10–12.

[9] Henry Terrell, "Wealth Accumulation of Black and White Families," *Journal of Finance* (May 1971), pp. 366–67.

minority-owned firms. Availability of government loan guarantees (against default risk) induced thousands of banks to extend loans to minority businesses, thus eroding a tradition of minimal contact between minorities and commercial bank lending departments. College enrollments by minority students increased dramatically in the 1960s and 1970s; enrollment in business-related fields has been particularly rapid. The incidence of black college enrollment, for example, rose from 10.3 percent in 1965 to 19.4 percent in 1981 for those aged 18–24. Educational achievements have translated into occupational and earnings gains, especially among young minority college graduates. Black male college graduates aged 25–34 earned in 1959 only 59 percent as much as their white college cohorts; by 1979 this figure had jumped to 84 percent.[10]

Since the 1960s, the traditionally backward minority business community has begun to diversify and expand in response to an influx of talent and capital. Opportunities created by set-asides, preferential procurement policies, and the like have induced better educated, younger minority entrepreneurs to create and expand firms in areas such as skilled services, contracting, wholesaling, and manufacturing. The average age of self-employed minorities dropped from 46.2 years in 1970 to 43.6 in 1980, while mean years of schooling rose from 9.7 to 11.3 years. The gap in average earnings and years of education between white and minority entrepreneurs has narrowed steadily since 1960. While the traditional minority business community consisted predominantly of very small firms serving a ghetto clientele, the lure of opportunity in recent years has induced entrepreneurs to create larger firms that are oriented more toward corporate and government clientele.

Lingering Manifestations of Discrimination

Discrimination in the education, training, and capital market realms has declined in recent decades, helping the minority business community to expand its size and scope. Growth has been fastest in the skill-intensive and capital-intensive lines of business where the presence of minority-owned firms has traditionally been minimal.

"Discrimination" is a vague term having numerous aspects, not to mention numerous definitions. Tests for discrimination—as applied by social scientists—are diverse and imprecise. Discrimination, as the term is most commonly used, does still restrict the size and scope of the minority business community. Empirical tests for the presence of discrimination—when conducted in manners consistent with the prevailing methodology of the social sciences—consistently indicate that it continues to shape the minority business community. The evidence discussed below is intended to demonstrate some of discrimination's manifestations; this discussion is intended to be illustrative rather than exhaustive.

Proportion of Self-Employed Individuals

Among working nonminorities under age 65, 5.02 percent listed self-employment as their primary labor force attachment in the 1980 Census of Population. The corresponding figure for minorities was 2.46 percent, but this varied widely among the major racial and ethnic minority groups.[11]

(1) Blacks: 1.75 percent self-employed.
(2) Hispanics: 3.16 percent self-employed.
(3) Asians: 3.76 percent self-employed.

Entrepreneurs by Line of Business

The self-employed people described above are broken down in table 1 to show those lines of business in which minorities are most heavily underrepresented and overrepresented.

Construction represents a line of business in which minorities have traditionally been discriminated against in terms of their access to building trades training programs. Especially in such skilled building trades as plumbing and electrical work, minorities have often been denied access to apprenticeship programs. In 1980, 16.5 percent of self-employed minorities worked in the relatively high-paying field of construction, and their presence was least common in those building trade specialties (such as plumbing) where discrimination has traditionally been greatest.

The finance, insurance, and real estate and professional service fields are the two lines of business with the highest entrepreneur educational levels. In these two fields that demand strong educational

[10] Daniel Fusfeld and Timothy Bates, *The Political Economy of the Urban Ghetto* (Carbondale: Southern Illinois University Press, 1984), p. 106.

[11] Data describing self-employed minorities appearing in this report have been taken from Timothy Bates, "An Analysis of the Minority Entrepreneur: Traits and Trends," final report to the Minority Business Development Agency (October 1984), pp. 2–31.

backgrounds of their entrepreneurs, minorities are most heavily underrepresented. In contrast, minorities are most heavily overrepresented in personal services, the least remunerative line of business in the entire small business sector.

Construction is a line of business in which minority set-asides have been quite common. It also typifies a situation in which discriminatory treatment regarding entrance into apprenticeship programs has restricted the supply of minority entrepreneurs in certain skilled building trades. The resultant lower number of skilled minority entrepreneurs in the building trades restricts their share of public contracts unless, of course, government chooses to remedy discriminatory treatment through programs such as set-asides.

Manufacturing and wholesaling are lines of business that are logical candidates for government procurement contracts. Compared to the 11.2 percent of nonminority entrepreneurs employed in these two fields in 1980, minorities are underrepresented; 9.6 percent of all minority entrepreneurs worked in these two areas.

Ratio of Minority to Nonminority Self-Employment Income

Although points *a* and *b* above are consistent with a pattern of continuing discrimination, the time series evidence on entrepreneurial earnings strongly suggests that discrimination must be weakening. In every single major industry group, minorities narrowed the gap in their mean self-employment income (relative to nonminorities) during the 1970s. The relevant minority to nonminority self-employment income ratios in 1970 and 1980 are shown in table 2.

The fact that minority entrepreneurs earn, on average, 92.8 percent as much as nonminorities is an impressive gain over the 1970 situation. In three industries heavily impacted by minority business set-asides—construction, manufacturing, and wholesaling—the relative income gains of the 1970s were less rapid, however, than in other lines of minority enterprise. Finally, the relative income gains of the 1970s were across-the-board for minority entrepreneurs belonging to all major racial and ethnic groups—blacks, Hispanics, and Asians. Mean Asian entrepreneur earnings actually *exceeded* those of nonminorities in 1980.

[12] See, for example, Carol Hymowitz, "Many Blacks Jump Off the Corporate Ladder to be Entrepreneurs," *The Wall Street Journal* (Aug. 2, 1984), p. 1.

Earnings of Minority Employees versus Entrepreneurs

Lower earnings of self-employed minorities (relative to nonminorities) could conceivably reflect a movement of skilled minorities away from entrepreneurship toward employee status. Indeed, a lessening of overall labor market discrimination could induce talented individuals to abandon self-employment status for more remunerative work as managerial or professional employees. This could cause self-employment earnings to lag because of *less* discrimination rather than because of its presence. Available data, however, indicate that this is not happening:

a. Self-employed minorities earn more, on average, than minority employees.
b. The ranks of self-employed minorities are growing much faster than the minority employee pool.
c. Educational credentials of self-employed minorities are rising faster, on average, than those of employees.

Indeed, it appears that better educated minorities are shifting, on balance, away from employee status in favor of entrepreneur status.[12]

An Econometric Test for Discrimination

An examination of a nationwide sample of over 24,000 self-employed individuals shows that the following entrepreneur traits are strongly associated with above average self-employment incomes:

a. Education beyond the high school level,
b. male sex,
c. membership in the 35–55 age group,
d. household head,
e. absence of work-limiting physical disabilities,
f. residence in a high-income State,
g. greater quantity of labor input, and
h. racial or ethnic status—nonminority.

These findings are based upon data drawn from the 1980 Census of Population public use samples. Average total labor incomes earned by these 24,000+ self-employed people in 1979 are shown in table 3. A major cause of lower minority earnings is rooted in their educational backgrounds: 45 percent of the nonminority males had attended 1 or more years of college, versus 33 percent for the minority males. Major causes of lower female earnings are rooted in their household head status—27 percent of

TABLE 1
Entrepreneurs by Line of Business

	% of Minority entrepreneurs working in this line of business	% of Nonminority entrepreneurs working in this line of business
1. Construction	16.5%	19.4%
2. Finance, insurance, and real estate	4.0	7.4
3. Professional services*	7.9	10.0
4. Personal services	14.7	9.0

* Excluding doctors and lawyers.

TABLE 2
Minority to Nonminority Self-Employment Income Ratios

	1970 Census data	1980 Census data
All fields	70.2%	92.8%
Construction	70.4	88.8
Manufacturing	71.5	84.5
Transportation, communications	61.9	88.1
Wholesale	73.3	77.0
Retail	84.1	99.6
Finance, insurance, and real estate	64.2	77.4
Business services	66.6	82.4
Personal services	90.1	98.0
Professional services	57.7	95.0

the nonminority female entrepreneurs were household heads versus 88 percent for the males—and their low quantities of labor input: Self-employed nonminority females worked 1,481 hours, on average, in 1979, versus 2,071 hours for the males.

My econometric test for discrimination is posed as follows: Assume that two self-employed individuals are identical in all respects but racial or ethnic status. Does the person of minority status earn less than his cohort whose age, education, sex, State of residence, and other traits are identical? Other things equal, what is the earnings differential of a minority versus a nonminority entrepreneur, a female versus a male entrepreneur? When we control econometrically for the influence on earnings of all of the above traits—age, education, and so forth—we isolate earnings differentials that are attributable to minority status (or female status); the results of such econometric exercises indicate consistently that minorities earn significantly less than their nonminority cohorts. Using two separate measures of income, minority males are found to have consistently lower earnings than their nonminority cohorts; results from the econometric exercises indicate the earnings differentials relative to nonminority males shown in table 4.

Self-employed minority females, in contrast, possess earnings that are *not* significantly different from those reported by their nonminority female cohorts. Results from the econometric exercises indicate that females, other factors constant, earn $3,695 less self-

TABLE 3
Average Total Labor Incomes of Self-Employed, 1979

	Nonminority	Minority
Male	$18,252	$14,293
Female	$7,537	$7,749

TABLE 4
Earnings Differentials

	Self-employment income only	Total labor income
Hispanic males	-$1,024	-$1,266
Asian males	-$1,603	-$2,399
Black males	-$2,674	-$3,535
American Indian males	-$3,141	-$3,697

employment income than male cohorts, and $4,607 less total labor income than male cohorts. Two self-employed individuals who are identical regarding education, age, household head status, and so forth differ *only* in terms of sex; of these two otherwise identical entrepreneurs, the female can expect to have a total labor income that is $4,607 less than that of the male cohort. According to this line of reasoning, we conclude that minority males and all females earn less than nonminority males—*not* because they are less educated or work fewer hours—they earn less because they are minorities or females.

The case of self-employed Asian males is an interesting one because they have—as a group—managed to overcome the handicap of being "Asian." By having much stronger educational backgrounds than nonminorities and by working longer hours, they have managed to raise their mean self-employment incomes to levels that exceed those of white males. Hispanic males, in contrast, have very weak educational backgrounds relative to nonminorities, causing their actual earnings from self-employment to lag more than $2,000, on average, behind those of nonminority males.

Overview

Self-employed minorities have made great progress in recent years. Their annual earnings exceed those of minorities who work as employees. A comparison of 1970 and 1980 census data indicates that minority self-employment grew very rapidly during the 1970s decade. Furthermore, both average earnings and average educational levels of minority entrepreneurs rose faster—between 1970 and 1980—than the education and earnings levels of nonminorities. Not only is the gap between minority and nonminority entrepreneurs narrowing: Asian males have actually surpassed the mean education and earnings levels of white males. Minority females, by 1980, were reporting higher mean self-employment earnings overall than nonminority females.

Nevertheless, the gap has not closed, and the vestiges of discrimination are glaringly apparent. Compared to minorities, nonminorities are over twice as likely to be self-employed, and they are overrepresented in such high earning lines of business as finance, insurance, real estate, professional services, wholesaling, and manufacturing. Minorities, in contrast, are heavily overrepresented in the least remunerative line of small business—personal services. Having relatively little accumulated wealth to draw upon, minorities who have established larger scale firms in fields such as wholesaling and construction have relied heavily upon long term debt as a source of funds. Being highly leveraged depresses profitability in periods of high interest rates, and it increases the risks of financial illiquidity and firm failure—especially during recessions.

Both minorities and women earn significantly less from self-employment than their nonminority male cohorts. Econometric exercises indicate that these laggard earnings are only partially explained by such

traits as the weaker educational backgrounds of minorities or the lower amounts of labor input that typify females. Minorities and females earn less than their nonminority male cohorts who are otherwise identical regarding age, education, quantity of labor input, and similar traits.

In major areas of government procurement such as construction, wholesale, and manufacturing, minority business ability to compete for contracts is hampered by:

a. The relatively low incidence of minority business in these areas.

b. The debt-burdened capital structure of the minority businesses in the fields that actually do receive contracts and, hence, their depressed profitability.

c. The relatively weaker educational backgrounds of self-employed minorities in these fields, including the lower incidence of training via certain apprenticeship programs in skilled building trades.

Financial data on large-scale minority firms that compete for business in the government and corporate sectors are presented in the next section.

The Impacts of Set-Asides

Effects of Set-Asides on Minority Enterprise

Exactly one comprehensive data source exists that is appropriate for analyzing the effects of set-asides on minority-owned businesses. Creation of this data base took place between 1979 and 1982 under the sponsorship of the Minority Business Development Agency (MBDA) of the U.S. Department of Commerce.[13] For 1980 the MBDA data base contains extensive balance sheet and income statement data for over 1,000 minority enterprises, as well as comparable data for a matching sample of businesses owned by nonminorities. These data were selected from a Dun and Bradstreet data base known as Dun's Financial Profiles (DFP). Dun and Bradstreet (D and B) maintains records on over 4 million firms, which are used to produce credit reports on businesses. Roughly 20 percent of these firms provide D and B with balance sheet and income statement data. If these data pass certain consistency checks, they are included in the 800,000 record DFP data base.

Unfortunately, DFP records contain no data on the racial or ethnic identity of business owners. MBDA, therefore, collected minority business directories from sources throughout the United States, yielding a list of over 23,000 minority-owned firms. This list was then compared with the 800,000 business names in the DFP files, and all firms that appeared on both lists were extracted from the DFP data base. A representative sample of the major directories used to create the list of 23,000+ minority businesses appears in figure 1.

Useful data on over 1,000 minority enterprises were, thus, extracted from the DFP files; summary statistics describing these firms are presented in table 5. Because most of the firms in the MBDA sample were actual or potential participants in corporate and government minority business procurement and set-aside programs, they are much larger than the mean firm in the minority business universe. For this reason, the sample firms are overrepresented in construction, manufacturing, and wholesaling, relative to all minority businesses. Within the service industry, personal service and repair lines of business are rare; most common are business services, professional services, and finance, insurance, and real estate.

In addition to the MBDA sample of minority firms, the DFP data base has been used to create comparable data on nonminority firms. The samples of nonminority firms were selected to resemble the minorities regarding four traits: (1) industry, (2) annual sales, (3) geographic location, and (4) corporation status. Table 6 summarizes key minority and nonminority sample differences regarding profitability and leverage. The entire comparison group of nonminorities reported mean net profits equal to 15.2 percent of total assets, which is higher than the 13.9 percent corresponding figure for the minority businesses. The most pronounced difference indicated in table 6, however, concerns the higher overall leverage that typifies the minority enterprises.

Tables 5 and 6, collectively, describe major lines of minority enterprise—construction, manufacturing, and wholesaling—that participate actively in minority business set-asides. Relative to nonminority enterprises of similar size and scope, they are slightly less profitable and much more highly leveraged. Indeed, their relatively heavy debt loads are the

[13] A full description of the data base appears in Timothy Bates and Antonio Furino, "A New Nationwide Data Base for Minority Business," *Journal of Small Business Management* (April 1985) (forthcoming).

FIGURE 1
Directories

Directory title	Publisher
Dallas/Ft. Worth Buyers Guide	Dallas Regional Minority Purchasing Council Dallas, Texas (1980)
Directory of Small Disadvantaged Businesses Located in the Great Southwest	Defense Logistics Agency, Defense Contract/ Administration Service Region Dallas, Texas (1981)
Minority Vendors Directory	Gulf Oil Corporation Pittsburgh, Pennsylvania (1979)
Minority Firms in MA, NY, CT, RI, ME, NH, VT	Defense Supply Agency Boston, Massachusetts (1980)
National Minority Business Council Business Directory	National Minority Business Council New York, New York (1980)
State of California Department of Transportation Minority Business Enterprise List	State of California Department of Transportation Sacramento, California (1981)
Western Electric Minority Source Directory	Western Electric Greensboro, North Carolina (1980)

major cause of their lower profitability (table 6) in comparison to nonminorities. In all lines of nonminority business (table 6), owner's net worth exceeds 50 percent of business total assets; for minorities, the exact opposite pattern prevails—owner's net worth is less than 50 percent of total assets in all cases. Another contrast with the nonminority sample reveals that the minority firms are younger overall; nearly two-thirds of the minority businesses were started in the post-1967 era of widespread government assistance, as shown in table 7.

It is among the youngest minority firms that undercapitalization is most apparent: Net worth was equal to 38.0 percent of total assets for the minority group formed since 1974 versus 46.8 percent for their nonminority cohorts whose firms were created during the same time period. If conventional wisdom holds, greater reliance on debt rather than equity is associated with higher loan delinquency rates and heightened possibilities for business failure. Previous studies have consistently documented high loan default rates among minority firms. The minority businesses described in table 5 also exhibit much more profit variance than their nonminority counterparts. Indeed, the incidence of minority firms with negative profits was 11.2 percent, while only 2.7 percent of the nonminority business comparison group reported negative profits.

On balance, the large-scale minority businesses in the DFP sample we have analyzed do have unique problems—particularly in the realm of leverage—but the evidence indicates that both minority and nonminority firms become less highly leveraged as they grow older. Second, firm age is directly related to dollar levels of firm size and profits for minorities, as shown in table 8. As the age distribution of minority firms begins to approach that of the nonminority business community, leverage problems should begin to lessen and aggregate profits should begin to rise.

Minority business set-aside efforts have been criticized for assisting the larger scale, more profita-

TABLE 5

Summary Statistics Describing the MBDA Sample of Minority-Owned Businesses
(Thousands of dollars)

Variable		Median	Mean	Standard deviation
A.	Construction			
	Net profits	37.1	71.5	166.8
	Total assets	282.8	650.2	1,183.7
	Net worth	14.0	244.6	452.9
	Number of observations	308		
B.	Manufacturing			
	Net profits	53.1	132.7	295.7
	Total assets	507.6	1,606.7	4,123.3
	Net worth	258.3	606.6	1,151.0
	Number of observations	214		
C.	Wholesale			
	Net profits	26.9	50.2	94.2
	Total assets	422.3	1,074.5	2,018.0
	Net worth	106.8	308.4	523.0
	Number of observations	151		
D.	Services			
	Net profits	30.7	68.9	143.6
	Total assets	244.2	1,084.1	4,342.0
	Net worth	100.9	284.9	985.7
	Number of observations	207		
E.	Retail			
	Net profits	18.2	44.2	128.5
	Total assets	170.8	456.1	1,232.5
	Net worth	87.0	171.3	285.4
	Number of observations	136		

Note that mean values are skewed sharply by the presence of some very large firms in the data base. For describing the "typical" minority business, the median is a superior summary statistic for these data.

TABLE 6

A Comparison of Minority-Owned Firms from the MBDA Sample with Similar Nonminority Businesses

	After-tax profits as a percent of total assets		Net worth as a percent of total assets	
	Minority	Nonminority	Minority	Nonminority
Construction	16.5%	18.5%	40.6%	54.8%
Manufacturing	12.6	13.3	44.8	54.1
Wholesale	7.3	12.1	33.8	56.1
Retail	13.5	14.1	49.0	55.8
Services	18.3	16.3	41.3	51.1
All	13.9	15.2	41.2	54.0

TABLE 7

Percentage of Minority Business Starts

	Minority	Nonminority
Formed before 1968	35.0%	57.8%
Formed between 1968 and 1973	30.8	14.3
Formed between 1974 and 1980	34.2	27.8
Total	100.0	100.0

TABLE 8

Profits Relative to Age of Firm

	After-tax profits: median	Sales: median
Firms formed before 1968	$40,856	$1,045,170
Those formed between 1968 and 1973	$32,254	$700,859
Firms formed after 1973	$27,815	$554,577

ble minority enterprises. Data in this section have shown that the types of firms that participate most actively in minority set-asides are, indeed, much larger and more profitable than the average firm in the minority business universe. The data have also shown that these minority-owned firms lag behind their nonminority counterparts in important respects. They are, relative to the nonminorities:

1. Less profitable as a group;
2. Their incidence of nonprofitability is over four times greater;
3. They are very highly leveraged, which makes them vulnerable to delinquency on debt obligations (and hence actual failure);
4. They are a younger group of firms.

Large-scale minority enterprises such as those described in table 5 are no longer the rarity that they were 20 years ago. The rapid increase in the numbers of such businesses represents tremendous progress in the realm of minority business development. These firms have not, however, achieved parity with their nonminority cohorts, and their unique traits (especially undercapitalization) continue to reflect the vestiges of discrimination.

The Utility of Business Set-Asides

If procurement assistance is to serve as a viable program for minority business development, then it must seek to assist the stronger and better managed minority firms. The SBA-administered 8(a) procure-

ment program has *not* focused upon assisting this sector of the minority business community. According to a 1981 report by the General Accounting Office (GAO), only 166 of the 4,598 firms participating in the 8(a) program had graduated as competitive businesses.[14] According to the GAO, many 8(a) firms have had all of the help that SBA has to offer, but they have still not developed into competitive firms. As stated earlier in this paper, the 8(a) program is designed to assist the marginal entrepreneur as opposed to the successful and the promising self-employed minority businessman. Government programs that are designed to aid the less promising minority entrepreneurs have consistently been ineffective and 8(a) is no exception. The 8(a) program should be abolished.

Other types of set-aside programs described above include agency specific efforts—created most commonly in response to Executive orders—and set-asides mandated by legislation, such as the 1977 Public Works Employment Act. These programs provide minority enterprises with partial protection from competition in the awarding of procurement contracts, but they are fundamentally different from 8(a) contracts. A Federal agency that purchases goods or services from a minority vendor will—other things constant—pick the low-cost supplier over the high-cost alternatives; similarly, the vendor that produces reliably will be favored over the alternative that produces haphazardly. Over time, therefore, procurement business will flow increasingly to the most efficient minority enterprises. Unlike 8(a), the forces of marketplace competition will be operative: Agencies will strive to minimize their procurement costs; in the resultant competitive struggle for procurement contracts, the efficient minority business will prosper. Similarly, in public works contracting, the general contractor will prefer to do business with the reliable and cost-efficient minority subcontractor or supplier. Over time, the more efficient firms will be able to expand relative to the less efficient ones.

Minority business set-aside programs that demand efficient business performance are the ones that are most useful to society. Such programs are also consistent with the goal of utilizing minority business expansion as a tool for promoting economic development. By encouraging expansion of the more efficient minority enterprises, government is creating the role models and success stories that are vital to the minority business development effort. Regarding job creation, the available evidence indicates that minority firms working on set-asides—as well as minority business in general—disproportionately employ minority employees. By no means are all of their jobs filled by minorities, especially when the firms involved are producers of professional services. Firms in construction and manufacturing are most likely to be the ones creating jobs that are overwhelmingly filled by minority employees.

Minority business set-aside programs have been evaluated thus far largely in terms of their contribution to minority business development. In this realm, they have aided in the creation and expansion of thousands of larger scale minority enterprises in such nontraditional fields as wholesaling, general construction, business services, and large-scale manufacturing. Federal Government programs have been emulated by corporations as well as State and local government units. Over the last decade, average incomes of minority entrepreneurs have expanded much more rapidly than those of self-employed nonminorities. Younger and better educated minorities have been lured into self-employment by the expanded opportunities that corporate and government markets represent.

A negative aspect of minority business set-asides, however, has been the higher procurement costs incurred by government as a result of utilizing firms that may be less experienced relative to nonminority enterprises. Higher procurement costs are inherent in set-asides such as the 8(a) program which assumes that the contract recipients are not competitive. In the procurement programs that seek to utilize the most efficient available firms, however, higher procurement costs are generally a transitory phenomenon, and they are *not* necessarily wasteful. Consider, for example, the widely studied 1977 Local Public Works Employment Act, which contained a large minority business set-aside provision.[15] Approximately 18 percent of expenditures under this act accrued to minority firms, and this resulted in an estimated overall cost increase of over 1 percent in the construction projects that were ultimately com-

[14] Comptroller General, *The SBA 8(a) Procurement Program—A Promise Unfulfilled* (Washington, D.C.: General Accounting Office, 1981), p. 1.

[15] Economic Development Administration, U.S. Department of Commerce, *Local Public Works Program: Final Report,* 1980, pp. 62-69.

pleted. In the absence of minority participation, the construction not only could have taken place at a cost saving of over 1 percent, but certain projects could have been completed faster.

The construction industry is traditionally one in which general contractors work with a closely knit group of subcontractors. In this "old boy" network, close personal relationships allow subcontractors to maximize their chances of receiving business from general contractors. This kind of network is exactly what shut out minority firms—few of which are large enough to be general contractors—from their fair share of large-scale construction projects. The 1977 Local Public Works (LPW) legislation changed this by forcing general contractors to subcontract work to minorities. This necessitated getting to know the minority firms, and the process of opening lines of communication between general contractors and minority construction firms was not altogether a smooth one. The process of finding suitable minority subcontractors was, of course, complicated by the uncertainty of dealing with an unknown firm, as opposed to dealing with subcontractors from the old boy network. The *key* point, though, is that the resultant opening of lines of communication—although difficult the first time around—promotes a more competitive overall situation in construction, which may actually reduce long run construction costs. According to one comprehensive evaluation of the LPW act, 61 percent of the minority subcontractors continued to do business with the general contractors after their initial LPW contracting work was completed.[16] Furthermore, the LPW set-aside helped participating minority firms to increase their bonding capacity, thus improving their chances of competing for larger scale construction jobs in the future.

Breaking down traditional barriers to minority business participation in the economy is not a costless process, but achievement of this goal is precisely the intent of minority business set-asides. Once this goal is achieved and once the buyers and sellers involved in the procurement process become knowledgeable about each other, the costs of transition to a less discriminatory economy fall off.

The Fairness of Minority and Women's Business Set-Asides

One's assessment of set-aside fairness depends upon one's initial premises about the appropriateness of the goals used to justify such programs. In the case of Asian entrepreneurs, however, none of the justifications or goals commonly associated with set-asides provide a rationale for assisting this particular group. Consider the following:

1. Self-employed Asians have higher average entrepreneurial earnings than nonminorities; in 1979, for example, mean personal incomes of self-employed Asians were $18,691, and their mean household incomes were $34,926. Corresponding figures for nonminorities were $16,717 and $26,730, respectively.
2. Asians collectively have average household wealth holdings that are on a par with those of nonminority households.
3. Asian entrepreneurs have the highest incidence of college degrees of any entrepreneurial group, including nonminorities. Their mean years of education overall are also substantially higher than those of nonminorities.
4. There is no counterpart in Asian communities to the massive unemployment that typifies black ghettos and Hispanic barrios.

Asians simply are no longer an economically disadvantaged group, relative to nonminorities. In contrast, blacks, Hispanics, and Native Americans are disadvantaged economically. Since minority business set-aside justifications are based upon premises of group disadvantage, it follows logically that there is no justification for preferential Asian treatment. Asian entrepreneurs should be ineligible for minority business set-asides.

Finally, the fairness of assisting self-employed women rests upon a basis that differs from non-Asian minority groups. Although very little is known about women entrepreneurs as a group, the following facts from the 1980 Census of Population are relevant to the evaluation of fairness issues:

a. Self-employed women earn less than half as much as self-employed men;
b. They are concentrated in low-earning industries such as personal services and retailing;
c. In a prior section of this report, the econometric test of discrimination showed that female

[16] The Granville Corporation, "A Longitudinal Analysis of Minority Business Enterprises Participating in the Local Public Works Program," final report to the Economic Development Administration (December 1982), pp. 1-3.

status was associated with a greater income loss than being black, Hispanic, or Native American;
d. Most self-employed females are not heads of households;
e. Over 65 percent of self-employed females are members of households that own their own homes;
f. The household incomes of self-employed females exceed, on average, the household incomes of the rest of the Nation.

Individually, self-employed females are a low-income group. Over 70 percent of them, however, are not heads of households; as household members, they are not a low-income group. Overall, fewer of the justifications advanced for minority business set-asides are applicable to females than is the case for blacks, Hispanics, and Native Americans.

LEGAL PERSPECTIVES: THE CURRENT STATE OF AFFIRMATIVE ACTION LAW REGARDING BUSINESS SET-ASIDES AND EMPLOYMENT

Affirmative Action Law in Employment and Contracting: An Uncertain Matrix

By Bruce E. Fein*

Fourscore and 9 years ago, Justice Harlan protested in *Plessy* v. *Ferguson*[1] that the majority's constitutional benediction of "separate but equal" treatment of persons based on race violated the 14th amendment's mandate of color blindness. In timeless language, Harlan declared that:

> [o]ur 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.[2]

This fundamental principle of color blindness should not be carelessly discarded, even where proponents of racial preferences proffer benign justifications. As Justice Brandeis cautioned in *Olmstead* v. *United States,*[3] "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent."

Today, many insist that color blindness is a disreputable legal or social norm if invoked to deny racial preferences for minorities. That proposition seems debatable. And debate over the issue is illuminated by recognition that color blindness has been championed by devout adherents to civil rights causes.

Thurgood Marshall, as an advocate in *Brown* v. *Board of Education,*[4] pleaded for color blindness in student assignments as a desegregation remedy. Martin Luther King, in his memorable "I Have a Dream" speech in 1963 glorified the day when people would not be judged on the basis of skin color, but by their character, achievements, and aspirations.[5] The Supreme Court, in *Anderson* v. *Martin,* unanimously denounced an effort to encourage racial bloc voting in holding unconstitutional ballots identifying candidates for public office by race.[6] Hubert Humphrey, a veritable icon of the civil rights movement, lauded color blindness as the norm for employment decisions in supporting enactment of Title VII of the 1964 Civil Rights Act.[7] The Civil Service Commission in the 1960s prohibited the Federal Government from collecting information regarding the race of prospective or actual

* Vice President, Gray and Company.

1 163 U.S. 537 (1896).

2 *Id.* at 559 (Harlan, J., dissenting).

3 Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

4 347 U.S. 483 (1954); *see* Davis v. Briggs, Oral Argument, Dec. 9–10, 1952 at 14–17, 55–62 (oral argument of T. Marshall for appellants in consolidated case).

5 Martin Luther King, "I Have a Dream," 1963.

6 Anderson v. Martin, 375 U.S. 399 (1964).

7 110 Cong. Rec. 6549 (1964) (remarks of Senator Humphrey).

government employees to vindicate civil rights objectives.[8]

The purpose of these opening observations is to demonstrate that color blindness is neither a novel nor radical legal or social policy, having been espoused by unquestioned defenders of minority rights. The observations do not answer the question of whether, in contemporary America, color blindness is or should be a legal injunction. But they disprove the idea that persons who advocate color blindness in the law and deplore the use of race in the forging of public policy are trumpeting ancient or discredited philosophy.

Variable Affirmative Action Concepts in Employment or Business Contracting

Statutes and case law suggest that six types of affirmative action may be usefully differentiated for purposes of evaluating their legality. The most modest affirmative action consists of "making whole" the victims of illegal racial discrimination in employment or contracting, even if legitimate expectations of innocent persons must be compromised. The making whole concept envisions retroactive seniority for persons denied employment on account of race[9] and legal redress for persons who declined to seek employment or contracting opportunity because of the defendant's racially discriminatory practices.[10] The make-whole idea ordains that victims of illegal discrimination be guaranteed the economic equivalence of what would have been achieved absent the wrongful conduct.[11] No perpetrator of racial discrimination should profit by his own wrongdoing.[12]

Affirmative action concepts also embrace special recruitment, internal training, or educational programs undertaken by employers or unions to enhance the employment of minorities or women. Recruitment efforts typically include the advertisement of employment or contracting opportunities in the media, or the use of informal networks that reach large minority or female audiences. The advertisements ordinarily pledge that applicants will be considered without regard to race or gender.[13] Training or education programs may consist of instruction to personnel officers regarding the appraisal of minority or female job applicants. The instruction would address the background, experience, attributes, or motivations frequently possessed by members of particular minority groups or women so that their talents or potential are not erroneously discounted or remediable deficiencies viewed as incurable.[14]

A third type of affirmative action envisions special training or education for minorities or women to enhance their ability to compete with rivals for jobs, promotions, or contracting opportunities.[15] The targeted groups might be taught reading or writing skills, construction or mining skills, or the market terms and availability of performance or payment bonds in the contracting industry.

Another concept of affirmative action is the assignment of a so-called "plus" factor to minorities or women who are competing with others in employment or contracting markets.[16] For instance, a minority might be awarded an extra 5 or 10 points on a rating scale from 1 to 100 in evaluating the qualifications of applicants for employment or the bids of contractors. This type of affirmative action does not exclude nonminorities from competing for jobs or contracts, but does diminish the likelihood of success.

Affirmative action also finds expression in goals and timetables. An employer, for instance, may pledge to seek the hiring or promotion of a specified percentage of minorities or women in specified job categories within specified time frames.[17] The employer might be obligated to undertake all conceivable efforts to satisfy the goals and timetables he has pledged to pursue.[18]

[8] 32 Fed. Reg. 11847 (Aug. 17, 1967), reprinted in 5 C.F.R. 713.302(b) (rev. ed. 1968).

[9] *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 776 (1976).

[10] *See* Teamsters v. United States, 431 U.S. 324, 364–67 (1977).

[11] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

[12] *See generally Teamsters, supra,* 431 U.S. at 367.

[13] *See, e.g.,* 41 C.F.R. 60–1.41 (OFCCP requirements for Federal contractors).

[14] *See, e.g.,* 41 C.F.R. 60–2.21 (a)(5) (Revised Order No. 4 covering Federal contractors).

[15] *See, e.g.,* United Steelworkers v. Weber, 443 U.S. 193 (1979).

[16] *See, e.g.,* Bushey v. New York State Civil Service Comm'n, 735 F.2d 220, 223 (2d Cir. 1984), *cert. denied,* 53 U.S.L.W. 3476 (Jan. 8, 1985) (describing one system for upward adjustment of minority test scores).

[17] *See, e.g.,* Associated General Contractors of Mass., Inc., v. Alshuler, 490 F.2d 9, 12–19 (1st Cir. 1973) (discussing the "Boston plan").

[18] *See, e.g., id.* at 17.

Lastly, affirmative action may consist of racial or gender quotas for either a temporary or indefinite duration.[19] A racial quota might require an employer to assign 50 percent of job openings or promotions for 5 years to minorities, or a contractor to subcontract 50 percent of all work to minority-owned firms for the same duration.

The legality of the six types of affirmative actions turns on an array of considerations, including whether the racial or gender preferences are undertaken by private or public employers, whether they are voluntary or compelled, whether they are triggered by past illegal racial or gender discrimination, or whether the beneficiaries of the preferences have all been victims of past discrimination.

Underrepresentation as Evidence of Illegal Discrimination or as Justification for Affirmative Action

Underrepresentation or underutilization of a minority group or women in an employer's work force or in awards of government contracts has varied legal significance. The magnitude of underrepresentation and the constitutional or statutory theories for claiming illegal discrimination are pivotal criteria in determining the legal importance of underrepresentation.

Magnitude of Underrepresentation

In *Castaneda* v. *Partida,*[20] the Court declared that substantial underrepresentation of a distinct class carries legal significance in proving unlawful discrimination. The following statistical disparities in minority representation on grand jury or jury lists have been held to constitute substantial underrepresentation: 60 percent blacks in the general population, 37 percent on the grand jury lists;[21] 27.1 percent blacks of total taxpayers, 9.1 percent on the grand jury venire;[22] 24.4 percent blacks on tax lists, 4.7 percent of grand jury lists;[23] 19.7 percent blacks on tax lists, 5 percent of jury lists;[24] 79.1 percent Mexican Americans in county population, 39 percent summoned for grand jury service.[25]

Underrepresentation must derive from samples that are reasonably large to be significant. Thus, in *Mayor* v. *Educational Equality League,*[26] the Court assigned no significance to underrepresentation of blacks on a 13-member educational nominating panel during one 2-year cycle in part because of the smallness of the sample size.[27]

Underrepresentation reflects a difference between the expected number of the distinct group in an employer's work force, if strict parity with their representation in the relevant labor pool obtained, and the observed number that is greater than two or three standard deviations.[28] A standard deviation is a measure of predicted fluctuations from the numbers expected to be derived from a sample.

If the size and standard deviation tests are surmounted, then the underrepresentation generally establishes a prima facie case of illegal discrimination.[29] Underrepresentation does not forfeit legal significance simply because an employer belongs to the same minority group that is underrepresented.[30] The Supreme Court has declared that "it would be unwise to presume, as a matter of law, that human beings of one definable group will not discriminate against other members of their group."[31] On the other hand, the absence of underrepresentation may be advanced to rebut a claim of unlawful discrimination, but it is not conclusive.[32]

Constitutional Claims

Under the 5th and 14th amendments, a public employer or contractor violates the equal protection norms of the Constitution if facially neutral employment decisions are made with an intent to discriminate on account of race or gender.[33]

Discriminatory purpose cannot be proven by showing only that a decisionmaker knew or foresaw that his actions would impact adversely against an

[19] *See, e.g.,* Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984).
[20] *See* Castaneda v. Partida, 430 U.S. 482, 496–97 n.17 (1976).
[21] *See* Mayor v. Educational Equality League, 415 U.S. 605 (1974); *see also Casteneda,* regarding selections of grand jury foreman.
[22] *See* Washington v. Davis, 426 U.S. 229 (1976).
[23] *Id.;* Personnel Adm'rs v. Feeney, 442 U.S. 256 (1979).
[24] *See* Washington v. Davis, *supra,* 426 U.S. at 241.
[25] *Id.* at 265, 279.
[26] 415 U.S. 605 (1974).
[27] *Id.* at 620–21; *see also* Friend v. Leidinger, 446 F. Supp. 361, 366–67 (E.D. Va. 1977).
[28] *See* Casteneda v. Partida, *supra,* 430 U.S. 482, 496–97 n.16. (1976).
[29] *Id.* at 497–99.
[30] *Id.* at 499–501.
[31] *Id.* at 499.
[32] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.").
[33] *See* Personnel Adm'rs of Mass. v. Feeney, 442 U.S. 256, 272–73 (1979).

identifiable group. Proof that the decisionmaker acted at least in part "because of," not merely "in spite of" adverse group effects is necessary to demonstrate unconstitutional taint. Government decisionmaking that yields underrepresentation based on race or gender, *simpliciter,* is constitutionally irreproachable.[34]

On the other hand, systematic exclusion or pronounced underrepresentation of minorities or women from public contracts or employment establishes a prima facie case of purposeful discrimination. The burden then shifts to the government to rebut the presumption of unconstitutional action by showing that permissible racially or gender-neutral selection criteria and procedures caused the exclusion or underrepresentations.[35] In *Washington* v. *Davis,*[36] the Court rejected the contention that the use of a reliable test to screen applicants for police officers should be constitutionally condemned because of its highly discriminatory impact on black candidates. The test, the Court explained, was utilized to enhance the communicative skills of police recruits, a legitimate government endeavor. Affirmative efforts by the police department to recruit black officers further negated any inference of discriminatory intent behind use of the test.

In *Personnel Administrators* v. *Feeney,*[37] the Court denied that a veterans' preference statute applicable to government employment was unconstitutional because over 98 percent of its beneficiaries were male. The preference, the Court observed, was awarded to all veterans without regard to gender and served four legitimate purposes: to reward the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations.[38]

Title VII Disparate Treatment Claims; 42 U.S. Code 1981 Claims

Section 703(a)(1) of Title VII of the Civil Rights Act makes it unlawful for an employer "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." Proof that an employer purposefully treated an individual less favorably than others on account of race or gender is necessary to establish a section 703(a)(1) violation.[39]

A prima facie case of unlawful discrimination can be established by showing a statistically significant underrepresentation of women or minorities in the work force of an employer. In *Teamsters* v. *United States,* for instance, the Court concluded that the government had established a prima facie case of illegal discrimination in the employment of blacks and Spanish-surnamed as "line drivers" by statistics showing that the employer had 5 percent black and 4 percent Spanish-surnamed persons in his work force, but only 0.4 percent and 0.3 percent, respectively, were line drivers; that, with one exception, no black had been hired on a regular basis as a line driver until 1969; and that 83 percent of the black and 78 percent of the Spanish-surnamed employees held lower paying city operations and serviceman jobs, whereas only 39 percent of nonminority employees held such unattractive positions.

Justice Stewart explained the evidentiary theory behind the use of statistics to prove illegal discrimination in *Teamsters.* "Statistics showing racial or ethnic imbalance are probative," Stewart declared, "only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will, in time, result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though section 703 (j) makes clear that Title VII [of the 1964 Civil Rights Act] imposes no requirement that a work force mirror the general population."[40]

[34] *Id.* at 279; *see also* Washington v. Davis, *supra,* 426 U.S. 229 at 242 (1976); *cf.* Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 264–65 (1977) (plaintiff must show discriminatory purpose underlying zoning regulation).

[35] *See e.g.,* Griggs v. Duke Power Co., 401 U.S. 424, (1977).

[36] 426 U.S. 229 (1976).

[37] 442 U.S. 256 (1979).

[38] *Id.* at 265.

[39] Teamsters v. United States, *supra,* 431 U.S. 324, 335 n.15.

[40] *Id.* at 339–40 n.20, *(citing* §703(j), Title VII, 1964 Civil Rights Act, 42 U.S.C. 2000e–2(j)).

A tiny sample may discredit the probative weight of a statistical imbalance. In *Price* v. *Denison Independent School District,*[41] the court of appeals discounted the value of statistics showing that of 10 public school principals within a school district, none was black during 1 year. Furthermore, in determining whether a minority group is underrepresented in employment within a school system, the racial population of the student body is irrelevant.[42] The pertinent comparison is with minority representation in the relevant labor market.[43]

A racially balanced work force is probative evidence of the absence of purposeful discrimination in employment, although such balance is not an absolute defense.[44] Similarly, an employer may rebut statistical evidence of intentional discrimination under Title VII by showing that racial imbalance in his work force was occasioned by discriminatory employment practices committed prior to the statutory enactment,[45] or an underrepresentation amongst applicants for employment,[46] or is otherwise explainable by legitimate reasons.[47] As the Supreme Court cautioned in *Teamsters:* "[S]tatistics. . .come in infinite variety. . . .[T]heir usefulness depends on all of the surrounding facts and circumstances."[48]

Section 1981 of Title 42, U.S. Code, provides that all persons "shall have the same right in every State and Territory to make and enforce contracts. . .as is enjoyed by white citizens." As construed by the Supreme Court, the statute prohibits private racial discrimination in employment practiced against either blacks or whites.[49] Only purposeful discrimination, however, is proscribed.[50]

Title VII Disparate Impact Claims

Section 703(a)(2) of Title VII makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." An adverse limitation or classification is exonerated from taint, however, if it results from employment decisions based on "any professionally developed ability test, provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. . . ."[51]

In *Griggs* v. *Duke Power Co.,*[52] the Court expounded on the meaning of these provisions. At issue was an employer's requirement of a high school diploma and the passing of a standardized intelligence test as conditions of employment or job transfer. Although these requirements were not tainted by a discriminatory purpose, they adversely impacted on blacks. In the State of North Carolina, 34 percent of white males had graduated from high school, whereas the corresponding percentage for blacks was 12. Furthermore, 58 percent of whites passed the relevant standardized intelligence test, compared with only 6 percent of blacks.

A unanimous Court held that the high school diploma and intelligence test requirements affronted section 703(a)(2) because of their disproportionate exclusionary impact on prospective or actual black employees. Writing for the Court, Chief Justice Burger explained that a Title VII objective was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Accordingly, practices, procedures, or tests facially neutral and used without racial animus are prohibited if they operate to the disadvantage of minority groups. The only exception Congress extended to employers was for employment practices demonstrably related to successful job performance. In sum, the Chief Justice maintained: "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in

[41] 694 F.2d 334 (5th Cir. 1982).
[42] *Id.* at 375–78.
[43] *Id.* at 377–78, *see also Teamsters, supra,* 431 U.S. at 337–38 and n.17; Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977).
[44] Connecticut v. Teal, 457 U.S. 440, 454 (1982); *see also Furnco Constr. Co., supra,* 438 U.S. at 579–80.
[45] *Teamsters, supra,* 431 U.S. at 360; *Hazelwood, supra,* 433 U.S. at 310.
[46] *See e.g., Hazelwood, supra,* 433 U.S. at 313 n.21 (1977) (noting that district court should consider on remand whether applicant flow data undercut statistical analysis based on work force).
[47] *See, e.g.,* Griggs v. Duke Power Co., *supra,* 401 U.S. at 431 (disparity permitted where employer utilizes bona fide occupational qualification).
[48] *Teamsters, supra,* 431 U.S. at 340.
[49] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 277, 285–96 (1976).
[50] General Bldg. Contractors v. Pennsylvania, 458 U.S. 375, 391 (1982).
[51] 29 U.S.C. §2000e-2(h).
[52] *Supra,* 401 U.S. 424, 430, 432 (1971).

headwinds' for minority groups and are unrelated to measuring job capability."

The employer in *Griggs* failed to prove that a high school diploma or passage of an intelligence test was a reliable predictor of employee performance. Thus, neither could be lawfully used as a condition of employment or job transfer.

In *Albemarle Paper Co.* v. *Moody*[53] and *Dothard* v. *Rawlinson,*[54] the Court elaborated on the meaning of the adverse impact rule of *Griggs.* To establish a prima facie case of illegal discrimination under section 703(a)(2), the Court declared, a plaintiff must show that a facially neutral employment practice disproportionately excludes members of minority groups or women. If that showing is made, the employer must demonstrate that the challenged practice is manifestly related to the employment at issue to disprove a presumptive Title VII violation. Even if job-relatedness is proven, the plaintiff may prevail by showing that the employment practice was used as a pretext for effectuating discrimination, or that other selection devices without a similar discriminatory effect would also serve the employer's legitimate interest in efficient and trustworthy workmanship.[55] In *Dothard,* the Court concluded that statutory height and weight restrictions for correctional counselor positions that excluded 41.13 percent of the female population but less than 1 percent of the male population from eligibility were prima facie unlawful under the adverse impact test of *Griggs.*

Tests that adversely impact minority or female employees are not saved from condemnation simply because an employer otherwise neutralizes the group impact in the hiring process. In *Connecticut* v. *Teal,*[56] in question was a written examination administered by a State welfare agency to select permanent employee supervisors. Black candidates passed the exam at approximately 68 percent of the passing rate for white candidates. To overcome the exclusionary impact of the test on blacks, the agency promoted black candidates for supervisor at approximately 170 percent of the promotion rate enjoyed by white candidates. This was insufficient, nevertheless, to save the test from reprobation under section 703(a)(2).

Writing for a 5–4 majority, Justice Brennan asserted that safeguarding *individual* employment *opportunities* for minorities or women was the object of Title VII. Accordingly, Brennan concluded, individual minorities or females cannot lawfully be excluded from employment opportunities by practices or tests yielding an adverse group impact, despite the fact that the employer's favorable treatment of other minority members or women offsets the statistical imbalance.

To recapitualate, employment practices or tests are prohibited by section 703(a)(2) of Title VII if they operate to exclude a disproportionately high percentage of minority or women and are either not job related or have been utilized as a pretext for inflicting discrimination. An employer cannot redeem a prohibited practice or test by preferential treatment of individual members of groups adversely impacted by the employment device.

The Equal Employment Opportunity Commission (EEOC), entrusted with enforcement of Title VII,[57] has adopted uniform guidelines on employee selection procedures that explicate the meaning of untoward impact under section 703(a)(2). The guidelines provide that any selection device that minorities or women surmount at less than 80 percent of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact.[58]

The 80 percent rule has similarly been endorsed by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor in executing its authority to enforce Executive Order 11246.[59] That order obligates Federal Government contractors to undertake affirmative action to guarantee equal employment opportunities for all persons without regard to race, color, religion, sex, or national origin. Thus, as administered by OFCCP, the Executive order generally prohibits government contractors from employing any tests or practices that minorities or women satisfy at less than 80 percent of the rate for white male success, absent proof of job-relatedness. However, in contrast to the ruling in *Connecticut* v. *Teal,* as a matter of enforcement discretion neither OFCCP nor EEOC will cast suspicion on tests or devices that fail the 80 percent norm if the actual hiring practices of the employer

[53] *Supra,* 422 U.S. 405 (1975).
[54] 433 U.S. 321 (1977).
[55] *Id.* at 329.
[56] 457 U.S. 440, 453–56 (1982).
[57] *See* 42 U.S.C. §§2000e–4 and 2000e–5.
[58] 41 C.F.R. §60–3.4 D.
[59] Exec. Order 11246, 3 C.F.R. §339 (1964–65 Comp.), *reprinted in* 42 U.S.C. §2000e note, at 28 (1983 ed.).

neutralize the adverse group impact of the interim selection procedures.[60]

The Cloudy Legal Status of Affirmative Action

The Supreme Court has struggled unsuccessfully for over a decade to articulate clear, coherent, and convincing principles to examine the legality of affirmative action programs or judicial decrees that prefer minorities or women on account of race or gender. As a consequence, a substantial proportion of voluntary or court-ordered affirmative action programs operate under a legal cloud.

Voluntary Affirmative Action by Private Employers

Underrepresentation of minorities in a private employer's work force can partially justify voluntary preferential treatment based on race that would otherwise violate Title VII of the Civil Rights Act. In *United Steelworkers* v. *Weber*,[61] a private employer (Kaiser) voluntarily embraced an affirmative action plan to benefit black employees. To eliminate conspicuous racial imbalance in its virtual monochromatic white craftwork forces, Kaiser established an on-the-job training program for both black and white production workers that would qualify them for craftwork. Because of historical racial discrimination by craft unions, only 1.83 percent of Kaiser's skilled craftworkers were black, although blacks constituted 39 percent of the local labor force.

Kaiser's plan reserved 50 percent of the training slots for blacks for the duration needed to make the percentage of black craftworkers equal to the percentage of blacks in the local labor force. As a consequence, some white employees were denied admission to the training program despite their greater seniority than black admittees. Suit was brought alleging that the racial preferences for blacks in the craftwork training program violated the nondiscrimination obligations of employers under sections 703(a) and (d) of Title VII.[62] Those sections make it unlawful to "discriminate because of. . .race" in the hiring and in the selection of apprentices for training programs.

By a 5–2 vote, the Supreme Court rejected the Title VII claim. Justice Brennan, speaking for the majority, acknowledged that the decision in *McDonald* v. *Sante Fe Trail Transportation Co.*[63] established that Title VII protects whites as well as minorities against racial discrimination. Brennan maintained, nevertheless, that the legislative history of Title VII evinced sympathy for voluntary action by private employers to eradicate the vestiges of past discrimination without the catalyst of a lawsuit. Moreover, Brennan stressed, section 703(j) of Title VII was carefully drafted to protect employers from government coercion to grant racial preferences to overcome racially imbalanced work forces, while maintaining management prerogatives to initiate employment preferences in pursuit of racial balance. Thus, Brennan concluded, the Title VII prohibition against racial discrimination incorporated in sections 703(a) and (d) is not an implacable barrier to all private, voluntary, race-conscious affirmative action plans.

The Kaiser race-conscious training plan passed muster under Title VII, Brennan explained, because of three earmarks: It was designed to open employment opportunities for blacks in occupations formerly sealed off by racially segregative practices; the interests of whites were not unnecessarily trammeled because none was fired and all could compete for half the training slots; and the racial preferences were temporary, lapsing when a specified percentage of blacks were elevated to skilled craftworkers. The Court offered no guidance as to whether these earmarks are indispensable to the legality of voluntary racial preferences for blacks, other minorities, or women under Title VII.

Voluntary Affirmative Action by Public Employers

In *Firefighters Local Union No. 1784* v. *Stotts*,[64] the Court expressly left open the question of whether public employers under Title VII or the Constitution can voluntarily embrace employment practices that prefer minorities on the basis of race when the beneficiaries are not limited to victims of past illegal discrimination.[65] Most lower Federal court decisions have answered the question in the affirmative, several extrapolating from the Supreme

[60] *See* "Uniform Guidelines on Employee Selection Procedures," 41 C.F.R. §60–3.4 C.

[61] *Supra*, 443 U.S. 193 (1979).

[62] 42 U.S.C. §2000e(a)(d).

[63] *Supra*, 427 U.S. 273 (1976).

[64] *Supra*, 104 S.Ct. 2576 (1984).

[65] *Id.* at 2590.

Court's rulings in *Regents of the University of California* v. *Bakke*[66] and *Fullilove* v. *Klutznick*.[67]

In *Bakke,* the Court addressed the legality of an admissions program to a State medical school that reserved 16 of 100 entering slots for minorities. A disappointed white applicant argued that the racial quota violated both the nondiscrimination norm of Title VI of the Civil Rights Act and the equal protection clause of the 14th amendment. Five Justices concluded that Title VI strictures are congruent with the commands of the equal protection clause. Four Justices, declining to decide that question, concluded that the racial quota offended Title VI. Justice Powell, joining this quartet in the result, concluded that the quota violated the 14th amendment. Four dissenting Justices voted to uphold the racial set-aside under both Title VI and the equal protection clause.

Justice Powell, who cast the pivotal vote denouncing the minority admissions quota, declared that all racial classifications are subject to exacting judicial scrutiny. The strict scrutiny rule obtains whether or not a classification is intended to benefit minorities; moreover, Powell asserted, a racial classification can be sustained only if necessary to advance a compelling government interest.

Powell acknowledged the legitimacy of racial preferences invoked to rectify past illegal discrimination if undertaken by responsible judicial, legislative, or administrative bodies that had made findings of constitutional or statutory violations. But no responsible legislative, administrative, or other body had determined that the State medical school had practiced racial discrimination necessitating remedial action.

Powell also denied that several other proffered objectives of the racial set-aside saved it from constitutional reproach. To prefer medical school applicants on the basis of race simply to augment minority representation in the profession, Powell maintained, is an illegitimate constitutional purpose. Similarly, racial preferences could not be justified by the goal of ameliorating the effects of societal discrimination that fell short of demonstrated unlawfulness. That goal places no limits on the amount of harm to innocent persons inflicted by the preferences because the extent of the past injury to the disadvantaged group will not have been calibrated. Furthermore, "[w]ithout. . .findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another."[68]

The worthy goal of furthering delivery of health care services to underserved minority communities was not shown to be advanced by the racial quota in admissions. Empirical data failed to support the proposition that race, as opposed to past conduct and stated intent, was the best predictor of a medical student's future service to disadvantaged communities.

A diverse student body, Powell conceded, is a commendable goal of a State medical admissions program. But ethnic diversity is only one element of a genuinely pluralistic student body that enriches education. Thus, minorities can be given a marginal but not absolute preference over white applicants to State medical schools to further educational objectives. The racial quota of 16 was flawed, however, because it fenced off 16 admissions slots solely for minority applicants.

Justice Powell's acceptance of the constitutionality of a so-called racial "plus" factor was limited to educational institutions and to the promotion of educational endeavors. Powell's rationale would not endorse racial "plus" factors in employment or contracting.

Justices Brennan, White, Marshall, and Blackmun dissented from the invalidation of the racial set-aside. Speaking for the quartet, Justice Brennan insisted that racial classifications that benefit minorities pass constitutional muster if they are substantially related to an important government objective. The racial admissions quota, Brennan asserted, served the important government objective of remedying the effects of past societal discrimination. There was a sound factual basis for concluding that minority underrepresentation in the medical profession is substantial and chronic, he maintained, and that the handicap of past discrimination is impeding access of minorities to the State medical school. In addition, the 16 admissions slots set aside for minorities were substantially related to overcoming the handicap. Minority population within the State exceeded 16 percent of total population, and the use of criteria other than race in the admissions process

[66] 438 U.S. 265 (1978).

[67] 448 U.S. 448 (1980).

[68] *Bakke, supra,* 438 U.S. at 308–09 (Powell, J.).

would not yield a satisfactory number of minority enrollees. Accordingly, Brennan concluded, the racial quota for admissions to the State medical school satisfied constitutional standards.

The Court further elaborated on relevant criteria for examining the constitutionality of racial preferences for minorities in *Fullilove.* At issue in that case was a $14 billion congressional public works spending program that reserved 10 percent of the expenditures on each project for minority-owned enterprises. By a 6–3 vote, the Court rejected an attack on the facial validity of the 10 percent racial set-aside.

Writing for a three-member plurality, Chief Justice Burger interpreted the statutory 10 percent minority enterprise quota as permitting administrative waivers either where compliance is infeasible or where bids submitted by minority enterprises exceed competitive levels by more than can be ascribed to the present effects of past discrimination or disadvantage. Moreover, Burger insisted, Congress endorsed the 10 percent set-aside only after making findings that minority enterprises were unfairly handicapped in competing for government procurement contracts because of past social or economic disadvantage or discrimination.

Without delineating a standard to evaluate the constitutionality of the waivable 10 percent minority quota, the Chief Justice enumerated several factors that in combination sustained its legality:

1. Congressional statutes deserve deference because Congress enjoys coequal status with the judiciary as a branch of the Federal Government.
2. Congressional spending and commerce clause powers and power to enforce the equal protection guarantee of the 14th amendment are broad.
3. The 10 percent quota was designed to remedy the identifiable effects of past economic discrimination suffered by minorities, and Congress was presented with abundant evidence that the present effects of such discrimination were obstructing minority success in bidding on government procurement contracts.
4. The waiver provisions ensured that preferences for minority enterprises will be circumscribed by the amount of demonstrable economic harm inflicted by past discrimination.
5. The 10 percent set-aside excluded white contractors from only 0.25 percent of annual construction work in the United States, and some of those contractors in the past might have profited by discrimination against minority-owned businesses.
6. The minority enterprise quota applied only to State or local public works grantees that voluntarily choose to participate in the congressional spending program.

Burger declared that any racial or ethnic preferences must receive "searching examination"[69] by the judiciary to ensure conformity with constitutional safeguards, and opined that the 10 percent quota "may press the outer limits of congressional authority. . . ."[70] The Chief Justice further cautioned that *Fullilove* did not raise the question of whether nonminority contractors were legally entitled to damages for harm caused by the minority set-aside.

Justice Powell, in a concurring opinion, reasoned that the set-aside was "justified as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress."[71] Congress, Powell observed, is expressly endowed with power to vindicate the equal protection promise of the 14th amendment and acted with a reasonable factual basis for concluding that past private and governmental discrimination had contributed to the virtual exclusion of minorities from governmental procurement contracts. Furthermore, Powell explained, the 10 percent racial quota was equitable and reasonably tailored to rectifying identified discrimination. That conclusion turned on several factors: Alternative remedies to aid minorities had proven fruitless; the duration of the racial preference was limited; the magnitude of the preference fell midway between the percentage of minorities in the population and the percentage of minority contractors in the contracting business; the availability of waivers; and the inconsequential economic effects on innocent nonminority contractors.

Justices Marshall, Brennan, and Blackmun concurred in the judgment. Speaking for the trio, Marshall declared that the 10 percent minority set-aside passed constitutional muster if substantially related to the achievement of important government objectives. Inspired by a quest to remedy past discrimination, the set-aside plainly vindicated a significant government objective. Moreover, the

[69] Fullilove v. Klutznick, *supra,* 448 U.S. at 491.

[70] *Id.* at 490.

[71] *Id.* at 508 (Powell, J., concurring).

means chosen to further the goal were reasonable because the magnitude of the preference was tailored to the economic consequences of past discrimination, and only a tiny fraction of construction expenditures were burdened by the set-aside. In sum, Marshall concluded, the 10 percent public works expenditures quota was "plainly constitutional."

Legal conclusions that can be deduced from the *Bakke* and *Fullilove* decisions regarding the constitutionality of voluntary affirmative action programs in employment or contracting adopted by government authorities seems as follows. Any racial preference must undergo searching scrutiny to pass constitutional muster. Such preferences are less vulnerable to attack if championed by Congress as opposed to State or local authorities because the former is constitutionally charged under section 5 of the 14th amendment with vindicating equal protection norms and is a coequal partner with the judiciary within the Federal Government.

Racial preferences are viewed with constitutional favor if they seek to redress harms caused by past illegal discrimination, and such discrimination is documented by the government authority granting the preferences. The preferences, however, must be delimited to injury ascribable to historic discrimination and be generally targeted on the injured victims. The greater the economic harm inflicted on innocent nonminorities by the preferences, the greater the need to evidence the justifying past discrimination and its nexus to preferred beneficiaries. The duration of the racial preferences and the economic importance of opportunities foreclosed to nonminorities are pertinent in this regard.

These inexact conclusions leave many unanswered questions for subordinate Federal or State courts, legislators, and executive officers. In *Detroit Police Officers Association* v. *Young,*[72] the Detroit police department voluntarily initiated a program of promoting policemen to the rank of sergeant that preferred blacks on the basis of race. The program was bottomed on a resolution of the board of police commissioners directing the chief of police to take affirmative action to promote minority candidates to sergeant. The board found necessity for such action because of past and present discrimination in the hiring and promotional policies of the police department. The chief inaugurated a program of promoting an equal number of blacks and whites to sergeant by elevating blacks who scored lower than whites on competitive examination scales. The legality of the voluntary 50 percent promotional quota was challenged by white patrolmen.

The court of appeals concluded that statistical evidence of underrepresentation demonstrated that the Detroit police department had engaged in unlawful discrimination. Over three decades, new hires by the department included 13.7 percent blacks, compared with 23.6 percent blacks in the Detroit labor market. No explanation for the underrepresentation of black officers and sergeants other than systematic exclusion was presented to the trial judge. In addition, evidence was adduced showing that the department employed hiring examinations that had an adverse impact on black applicants, but were not job related as mandated under section 703(a)(2) of Title VII. And many individual lawsuits against the department eventuated in judicial findings of illegal discrimination. Accordingly, the court concluded the totality of the evidence proved a substantial probability of past unconstitutional employment practices by the police department.

In light of such unlawful actions, the court reasoned, the voluntary racial preference plan for police promotions escaped condemnation under Title VII by virtue of the *Weber* decision. Moreover, the court insisted, the 50 percent promotion quota was not unconstitutional simply because its beneficiaries were not proven victims of lawlessness. Under the dissenting *Bakke* opinion of Justice Brennan, the constitutional question turned on whether there was a sound basis for believing that minority underrepresentation in the police department was substantial and chronic, and traceable to barriers erected by past discrimination, and whether the 50 percent racial quota was a reasonable remedial measure in light of alternatives that might inflict less harm on innocent nonminorities. The court added that a temporary quota that seeks the same racial proportion among employees as in the local labor force ordinarily will be reasonable. Finally, the court declared, the quota might be independently justified, if necessary, to inspire public confidence and cooperation with the police.

The court's analysis in *Young* seems incomplete or flawed. It assumes that the *Weber* decision applies to public as well as private employers. But the *Weber* ruling relied, in part, on congressional intent to

[72] 608 F.2d 671 (6th Cir. 1979).

preserve *private* managerial business prerogatives free from statutory oversight. No comparable intent was expressed regarding the prerogatives of public employers not engaged in business endeavors. Presumed concerns of Congress for federalism in the enactment of statutes,[73] however, might substitute for the private managerial prerogative concern noted in *Weber.*

The opinion in *Young* also accepted the legitimacy of a so-called "operational needs" justification for the 50 percent promotion quota. If greater black prominence in the police force of a city 50 percent black would enhance the department's effectiveness by fostering community assistance, cooperation, and respect, the court maintained, the quota might surmount constitutional difficulties. But if the improved public perception of the department is ascribable to racial animus by blacks in the community toward white police officers, then the Supreme Court's recent decision in *Palmore* v. *Sidoti*[74] suggests that such justification for the racial quota would be unconstitutional. Writing for a unanimous Court in *Palmore,* Chief Justice Burger declared: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held." (Quoting from *Palmer* v. *Thompson.*[75])

In *Bushey* v. *New York State Civil Service Commission,*[76] a State determined that promotional examinations for supervisory positions in the State's correctional services unlawfully impacted adversely on minority candidates. The latter passed the exam at only 50 percent of the pass rate for nonminority candidates. Accordingly, the State adjusted the scores of minority candidates to equalize their pass rate with that of nonminorities. The adjustment was assailed by nonminorities as a violation of Title VII of the Civil Rights Act.

The court of appeals denied the Title VII claim. It noted that the 50 percent statistical disparity in passage rates between minority and nonminority candidates taking the promotional exam established a prima facie case of illegality under the standards expounded in *Griggs* v. *Duke Power.* The lack of any judicial finding that the tests were not job related was not fatal to the State's voluntary remedial action, since compliance with Title VII without the compulsion of litigation is favored.[77] Relying on the *Weber* decision, the court maintained that the State's voluntary racial preference for minority aspirants for promotion escaped Title VII condemnation if the score adjustments did not unnecessarily trammel the interests of innocent nonminority candidates. In that regard, the court noted that the racial preferences were temporary, required no discharge of nonminority employees, erected no absolute barrier to nonminority promotions, and were tailored to offset only the adverse impact of the promotional exam. The case was remanded for further findings on the issue of whether the adjustment of scores unnecessarily subordinated the interests of nonminority candidates.

The court of appeals in *Bushey* declined to explore whether *Weber* should apply to public employers not engaged in business enterprise. Furthermore, the court failed to address whether reliance on the State to assess whether the promotional exam was job related and, thus, lawful despite its adverse impact, was appropriate. Having commenced an affirmative action program with racial preferences justified by the examination's putative illegality, the State lacked any incentive to assemble evidence of job relatedness that would condemn its own handiwork. Thus, the court in *Bushey* could not, with confidence, conclude that the questioned racial quota in promotions was justifiably remedial.

In *Wygant* v. *Jackson Board of Education,*[78] a school board voluntarily agreed that any layoffs of public school teachers would not reduce the percentage of minority teachers, even if that pledge required ignoring seniority to the disadvantage of nonminorities. The racial preference was challenged as unconstitutional, among other grounds. The court of appeals rejected the challenge.

Because minority teachers are role models for minority pupils, the court explained, the determination of substantial underrepresentation turned on a

[73] For example, when Congress creates a private right of action under a Federal statute, it will be presumed not to have abrogated a State's 11th amendment sovereign immunity from suit in Federal court in the absence of a clear statement to the contrary. *See, e.g.,* Quern v. Jordan, 440 U.S. 332 (1979).

[74] Palmore v. Sidoti, 104 S.Ct. 1879 (1984).

[75] *Id.* at 1882 (quoting Palmer v. Thompson, 403 U.S. 217, 260–61 (1971) (White, J., dissenting)).

[76] *Supra,* 733 F.2d 220 (2d Cir. 1984).

[77] *Id.* at 226.

[78] 746 F.2d 1152 (6th Cir. 1984).

comparison between minority faculty and minority students. That comparison showed that the percentage of black faculty in the school district was persistently and substantially below the percentage of minority students. The school board made such findings of underrepresentation, was competent to do so, and, thus, was justified in seeking a remedial affirmative action program for black faculty. Moreover, the degree of racial preference was reasonable because of the school board's "interests in eliminating historic discrimination, promoting racial harmony in the community and providing role models for minority students. . . ." Thus, the court concluded, the racial preference in layoffs was constitutional.

The *Wygant* opinion seems deficient. The court reasoned that substantial and chronic underrepresentation of minorities amongst the faculty demonstrated past unconstitutional discrimination. But the Supreme Court has held that only intentional racial discrimination violates the Constitution, and that underrepresentation, *simpliciter,* does not prove unlawful intent. Moreover, in *Wygant,* minority faculty underrepresentation was determined by comparison with minority student population, not the percentage of minorities in the relevant labor market. That comparison is an improper basis for proving illegal discrimination in teacher employment.[79] In addition, the court assumed that racial preferences could be justified by the goal of providing role models for minority students. The Supreme Court, however, has never endorsed such a goal as a justification for racial classifications under the 14th amendment. Justice Powell's opinion in *Bakke* suggests that a role model justification is unconstitutional.[80]

The *Wygant* opinion further sanctioned the use of race as a criterion to benefit minorities who were not demonstrated victims of illegal discrimination and without regard to the magnitude of the putative discrimination. The *Fullilove* decision, however, casts a cloud over the use of racial preferences to aid persons not demonstrably handicapped by historical discrimination or, to an extent, not tailored to the harm inflicted by discrimination. Finally, the racial preference at issue in *Wygant* lacked any fixed termination point and was authored by an arm of a State, as opposed to Congress. The rationale of Chief Justice Burger's plurality opinion in *Fullilove* suggests that these features of the preference cut against its constitutionality. Unlike Congress, a State is not coequal with the Supreme Court on the Federal level and is not empowered by the 14th amendment to vindicate equal protection objectives.

A pronounced voluntary local government preference for minority contractors was sustained by the court of appeals in *South Florida Chapter of the Associated General Contractors of America* v. *Metropolitan Dade County.*[81] In that case, a county ordinance empowered contracting officials to set aside procurement contracts or to establish participation goals solely for black-owned enterprises. The ordinance was the child of legislative findings that past discrimination had handicapped black businesses in competing for county contracts and that procurement preferences were essential to augmenting black minority participation in county procurement awards. Pursuant to the ordinance, prime contractor bids on a rapid-rail transit station were reserved for black-owned enterprises, and a goal of awarding 50 percent of the value of all subcontracts to black firms was established. The constitutionality of the racial set-aside and 50 percent goal was attacked by nonminority contractors.

The court of appeals observed that the voluntary racial preferences were remedial, based on findings of past discrimination, and sacrificed no legitimacy simply because they were endorsed by a county, rather than by Congress. The court further noted that no set-asides were made or minority participation goals adopted until thorough administrative review determined that the racial preferences were in the best interests of the county. In addition, the black set-aside and participation goals at issue affected less than 1 percent of the county's annual contract expenditures, whereas blacks constituted 17 percent of the county population and less than 1 percent of county contractors. Accordingly, the black set-aside and 50 percent goal were reasonably tailored to rectify historic discrimination. Finally, the court declared, an equivalent for a waiver from the racial preferences was incorporated in the contract review process that requires a finding that preferences are needed to redress past discrimination and are otherwise in the best interests of the county.

[79] *See* cases cited in notes 42 and 43, *supra.*

[80] *Bakke, supra,* 438 U.S. at 307, 310–11 (Powell, J.); *see also* Smith v. Board of Educ., 365 F.2d 770, 781 (8th Cir. 1966) (then Judge Blackmun rejected "rapport" between students and teachers as justification for racial discrimination).

[81] 723 F.2d 846 (11th Cir. 1984).

The *Dade County* opinion seems incomplete. The black set-aside and subcontracting goal were not reserved for contractors that suffered any identifiable handicap of past discrimination. In addition, evidence was not adduced to show that the amount of racial preference in the contracting scheme was reasonably congruent with the amount of past discrimination. The *Fullilove* plurality makes these considerations central to the constitutionality of any remedial affirmative action program. Moreover, the *Fullilove* plurality emphasized the status of Congress as a coequal with the Supreme Court within the Federal Government, and as a foremost vindicator of minority rights under section 5 of the 14th amendment as salient in the judicial scrutiny of voluntary racial preferences. The *Dade County* decision failed to explain why a county, a constitutional inferior of Congress and a likely practitioner of racial discrimination in the eyes of the architects of section 5 of the 14th amendment,[82] should enjoy the same constitutional discretion in embracing racial preferences as the *Fullilove* decision declared Congress possesses.

At issue in *Associated General Contractors* v. *Altshuler*[83] was a State statute requiring contractors engaged in public construction to utilize qualified minority employees for at least 20 percent of needed manhours. The court of appeals denied that the racial quota violated the equal protection clause. Blacks historically have been significantly underrepresented and discriminated against in the construction trades, the court reasoned, and such imbalance contributes to racial tensions and undermines equal opportunity elsewhere in the economy. The court insisted that the goal of equal opportunity is undisturbed by automatic preferences for blacks over whites if both are equally qualified because of historical discrimination against blacks as a group.

Decided before *Fullilove,* the *Altshuler* decision is vulnerable to the same criticisms as *Dade County.* In addition, how can the goal of equal individual opportunity be vindicated if two equally qualified individuals are judged on the basis of race in making an employment decision? If race is injected into the decisionmaking process in such circumstances, and both individuals are innocent of wrongdoing and unvictimized by past discrimination, then the employment opportunities of the two rivals are emphatically not equal. The black applicant is clearly advantaged.

The court of appeals in *Bratton* v. *City of Detroit*[84] broadly approved the legality of voluntary racial preferences by public employers. Challenged in that case was a 50 percent racial quota for promotions from sergeant to lieutenant initiated by the Detroit police department. The quota was to endure until 50 percent of all lieutenants were black, benefited only "qualified" black sergeants, and was justified by a need to remedy past discrimination.

Under Title VII of the Civil Rights Act, the court asserted, without elaboration, that public employers may undertake voluntary affirmative action programs permitted to private employers by the *Weber* ruling. In addition, the constitutionality of such programs under the 14th amendment turns on the demonstrated need for remedial endeavors and the reasonableness of the racial preferences in light of remedial goals.

The need for a racial promotion quota was shown by findings of the board of police commissioners that the police department had historically employed a consistent overt policy of intentional discrimination against blacks in all phases of its operations. Statistics demonstrated severe black underrepresentation in the police work force unexplained by racially neutral reasons. The statistics of racial imbalance were supplemented by individual instances of racial discrimination.

The 50 percent quota selected to remedy historic discrimination was reasonable for several reasons. It stigmatized neither blacks nor whites because the quota was remedial, temporary, and blessed only qualified black sergeants. Additionally, 50 percent of the city population was black (and that percentage was increasing), the black community in Detroit has historically suffered indignities and harassment by white police officers, and no whites were discharged because of the promotional quota. The court rejected the argument that the quota must constitutionally be limited to the probable percentage of black lieutenants in the department that would have obtained promotions, absent past discrimination.

The *Bratton* reasoning is questionable. The black beneficiaries of the promotional quota were neither proven victims of past discrimination nor preferred over whites in an amount calibrated by reference to

[82] *See* Graham, "Our 'Declaratory' Fourteenth Amendment," 7 Stan. L. Rev. 3 (1954).

[83] 420 F.2d 9 (5th Cir. 1973).

[84] 704 F.2d 878 (6th Cir. 1983).

such discrimination. The plurality in *Fullilove* indicates these features of the quota are constitutionally suspect. Moreover, the quota set aside 50 percent of promotions to lieutenant for blacks, a much larger foreclosure of opportunities for whites than the tiny percentage of annual construction expenditures affected by the racial set-aside in *Fullilove.* Additionally, the preference in *Fullilove* was for 1 year, whereas in *Bratton* the preferences had a life expectancy of many years. Finally, the racial preferences in *Bratton* were adopted by an arm of State government, not Congress. The architects of the 14th amendment were skeptical of the capacity of State governments to address race issues responsibly and, thus, endowed Congress with special enforcement powers.[85] These considerations indicate that *Bratton* was wrongly decided, or at least deficient in its reasoning.

Voluntary race-conscious teacher assignments were sustained in *Kronnick* v. *School District of Philadelphia.*[86] In that case, the Philadelphia Board of Education reassigned the public school teaching faculty on the basis of race to maintain a faculty ratio at each school of between 75 percent and 125 percent of the systemwide ratio of black and white teachers. The race-conscious reassignment rules were not designed to remedy past unconstitutional discrimination, affected black and white teachers equally, and lacked any termination date.

In upholding the racial reassignment plan, the court of appeals stressed the absence of adverse impact upon one race. The objective of the reassignment scheme, moreover, was to provide public school pupils the opportunity to be instructed by an integrated faculty, to satisfy State legal requirements of racial balance, and to ameliorate racism and racist attitudes in society. Furthermore, school boards are endowed with special competence to determine the need for race-conscious assignments to the educational mission of the school system. Finally, the court emphasized, the reassignment plan operated with a flexible percentage range, affected only a small percentage of teachers within the school system, and was required to counteract the natural preference of black teachers for black schools and white teachers for white schools. Accordingly, the plan passed constitutional muster.

The court of appeals also concluded that Title VII of the Civil Rights Act was unoffended by the use of race to make teacher assignments. The assignments occasioned no disparate group impact based on race and were intended to remedy racial imbalance, not to discriminate for racial reasons. In addition, the racial classification of teachers was adopted to benefit the learning of students in a desegregated environment, an exceptionally worthy goal. Thus, the court reasoned, the questioned teacher assignment plan did not run afoul of the intent of Title VII.

The *Kronnick* ruling is ill-founded. The Supreme Court has rejected the idea that racial classifications are exempt from searching scrutiny simply because both races are equally affected.[87] In addition, the Court strongly suggested in *Palmore* that teachers may not be assigned on the basis of race to overcome private bias amongst students or otherwise to enhance student learning. If students learn best with a monochromatic faculty, could a school district require racial separation of teachers?

Furthermore, Justice Powell's opinion in *Bakke* rejected the idea that racial classifications might be justified to overcome general unidentified societal discrimination. And simply because a constitutional violation injures only a few teachers does not make the practice less unconstitutional. Finally, the teacher reassignment plan was not remedial in the constitutional sense. It was aimed at compliance with State laws designed to remedy *de facto* school segregation; such segregation, however, is constitutionally irreproachable.[88] There seems little in the *Bakke* and *Fullilove* decisions to sustain the *Kronnick* constitutional analysis.

Regarding Title VII, nothing in its legislative history suggests an overriding intent to authorize the voluntary use of race to classify public school teachers in furtherance of student educational objectives.[89] The race-conscious reassignment plan in *Kronnick* violates the express language of Title VII[90] and, thus, should have been prohibited absent

[85] *See generally* Graham, *supra,* 7 Stan. L. Rev. 3.

[86] 739 F.2d 885 (3d Cir. 1984).

[87] *See e.g.,* Loving v. Virginia, 338 U.S. 1, 8–9 (1967) (antimiscegenation statute held to violate equal protection laws although it treated both blacks and whites in same way).

[88] *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 205, 208 (1973).

[89] The legislative history of Title VII demonstrates that such racial classification was permitted only to remedy specific instances of employment discrimination. *See e.g.,* 110 Cong. Rec. 6549 (remarks of Sen. Humphrey); and *id.* at 7214 (memorandum of Sens. Clark and Case).

[90] *See* 42 U.S.C. §2000e–2(a)(2) (making it illegal to classify or segregate employees on the basis of race).

unequivocal legislative history compelling a contrary result.[91] The make-whole employment objectives of Title VII and its encouragement of voluntary compliance, however, are wholly unrelated to the asserted redeeming goal in *Kronnick* of enhanced student education. Title VII addresses employment goals, not educational aspirations.

Judicially Ordered Affirmative Action to Remedy Past Illegal Discrimination

Title VII

Section 706(g) of the Civil Rights Act empowers a court to award injunctive relief, reinstatement or hiring of employees with or without backpay, or other appropriate affirmative action to remedy unlawful racial discrimination by an employer. The purpose of Title VII is to make persons whole for injuries suffered on account of unlawful discrimination.[92] Thus, "given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[93] Under this standard, an employer cannot escape backpay liability simply because his violation of Title VII was not in "bad faith."[94] Title VII was aimed at the consequences of employment practices, not with good or bad motives of employers. Moreover, the prospect of backpay awards is a spur to employers and unions to eradicate racially discriminatory practices without the necessity of lawsuits. These goals would be defeated by making the employer's intent the touchstone for backpay awards.

Section 706(g) denies the judiciary authority to award backpay or similar relief to persons whose adverse treatment was for reasons other than race, color, religion, sex, or national origin. If a Title VII violation is proven by showing that an employment practice disproportionately impacted adversely against a protected group, then individual members are presumptively entitled to make-whole relief, including reinstatement, promotion, or backpay. An employer can avoid such obligations only by demonstrating, by a preponderance of the evidence, that factors other than the condemned discrimination were responsible for the employment decisions assailed by the individual claimants. If this burden is satisfied, the individual may, nevertheless, obtain make-whole relief by showing that the employer's exculpatory reason was used as a pretext for practicing discrimination.[95]

In *Firefighters Local Union No. 1784* v. *Stotts,*[96] the Supreme Court expounded section 706(g) to proscribe judicial awards of affirmative action relief to persons uninjured by illegal discrimination. In that case, a Federal district court enjoined a municipality from laying off firefighters in accord with seniority provisions of a collective-bargaining agreement if adherence to the seniority rule reduced the percentage of black firefighters in the work force. The racial preferences in layoffs, the district court asserted, were necessary to vindicate a consent decree issued under Title VII intended to increase minority representation in the fire department.

By a 6–3 majority, the Supreme Court held the injunction beyond the scope of Title VII relief. Speaking for the Court, Justice White explained that the policy of section 706(g) "is to provide make-whole relief only to those who have been actual victims of discrimination. . . ." The legislative history of the statute is unambiguous in this regard. The district court's injunction was legally infirm because there was no finding that any of its black beneficiaries had been a victim of discrimination.

The rationale of *Firefighters* establishes that Title VII proscribes judicial awards of specific relief, whether regarding hiring, promotions, layoffs, back pay, or otherwise, to persons not victimized by a Title VII violation. The Court unambiguously declined to limit the decision solely to racial preferences in layoffs.

Constitutional Violations

Remedies for constitutional violations must be compensatory, not punitive.[97] A child's constitutional right to attend a desegregated school system is vindicated by a remedy that seeks a racial distribu-

[91] *See generally* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (plain language of statute will yield only to "clear contrary evidence of legislative intent").

[92] Albemarle Paper Co., *supra,* 422 U.S. at 418.

[93] *Id.* at 421.

[94] *Id.*

[95] *See* Sledge v. J.P. Stevens, 585 F.2d 625, 637 (4th Cir. 1978).

[96] Firefighters Local Union No. 1784 v. Stotts, *supra,* 104 S.Ct. 2576.

[97] Carey v. Piphus, 435 U.S. 247, 254–57 (1978).

tion of students within schools that would have obtained, absent illegal segregative actions.[98] Remedies must be designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.[99] These standards for fashioning constitutional remedies seemingly establish that judicial relief for illegal employment or contracting practices should not extend to persons not injured by the constitutional wrongdoing. Some lower court decisions, however, have ignored this limitation without convincing explanation.

In *United States* v. *City of Miami,*[100] the court of appeals sustained a consent decree that adopted percentage goals for hiring and promotion of blacks, Latins, and women in municipal employment, absent proof that any of the beneficiaries were victims of illegal discrimination. The court reasoned that the beneficiary groups were underrepresented in the municipal work force and that the goals were reasonable because they mirrored the percentage of blacks, Latins, and women in the community without foreclosing all employment opportunities for white males. Underrepresentation of a distinct group, *simpliciter,* however, does not establish unconstitutional action. In addition, the court failed to explain why as between two innocent and unvictimized employment applicants, one black and the other white, equitable or remedial norms would entitle preferring the black solely for racial reasons.

In *Rios* v. *Enterprise Association,*[101] the court of appeals upheld the use of racial goals regarding union membership to remedy past illegal discrimination against minorities. The beneficiaries of the goals were not limited to victims of illegal discrimination. The succinct rationale of the court was that, absent past discrimination, minorities would have been more prominently represented in the union. Thus, a remedy may properly aim at seeking minority representation in a union that would have resulted, absent the unlawful discrimination. But no individual possesses a right to a particular representation of his or her race or gender in a union or work force. The racial goals in *Rios* were severed from the vindication of any individual rights. Moreover, as in *City of Miami,* the court failed to explain why, as between two innocent and unvictimized applicants for union membership, one black and the other white, equitable principles justified a racial preference for the former.

In *United States* v. *City of Chicago,*[102] a district court held that police department practices in hiring and promoting police officers unlawfully discriminated against blacks, Hispanics, and women. As a remedy, the trial court required that at least 16 percent of new patrol officer vacancies be filled by women and that at least 42 percent of those vacancies be filled by black and Spanish-surnamed men. In addition, 40 percent of officers promoted to sergeant were to be black or Spanish-surnamed. The court of appeals summarily rejected the contention that the quotas which benefited nonvictims of discrimination were unconstitutional.

Racial preferences in the employment of school faculty may be a legitimate remedy for unconstitutional school segregation. In *Arthur* v. *Nyguist,*[103] the court of appeals concluded that a race-conscious system for hiring and laying off teachers could be employed to vindicate a student's right to a desegregated public school education. In that case, the school authorities had unconstitutionally desegregated the teaching staff within the public school system. The challenged remedy required hiring one minority for every majority hiree until minorities constituted 21 percent of the faculty, a percentage equal to the percentage of minorities in the community.

Executive Branch Affirmative Action

Executive Order 11246, as administered by the Office of Federal Contract Compliance Programs, requires that Federal Government contractors or contractors performing under federally assisted construction contracts undertake affirmative action efforts to ensure that minorities or women are not denied equal opportunity in employment.[104] Generally speaking, such contractors must develop written affirmative action programs that identify and analyze problem areas inherent in minority employment, and that establish specific goals and timetables

[98] Dayton Bd. of Educ. v. Brinkman, 97 S.Ct. 2766 (1977).
[99] Milliken v. Bradley, 418 U.S. 717 (1974).
[100] 614 F.2d 1322 (5th Cir. 1980).
[101] 501 F.2d 622 (2d. Cir. 1974).
[102] 549 F.2d 415 (7th Cir. 1977).
[103] 712 F.2d 816 (2d Cir. 1983).
[104] Exec. Order 11246, 3 C.F.R. §339 (1964–65 Comp.), *reprinted in* 42 U.S.C. §2000e note, at 28 (1983 ed.).

for increasing minority representation where there are deficiencies.[105] A contractor must undertake good-faith efforts to meet his goals and timetables.

To determine whether a government contractor's employment practices are deficient, a utilization analysis of women and minorities in his work force must be conducted.[106] An employer is underutilizing minorities or women if their work force participation is lower that what might reasonably be expected by their availability. In making a utilization analysis for minorities or women, a contractor must consider:[107]

1. Their percentage of the population in the labor area surrounding working facilities;
2. The number of unemployed minorities and women in that area;
3. Their percentage representation in the labor market in the immediate area;
4. The general availability of minorities and women possessing requisite employment skills in the immediate labor area, and in an area where the contractor can reasonably recruit;
5. The availability of promotable and transferable minorities and women within the contractor's organization;
6. The existence of training institutions capable of training persons in the requisite skills; and
7. The degree of training that the contractor is reasonably able to undertake as a means of making all job classes available to minorities and women.

If a contractor is underutilizing minorities or women, then goals and timetables must be developed to rectify any deficiencies.[108] However, "[g]oals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."[109] Moreover, goals "should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin."[110]

The use of an employee selection procedure that has an adverse impact on minorities or women is considered discriminatory, absent proof of job-relatedness.[111] A selection rate for any race, sex, or ethnic group that is less than 80 percent of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact.[112]

Executive Order 11246 is not preceded by executive branch findings of past discrimination against minorities or women and disclaims any remedial purpose. Its professed norm is *equal* employment opportunities irrespective of race or gender.

The legality of the Executive order was assailed in *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor.*[113] Acting under the authority of the order, the Department of Labor required all bidders on Federal or federally assisted construction contracts in the vicinity of Philadelphia to develop specific goals for the utilization of minority manpower in six skilled crafts (the Philadelphia plan). The Philadelphia plan contained a finding that past exclusionary practices of craft unions had caused a pronounced underrepresentation of minorities in skilled trades. After public hearings, the Department ordered that specified ranges be utilized as the standards for minority manpower utilization for each of the six designated trades in the Philadelphia area over a 4-year period. Generally speaking, the ranges progressively increased from a 4–8 percent minority manpower goal up to a 19–26 percent utilization objective.

The Philadelphia plan was unsuccessfully challenged, *inter alia,* as beyond executive power, inconsistent with Title VII, and an unconstitutional command that racial quotas be used in hiring. Since 1941 the court of appeals observed, Presidents, by Executive order, have required certain government contractors to desist from discriminatory employment practices. Such discrimination, moreover, inflates the cost of government contracts. Executive Order 11246 and the Philadelphia plan are consistent with statutory procurement goals and have not been repudiated by Congress. Accordingly, the court declared, the plan is a valid exercise of executive power unless contrary to Title VII.

[105] Regulations, Office of Federal Contract Compliance Programs, Equal Opportunity, Department of Labor, 41 C.F.R. §60–2.2(a).
[106] *Id.* at §60–2.11.
[107] *Id.* at §60–2.11(b).
[108] *Id.* at §60–2.12(h).
[109] *Id.* at §60–2.12(e).
[110] *Id.* at §60–230.
[111] *Id.* at §60–3.3A.
[112] *Id.* at §60–3.4D.
[113] 412 F.2d 159 (3d Cir. 1971).

Title VII precludes racial preferences in employment simply to rectify imbalance in an employer's work force[114] or to interfere with a bona fide seniority system.[115] But these restrictions, the court explained, limit only Title VII judicial remedies, not executive programs. Title VII further prohibits the denial of employment on account of race. To meet the Philadelphia plan minority hiring goals, it was urged, required discrimination against white applicants. The court of appeals insisted, however, that Title VII was not intended to foreclose remedial efforts by the executive to overcome underrepresentation of minorities in the work force.

Finally, the court maintained, the racial hiring quotas contemplated by the plan are constitutionally justified by the findings of past discrimination within the construction trades, and the cost and performance interests of the Federal Government in the contracts governed by the plan.

Under the criteria delineated in *Fullilove,* the Philadelphia plan seems constitutionally flawed. The plan's racial preferences were not limited to victims of discrimination. In addition, there were apparently no findings that the quotas were reasonably related to minority representation in the local labor market. These considerations, *Fullilove* indicates, cast a grave constitutional cloud over the 4-year racial hiring quotas incorporated in the plan.

In *Legal Aid Society* v. *Brennan,*[116] the court of appeals interpreted affirmative action obligations under Executive Order 11246 to avoid any possible conflict with Title VII or the Constitution. The hiring and promotion goals in question, the court observed, represented:

> the contractor's own judgment as to the percentage of female and minority members that would be found in his work force if all available qualified persons applied for employment and if all selection processes operated in a completely nondiscriminatory manner. Given this premise, it is entirely reasonable to assume that a contractor who finds a lower percentage of women or minority members in a particular job category in his work force may well be able to correct the deficiency simply by removing obstacles to fair and equal employment, without reliance upon racial preference or discrimination.[117]

To conclude, Executive Order 11246 seems facially constitutional. It seeks only equal opportunity in employment and explicitly renounces racial or gender quotas. As applied in particular cases, however, the order may operate unconstitutionally to coerce the granting of racial or gender preferences to persons unvictimized by past discrimination. These observations are equally pertinent to the equal employment opportunity obligations of Federal agencies under Federal statute and regulations.[118] The Executive order does not impose sanctions for any conduct that does not also violate Title VII of the Civil Rights Act.[119]

Special Title VII Rules for Seniority Systems.

Even if it perpetuates the effects of past discrimination, or otherwise adversely impacts against minorities or females, a bona fide seniority system is lawful under Title VII unless it was adopted or maintained with the intent to inflict racial or gender discrimination.[120] The rule obtains whether or not the seniority system was adopted before or after the enactment of Title VII[121] and stems from section 703(h). That section provides that "it shall not be an unlawful employment practice for an employer to employ different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . ."

Conclusion

The law of affirmative action is riddled with ambiguities. Responsibility for this legal confusion can be largely ascribed to the Supreme Court's failure to provide authoritative guidance in resolving constitutional or statutory affirmative action questions. Recent action by the Court, however, suggests an unaccustomed willingness to speak broadly and definitively on affirmative action issues.[122]

[114] 42 U.S.C. §2000e-2(j).

[115] 42 U.S.C. §2000e-2(h).

[116] 608 F.2d 1319 (9th Cir. 1979).

[117] *Id.* at 1343.

[118] *See generally* 42 U.S.C. §2000e-16(a) and (b).

[119] United States v. Trucking Management, Inc., 662 F.2d 36, 42-45 (1981); see also Exec. Order 11246, *supra,* §209.

[120] *See Teamsters, supra,* 431 U.S. at 352-53; *see also Stotts, supra,* 104 S.Ct. at 2587.

[121] *Compare Stotts, supra,* 104 S.Ct. at 2585 n.7, 2587 (seniority system adopted subsequent to enactment of Title VII upheld) *with Teamsters, supra,* 431 U.S. at 349-52 (Title VII's enactment held not to affect then existing seniority rights).

[122] In *Stotts,* for example, the Court relied on the broad victim-specific limitation on a court's remedial powers under section 706(g) of Title VII rather than limiting its analysis to the bona fide seniority exception found in section 703(h). *See* 104 S.Ct. at 2588-90.

Much of the Court's affirmative action fragmentation is the result of a refusal to employ the intent of the architects of the 5th or 14th amendments as the touchstones for constitutionality.[123] Unhinged from an intent standard, the Justices are left at sea amidst a welter of conflicting social policies, values, or goals that yield no uniform standard for adjudication of affirmative action claims. The disparate views of the Justices regarding the wisdom or fairness of affirmative action as a matter of public policy that infect the High Court's deliberative process begets clashing legal opinions.

The Court's equivocal affirmative action jurisprudence promotes unevenhanded justice. Subordinate tribunals employ varying legal standards and analyses in determining the legality of affirmative action plans. Decisions turn more on the civil rights propensities of the presiding judges than on any articulated rule of law. The appearance of justice[124] is thus absent in a contentious area of law where the need for public belief in impartial legal standards is at its zenith.

Race has been a divisive wound in America's legal and social culture for centuries. The Declaration of Independence, the Northwest Ordinance of 1787, the Constitutional Convention, the Missouri Compromise of 1820, the Kansas-Nebraska Act, the infamous *Dred Scott* decision, the Civil War, and the post-Civil War amendments are exemplary of the difficulties America has encountered in seeking to reconcile the noble aspirations of equal justice under law and equal individual opportunties with racial classifications etched in law or custom.

Enlightened and sober-minded public debate over the legality of affirmative action programs will be decisive in the forging of coherent and principled constitutional standards by the judiciary, legislators, and executive officials. It would be a triumph of hope over experience to believe the Supreme Court will issue broad and edifying constitutional decrees on an issue that splinters society.

If debate over affirmative action is to be constructive, however, it must be recognized that the legal questions it raises cannot be resolved by facile syllogisms or wooden algorithms. The spirit of tolerance, as expounded by Judge Learned Hand, will nourish and enrich the quest for answers reconcilable with the Nation's constitutional heritage:

> The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias. . .the spirit of liberty is the spirit of Him who. . .taught. . .that there may be a kingdom where the least shall be heard and considered side by side with the greatest.[125]

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[123] For example, in Brown v. Board of Educ., 347 U.S. 483 (1954), the Court first considered and then expressly discounted the relevance of the Framers' intent in the Court's analysis of the meaning of the equal protection clause. But while "we cannot turn the clock back to 1868 when the Amendment was written," *id.*, at 492, we can and must look to the original understanding as "the starting link in the chain of continuity which is a source of the court's authority. . . ." Bickel, "The Original Understanding and the Segregation Decision," 69 Harv. L. Rev. 1, 5 (1955).

[124] *See* Offutt v. United States, 348 U.S. 11, 14 (1955) (Frankfurter, J.) ("Justice must satisfy the appearance of justice").

[125] Irving Dillard, ed., *The Spirit of Liberty* (New York, 1974) (3rd ed.), at 190.

Affirmative Action and Racial Discrimination Under Law: A Preliminary Review

By William W. Van Alstyne*

The purpose of this paper is to identify the several usages of "affirmative action" that can be distinguished in our conduct and in our laws. It is also to disentangle varieties of affirmative action that do not encourage or require racial discrimination from those that do.

The latter kinds of action, although not now regarded as unconstitutional, nonetheless tend to divide this Commission as well as the people of the United States. The former are, in contrast, overwhelmingly ameliorative and vastly more in keeping with our mutual commitment to equal protection under law. The dividing line between them is that the object of appropriate affirmative action is to protect every person from racial discrimination even while expanding opportunities, whereas the object of inappropriate programs is to determine each person's civil rights, either in whole or in part, by race. To be sure, this too is sometimes also called affirmative action. But for reasons that will become clear during the course of this review, I do not believe the description to be warranted.

I am grateful for this Commission's interest, and I wish it well in its own review and in its deliberations on this subject. The subject is, of course, deeply enmeshed with a number of complicated Federal statutes as well as with large variations in State and local practices, quite apart from a complexity of case law. Because this Commission has its own expert staff, however, I do not think it useful to extend this brief paper by duplicating within it the research I am confident others have already provided. I mean, instead, simply to advance on the subject step by step, footnoting along the way sufficient references as may be helpful to illustrate the text. My object is to persuade the Commission that affirmative action is generally welcome while racial discrimination is never welcome. So much, then, by way of introduction.

There are, in fact, not less than four distinct usages of affirmative action that do not involve racial discrimination. We may understand each and distinguish each from that which involves racial discrimination, in the following way:

The most obvious use of affirmative action is nontechnical and purely personal. It is not enmeshed in legal structures or even in constitutional principles. It is, rather, fundamentally a matter of attitude and of character. It is a personal disposition to think

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well of people, to welcome their company, and to treat each as their own person 'unjudged' by race.

Affirmative action, in this sense, is Kantian. It is a way of living as well as of teaching, by personal example. It acts out one's belief that individuals are not merely social means; i.e., they are *not* merely examples of a group, representatives of a cohort, or fungible surrogates of other human beings; each, rather, is a person whom it is improper to count or to discount by race. The friendship of a person should not be less valued than another because of race, for it is not friendship at all if, indeed, race provides its contingency. A brightness with numbers or an athletic grace the rest of us lack are talents by which we are all, nonetheless, enriched. We impoverish ourselves and we cheat the human beings whom we refuse equally to admire when we measure these things only more or less, depending upon who has them, by what race they are. Affirmative action is, thus, the antithesis of schemes that sponsor race ways. Affirmative people do not, in fact, share race ways of thinking or race ways of acting. Genuine affirmative action internalizes and enacts a personal resolve and a personal attitude. It measures no one person by race, and it is appalled by a government that does.

Affirmative action as a personal creed is also Kantian in an additional sense. It declares, by the affirmation of how one conducts one's *own* life, what would surely be commendable universally—and one persists in one's example regardless of what others continue to do.

Affirmative action of this sort is, of course, frequently difficult. One's society and its laws may make race count. They may insist that race be used, one way or another, but used nonetheless. A resolve not to do so either disables one from work in any environment where those racial decrees must be obeyed, or puts one at risk (insofar as one explicitly refuses those racial decrees), or presses one into covert violations of the law such that one feels oneself a hypocrite.

Whether the particular racial decree is one from South Africa, forbidding a person from using a black contractor unless no white contractor applies, or a decree from the United States, with its opposite racially ordered preference, the difficulty for the affirmative individual is the same: to quit the field thus occupied by a race law; to act out your unwillingness to yield regardless of what others may do and the penalties that you will be subject to; or to dissemble by pretending to comply while, in fact, not complying. Which course each of us pursues necessarily tells us something crucial about ourselves—how much we are committed to affirmative action and how much we care.

Each society that gives us only these choices, however, and sets its own laws against the freedom to banish racism and racial ordering from our own lives, has also said something crucial about itself as well—whether in South Africa or in the United States. It says it does *not* want affirmative action. What it wants is racial discrimination. Currently, the laws of the United States both require and encourage a considerable amount of racial discrimination, moreover, as this Commission is well aware.[1]

In an additional and equally correct usage, however, affirmative action may go beyond the definition respecting personal conduct. Rather, it may also extend to taking special steps (i.e., affirmative steps) to ensure that discrimination does *not* occur within an enterprise that is subject to one's own power of management and control. These measures are taken to show that you mean what you say. A merely literal application of the original Executive Order 11246, with which this Commission is familiar, provides an excellent illustration.

The order requires of each contractor an assurance that the contractor will engage in *no* racial discrimination and that the contractor will, moreover, take meaningful affirmative action to ensure that such discrimination does not occur. Note exactly what is required and note how the phrase "affirmative action" is used:

> The contractor will not discriminate against *any* employee or applicant for employment because of race, color, religion, sex, or national origin. 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. [Emphasis added.]

[1] The best known example is the Public Works Employment Act of 1977 (Pub. Law No. 95-28, 91 Stat. 116), requiring such racial discrimination by applicants for any local public works project as may be necessary to assure a stipulated minimum of business enterprises owned principally by "Negroes, Spanish-speaking, Orientals, Indians, Eskimos [or] Aleuts." Essentially the same formula was used again in the Surface Transportation Assistance Act of 1982 (Pub. Law No. 97-424), effective Jan. 6, 1983. The lucrative nature of these exclusive racial preferences has reportedly induced a 25 percent fraud rate in highway contracts in some jurisdictions, e.g., New Jersey. (See byline report by Jonathan Friendly, *New York Times,* Nov. 30, 1984.)

These steps are "race conscious" in the specific sense of steps that are taken from a consciousness that racial discrimination might otherwise occur and yet go undetected and/or uncorrected. These affirmative actions, moreover, may be quite expensive. And none is required, strictly speaking, by a standard of nondiscrimination, as such. Examples include such decisions as: to provide special personnel to whom complaints of suspected discrimination may be carried; to provide also for the posting of admonitory notices regarding civil rights laws and the wrongfulness of discrimination, inclusive of information respecting modes of redress individuals are advised are available to them; to make provision for records to be maintained in the employment office and elsewhere, for periodic review to ensure that applicants and employees are, in fact, treated fairly and without discrimination—all to the end of ensuring the integrity of business practices from the vices of racial discrimination.

This is affirmative action (i.e., action of a positive character, discriminating against none, dispreferring no one, involving neither quotas nor queues nor targets nor presumptions of what is the "right" mix or "proper" share of each according to race). It has nothing to do with such a philosophy and, indeed, represents quite the opposite of that philosophy. It seeks the better protection of *each* person from racial discrimination that might otherwise occur, whether in a white-owned enterprise against blacks, in a black-owned enterprise against whites, or whatever. It takes a strong national policy seriously. It is action undertaken consciously (and sometimes at considerable expense) to vindicate more effectively a commitment opposed to racial discrimination in *all* its forms.[2]

Affirmative action to avoid *gratuitous* discrimination is related to affirmative action of the kind just described, but it goes considerably further than even a scrupulous resolve to prevent discrimination. Even so, it, too, is wholly consistent with a common resolve to make no disadvantaging use of *any* person's race. Rather, its aim is the removal of gratuitous barriers to each person's opportunity to be treated the same as others, without fear or favor of their being white or black, Hispanic or Oriental, or however the charts of racism would seek to identify people and allocate racial shares by racism's ingenious and derogatory indexes.

Gratuitous discrimination is that which occurs *not* by design, but indeed quite contrary to one's best resolve. Rather, it is the unintended consequence of unexamined practices or habits that create unnecessary headwinds or hardships. It is the tendency of habit or custom to assume the need or appropriateness of certain things without realizing that: (a) these things may, in fact, be quite unnecessary (i.e., they are gratuitous); and (b) they, nonetheless, do not even affect everyone similarly. They ought, therefore, to be reexamined to determine whether they might be abandoned or changed. The process that pursues this course is itself one of affirmative action—action undertaken to reduce gratuitous differential treatment of persons not necessary to distinguish in the manner one's customary practice did distinguish them. One acts affirmatively by being sensitive to this possibility, and by acting affirmatively to avoid it.

The simplest sort of example that we now readily recognize is provided not in the policitally charged context of race, but in elimination of gratuitous barriers of a physical and literal kind, e.g., in the elimination of continuous, high curbs at new street corners. Such curbs were not originally installed to make it difficult for persons to move through an intersection from one sidewalk to another, but obviously they did have that effect for some persons particularly. Changing the technique of sidewalk construction, providing a smooth gradient entry onto the sidewalks, may cost no more even as it facilitates access by persons previously frustrated and put at risk. Thus, a community acts affirmatively to change the mode of new curbing. It may also willingly assume the expense of redoing existing crossings as well, distributing the costs through some form of taxation—"the general price we pay," as Justice Holmes once said, "for acting in civilized ways."

In respect to affirmative action and race, one portion of Title VII requires something quite similar to the example just given. It forbids ways of classifying applicants or employees that tend to affect their chances although not meant to do so.[3] The law imposes an obligation to review employ-

[2] At the same time, the Civil Rights Commission is doubtless aware that this is not the manner in which the Executive order has, in fact, been applied or interpreted.

[3] The pertinent statutory provision is 42 U.S.C. §2000e–2(a)(2). *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Age Discrimination Act (29 U.S.C. §623(a)(1) and 9a) (2)) is framed identically and thus also forbids gratuitous age discrimination standards.

ment criteria to take care that they are, in fact, job related (rather than the mere residue of custom or habit, like unnecessary curbs obstructing sidewalk access). It may also reach customs of advertising and job notices, to take care that able people are not overlooked by the limits of one's rather narrow recruiting patterns, as relying solely on a union hiring hall.

The *extent* to which this kind of affirmative action is required, on the other hand, is genuinely controversial. It is controversial at whatever point it becomes questionable as to whether the practice in question is gratuitous. The easiest cases are not numerous. It is hardly surprising that this is so, for ordinarily the exigencies of competition will discipline an employer who is inattentive to the actual relevance of employment criteria. Whenever the cost of altering the business practice will be less than the gain in production resulting from the change, the resulting economic advantage will compel the change under genuinely competitive circumstances. The harder cases raise substantial questions, e.g., how great an expense is it reasonable to assume to change from one practice to another when the former practice may, in fact, have been reasonably efficient and the new one, moreover, may produce very little gain in expanded chances for additional persons? The extent to which a demonstration of job necessity may be demanded may, in fact, simply drive the person on whom it is imposed into a practice of racial discrimination in order to forestall the demand itself.[4] He or she may be, thus, furtively directed to do whatever appears necessary to generate the right numbers, including racial discrimination against others, in order to avoid the threat of suit by the EEOC or by others concerned only to secure better racial results. There is no doubt that such actions themselves violate Title VII.

But in the clear case, there is surely nothing objectionable to this form of affirmative action and, indeed, there is much to commend it. The elimination of gratuitous barriers to equal opportunity disadvantages no one by race. It is conscious of those whom it will benefit, and conscientious of those with whom they are then treated identically,

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On the other hand, there is is no equivalent provision in any of the Reconstruction Civil Rights Acts (42 U.S.C. §§1981, 1982, 1983, 1985), and the Supreme Court has declined to interpret them as though there were. These statutes, therefore, prohibit only the explicit use of race itself as the differentiating criterion or the use of a deliberately selected surrogated criterion. See General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982); Memphis v. Greene, 451 U.S. 100 (1981). The same observation should also apply equally to the Fair Housing Act of 1968 (42 U.S.C. §§3601 *et seq.),* but the Supreme Court has not yet addressed the question (Village of Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977)), and, in the meantime, several courts of appeal have presumed to read into that act the same "disparate impact" standard as is provided by Title VII. (See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978). *See also* discussion and numerous cases collected in In re Maline, 592 F. Supp. 1135, 1165-66 (E.D. Mo. 1984).)

More extreme still, as the Commission is aware, the 1982 amendments to the Voting Rights Act (42 U.S.C. §§1971 *et seq.)* enacted a stringent (albeit ambiguous) "results" statutory standard that may require courts to reorder nearly all features of elections along distinctly racial lines, at least insofar as tendencies of voters to regard race preferentially already characterized the community. The key provision is at 42 U.S.C. §1973.

[4] In fact, it may operate with the reprehensible consequence of compounding racial discrimination. *See, e.g.,* Connecticut v. Teal, 102 S.Ct. 2525 (1982) (acts of gratuitous discrimination against some persons were sought to be offset by the employer by acts of outright discrimination against other persons, and then defended on the grounds that the overall resulting work force was of approximately the same racial mix as it would have been in the absence of any discrimination of either kind). The *Teal* case is of pivotal importance to this Commission. It rejects the view that an individual's personal opportunities may be measured by race, i.e., that an individual may be discriminated against because of that person's race so long as the racial group has been granted its fair share as a racial group. *See also* Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978); Arizona Governing Comm. v. Norris, 104 S.Ct. 57 (1984); Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984).

The theory that the right of the individual may appropriately be measured by race, such that (for instance) whether one is racially ineligible for employment because his or her racial group quota has already been filled by others, with each race's quota to be measured by the racial fraction of an employer's customers of the same race, was originally repudiated by the Supreme Court on the grounds that it was utterly inconsistent with the 14th amendment. *See* Hughes v. Superior Court, 339 U.S. 460 (1950), unanimously affirming a State court injunction forbidding racial picketing to coerce race quota hiring based on racial customer "shares." ("If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have an equal right to demand discriminatory hiring on a racial basis. [But] it was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely on individual qualification for work to be done—which we condemned" in the first place. Hughes v. Superior Court, 32 Cal. 2d 850, 856, 198 P.2d 885, 889 (1948), *aff'd,* 339 U.S. 460 (1950).) More recently, however, the NAACP has resumed efforts to induce boycotts of enterprises in order to compel their agreement for racial hiring in proportion to racial customer shares, although it obviously does not suggest that such a business practice is appropriate where, under standards of merit and nondiscrimination, black Americans are already employed disproportionately to expenditures by black customers alone (e.g., the NBA). Nor does the NAACP suggest that whites should similarly boycott businesses that employ "too few" whites as identically tested by percentage of white customer patronage. See Iver Peterson, "Making Big Business a Threat It Can't Refuse," *New York Times,* Dec. 2, 1984, p. 10E.

favoring regulations or expenditures, but to see no equivalent constitutional wrong in permitting or even encouraging precisely such racist exercise of power by others. Whatever its virtues, then, what we have been discussing is probably not a proposal that is, in fact, a proper feature of a mature and compassionate community. That such communities should be attentive to the less fortunate regardless of race and that they should act affirmatively in selecting among priorities those particularly helpful to disadvantaged neighborhoods or families is entirely unobjectionable. But that they should instead sedulously cultivate the different question (Who will racially benefit?) is emphatically not affirmative action at all. The resulting demoralization, polarization, bitterness, fight, and intrinsic race hatreds that must come under these new circumstances are all obvious. The reintroduction of fears and of anxieties, to think in terms of "us" (racially) and of "them" (racially), is altogether predictable.

Even so, the realpolitik of American life may, in fact, nurture these realities and probably neither courts, constitutions, nor legislation can practically preclude them altogether.[8] Perhaps some such forms of race-conscious, programmatic preferences can even help, moreover, as a way station to a better society, assuming only that such measures are undertaken carefully and probably only at the Federal level. It is a crucial feature of even this extended form of affirmative action, however, that it, too, abides by one absolutely fundamental article of constitutional faith. *No individual, no person, is measured by race. No one is issued their racial identity card and told what shall be their racial queue, their quota, their share, their eligibility by race.*[9] Wherever the library is located, *that* question is never asked. However few or many the books in the library, that is never how they are rationed. These things are recognized for what they are, not affirmative action but, rather, racial discrimination.

Before stating a fifth kind of affirmative action, it may be useful very briefly to recapitulate the four kinds we have already reviewed. The reason for doing so is principally for clarity. The four we have briefly reviewed were these:

1. Acting affirmatively toward each human being as a person and as an individual entitled to one's regard unbounded by his or her race.
2. Acting affirmatively to ensure that racial discrimination does not occur anywhere within one's field of control.
3. Acting additionally to eliminate gratuitous obstructions otherwise tending to limit each person's eligibility or opportunities.
4. Electing among alternative nondiscriminatory political choices those likely to be of most significant use to ethnic minority persons.

A fifth thing is also called affirmative action, but in my view it is not—not affirmative action at all. On occasion, it is also called reverse discrimination, but it is not that either. These are but euphemisms for a new racial order. They are today's demagogic terminology for an acceptable legal order of direct racial discrimination.

Racial discrimination consists of indexing individuals by race and then measuring their civil rights according to that racial index. In the simplest terms, it is the practice of requiring each person to be identified racially, precisely for the purpose of distinguishing that person's civil rights from those of others.

The distinction may be in respect to whom one may marry.[10] It may as readily be the determination of the life insurance premium one must pay, different from the premium charged others.[11] The distinction may be in respect of the school to which one is assigned.[12] It may as readily be the determination of job eligibility.[13] The distinction may be in bidding on government contracts,[14] or in the determination of one's eligibility for housing.[15] It could be in determining which military unit one serves with, or it might as well be in determining in which ballot box one's vote shall be placed, whether one is

[8] For a very thoughtful review, see the opinion of Justice Stevens in Rogers v. Lodge, 458 U.S. 613, 631 (1982).

[9] Compare the statutes and practices cited above, nn. 1, 4, 5, which do not keep faith with this minimum assurance.

[10] *See Loving* v. Virginia, 388 U.S. 1 (1967); Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948); Pace v. Alabama, 106 U.S. 583 (1993).

[11] *Cf.* Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978); Arizona Governing Comm. v. Norris, 104 S.Ct. 57 (1984).

[12] Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424 Brown v. Bd. of Educ. 347 U.S. 483 (1954).

[13] United Steelworkers v. Weber, 433 U.S. 193 (1979).

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

[15] Otero v. New York State Hous. Authority, 484 F.2nd 1122 (1973).

subject to a curfew, or whether one is admitted to a Head Start program, a medical school,[16] or, for that matter, a concentration camp,[17] or a cemetery.[18] As such, racial discrimination is indifferent to its own uses, how it is used, or whom it hurts or helps. Irrespective of those considerations, it has one persistent, ineradicable, and essential characteristic: It assigns a person's race, and it makes each such person's civil rights differ in some respect from those of others according to that assignment.

If Larry Bird himself had been selected to play for the Boston Celtics because he was white, to assure a better racial balance or a better racial proportionality for the Celtics, he would then have been the beneficiary of racial discrimination; that he would have been its beneficiary rather than its victim does not mean that there was no discrimination. There was, by definition, to *whatever* extent and in *whatever* way race would have been attributed to Bird and then utilized to determine his selection in preference to another player identified by his different racial label and passed over on that account. That the audiences before whom Bird may play may themselves contain an even larger fraction of white ticket-buying patrons than he, by his presence, provides on the team, may for some rationalize (i.e., excuse) the racial discrimination involved in his selection,[19] but, of course, it would not deny or diminish the fact of racial discrimination in the stipulated circumstances. It does not alter the fact of racial discrimination stipulated in his selection. The point is obvious. Argument about it is pointless.

Racial discrimination may obviously benefit someone. Typically, racial discrimination benefits a large number of people. Indeed, if it did not, or if it were not thought to do so, it would be odd to account for its use, for neither people nor governments commonly engage in practices they think do no one any good. Racial discrimination may even be thought to benefit everyone as, indeed, most societies (including our own) that have practiced it and still persist in it have usually insisted that it does. The "greater good for the greater number" is as common a rationale for *racial* discrimination as it is for nearly everything else organized societies presume to do.

Racial discrimination that the government currently requires or encourages (one need not say "or," however, since the government does both), it accordingly wants desperately to describe as affirmative action in order to give a bad thing a good name. It indexes people according to racial categories and allocates to them different civil rights by their race. It adopts quotas; it prescribes queues; it provides set-asides; it designates targets, goals, subsidies, and guidelines by race, deliberately and willfully prescriptive of racial discrimination. In its own practices, it inquires about one's race and computes one's civil rights by a racial index. In its regulatory capacity, it requires others to demand racial identification and demands that one's racial identity be used to fix a different set of rights than others are to have.

On its face, the principal section in Title VII of the Civil Rights Act of 1964 disallows racial discrimination. It provides (at 42 U.S.C. §2000e(a)(1)), that it is an unlawful employment practice for an employer:

> to fail or refuse to hire or to discharge *any* individual, *or otherwise to discriminate* against *any* individual. . .because of such individual's race, color, religion, sex, or national origin. [Emphasis added.]

Originally, the Supreme Court treated the guarantee seriously, declaring that "discriminatory preference for *any* group, minority or majority, is precisely and only what Congress has proscribed."[20] Subsequently, with the government's encouragement, the Court altered its view. In fact, employees may be required to identify themselves by race and deemed ineligible on purely racial grounds for entry into a specific job training program where a better racial allocation is being sought.[21]

Similarly, on its face Title VI of the same act (42 U.S.C. §2000(d)) identically forbids racial discrimination against anyone. It provides that, "*No* person. . .shall, on the ground of race, color, or national origin, be excluded from participation in *any* program or activity receiving Federal financial

[16] Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

[17] Korematsu v. United States, 323 U.S. 214 (1944).

[18] Rice v. Sioux City Cemetery, 349 U.S. 70 (1955).

[19] See discussion above, n. 4, of efforts by the NAACP to induce racial discrimination in proportion to racial patronage.

[20] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (emphasis added).

[21] *See* United Steelworkers v. Weber 99 S.Ct. 2721 (1979). But see McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976) ("We. . .hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the *same* standards as would be applicable were they Negroes.") For a thorough (and thoroughly critical) review of *Weber,* see Meltzer, "The Weber Case," 47 U. Chi. L. Rev. 423 (1980).

assistance," but it, too, has been given a Newspeak interpretation that a person may be excluded on purely racial grounds if too many people of his race are already on hand. Either a public institutional preference for a different racial mix (Justice Powell's view) or the simple insistence that others are of a more deserving race than he (Justices Brennan's and Marshall's view) make it entirely appropriate to use his race to reject him.[22]

In a memorable dissent, echoing Justice Harlan's lonely voice a half-century earlier[23] and anticipating Justice Douglas' identical view a quarter-century later,[24] Justice Murphy had pleaded with his colleagues:

> Racial discrimination in *any* form and in *any* degree has *no* justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States.[25]

But the Congress of the United States itself now mandates racial discrimination by its own minimum racial quotas.[26] Racial discrimination is widely used also to identify and disqualify persons from eligibility in public service, as it is used equally to provide racial bumping rights in federally assisted and State-operated universities and elsewhere. A State commissioner of prisons even presumes to discriminate racially in deciding promotions in order to perfect a racial math between the inmate population and those who want jobs.[27]

The vision of a new racial order, to each according to his race, is thus fast upon us. It is similarly the source of division and of conflict within this Commission on Civil Rights. And it is so obvious to anyone, on the other hand, that these incessant varieties of racial discrimination are fundamentally not desired by the vast majority of Americans as to make one tremendously angry with a government that will not stop its own weaknesses. One can but hope that this Commission will behave differently and provide a better vision than that which we now see as through a glass, darkly.

Consistent with the four varieties of affirmative action previously reviewed in this memorandum that do not involve indexing persons by race or in any way measuring their personal legal rights by race, and consistent also with the resolve to end racial discrimination under governmental auspices in the United States, this Commission might usefully consider additional draft legislation toward this end. The power resides unmistakably in Congress to forbid State and local governments from utilizing any person's race, color, or national origin for purposes of determining any right, privilege, or obligation under law by demanding their racial identity and rejecting them or treating them differently from others on that basis. It arises amply from section five of the 14th amendment, to adopt such legislation as in its view enforces the obligation of every State to deny to no person within its jurisdiction the equal protection of the laws. The power in Congress to provide similarly in respect to the Federal Government itself arises equally clearly from the necessary and proper clause in Article I of the Constitution. And the combination of national powers over commerce and over Federal expendi-

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[22] Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

[23] The destinies of the. . .races, in this country, are indissolubly linked together, and the interests of [all] require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.

The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race.

These notable additions to the fundamental law [that is, the 13th, the 14th, and the 15th amendments] were welcomed by the friends of liberty throughout the world. *They remove the race line from our governmental systems.* Plessy v. Ferguson, 163 U.S. 537, 555 (1896) [emphasis added].

[24] A [person] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. So far as race is concerned, *any* state-sponsored preference to one race over another. . .is in my view "invidious" and violative of the Equal Protection Clause. DeFunis v. Odegaard, 416 U.S. 312, 337, 343–44 (1974) [emphasis added].

[25] Dissenting, in Korematsu v. United States, 323 U.S. 214, 242 (1944) (emphasis added).

[26] Sustained, in Fullilove v. Klutznick, 448 U.S. 448 (1980).

[27] *See* Minnick v. California Dep't of Corrections, 95 Cal. App.3d 506, 157 Cal. Rptr. 260, *cert. dismissed,* 452 U.S. 105 (1981). But see the dissenting opinion by Justice Stewart, 452 U.S. at 128, who would have reversed outright insofar as, in his view, the State court of appeals had "wrongly held that the State may consider a person's race in making promotion decisions." Speaking directly to the concerns of this Commission, Justice Stewart went on to declare (emphasis added):

> So far as the Constitution goes, a private person may engage in any racial discrimination he wants, cf. Steelworkers v. Weber, 443 U.S. 193, but under the Equal Protection Clause of the Fourteenth Amendment a sovereign State may never do so. And it is wholly irrelevant whether the State gives a "plus" or "minus" value to a person's race, whether the discrimination occurs in a decision to hire or fire or promote, or whether the discrimination is called "affirmative action" or by some less euphemistic term.

tures is ample, similarly, to forbid racist allocations in the private sector of our economy as well.

Conclusion

Among the several varieties of bona fide affirmative action we have reviewed, one is essentially preventive in nature and two are essentially ameliorative in nature. That which is essentially preventive was the form of affirmative action encouraging or requiring one to take special measures to prevent racial discrimination from occurring, including measures substantially more impressive than what mere business prudence might otherwise suggest. So long as these requirements are not organized or administered by Federal agencies de facto to coerce racial discrimination, rather than to prevent it, I believe they are both necessary and desirable to continue for an additional, reasonable period of time. Thereafter, but not yet, they may be discontinued for lack of sufficient need.

Of the two ameliorative forms of affirmative action, the first seeks a review and revision of such practices as may, in fact, contribute marginally (if at all) to the mission or productivity of a given enterprise, even while operating (albeit not by design) with disproportionate impact upon certain categories of people and especially upon ethnic minorities. To the extent that modifications of such practices can extend access to previously ineligible persons, they are obviously desirable, and it is additionally appropriate to consider the Federal subsidy of such programs as may be helpful to that end.

Similarly, in electing among domestic priorities an emphasis upon those best calculated to raise the real opportunities of disadvantaged people to have productive lives as equal citizens, all levels of government would act affirmatively and yet always without any racial discrimination. This, too, is a thoroughly decent and commendable form of affirmative action. It is only at the point that racial politics may corrupt that action, selectively targeting only such programs as deliberately extend real assistance principally only to those now racially driven to treat their opportunities in government as a license for racial political spoils systems, that our laws should be understood and applied to forbid that insidious practice. Whether the practice is pursued by self-serving white persons or by similarly self-serving other persons seeking simply to enact their own racial advantage can make no difference. Each is as odious as the other. Each should be as remediable under law as the other.

AFFIRMATIVE ACTION: UNDERREPRESENTATION AND UNDERUTILIZATION

Testimony of Anti-Defamation League of B'nai B'rith

By Nathan Perlmutter*

The Anti-Defamation League of B'nai B'rith is pleased to have this opportunity of testifying before the U.S. Commission on Civil Rights on the topic of affirmative action. The Commission's present inquiry reflects its commitment to address an issue that is both complex and crucial to the guarantee of equal protection for every individual. The Commission, by its actions, its reputation, and its recommendations, is an influential and respected body. Its policy on affirmative action will, therefore, have a great impact in the civil rights community and on the role of government in the years to come.

The Anti-Defamation League has, for over 70 years, been on the front lines of the war against discrimination and prejudice. In 1913 the early leaders of ADL were alarmed by increasing hostility toward newly immigrated European Jews. Reflecting this concern, the league's charter states:

> Its ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens.

Since 1947 ADL has filed briefs in the U.S. Supreme Court and lower Federal and State courts in almost every major civil rights case. In *Shelley* v. *Kraemer*[1] ADL successfully argued that enforcement of racially restrictive real estate covenants was a violation of the 14th amendment. In 1950, 4 years before *Brown* v. *Board of Education*[2] was decided, ADL challenged the constitutionality of segregated public schools, attacking the principle of "separate but equal" in *Sweatt* v. *Painter.*[3] Since the *Brown* decision, ADL has turned its attention in education to ensuring that every child has the same opportunity for a quality education. In *Runyon* v. *McCrary,*[4] ADL argued that the refusal by private schools to allow black children to register was discriminatory under Federal law, a position ultimately upheld by the Supreme Court. Recently, ADL supported the denial of tax-exempt status to Bob Jones University and Goldsboro Christian Schools because of their racially discriminatory policies and regulations. In other cases, ADL has fought religious discrimination by supporting Federal laws that require employers to make a reasonable effort to accommodate the religious practices of employees. Last year

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[1] 334 U.S. 1 (1948).

[2] 347 U.S. 483 (1954).

[3] 339 U.S. 629 (1950).

[4] 427 U.S. 160 (1976).

ADL's national commission voted to support current efforts to reverse the criminal convictions arising from the internment of Japanese Americans in detention camps during World War II.

Through the years, there has been a wide divergence in the litigants ADL has supported and in the discrimination issues we have attacked. One common principle ties these efforts together: ADL's civil rights activism has been consistently directed at promoting equal rights and opportunities for all Americans. As long as any person is judged by skin color, cultural heritage, gender, or religious faith, no individual is secure in his or her rights. As long as an individual is denied equal protection of the law and equal opportunity in our society, none of us is free from prejudice and discrimination. ADL's early commitment to individual rights has remained steadfast. Our recognition of individual merit as the only legitimate standard of judging a person has been consistent and has guided our efforts on behalf of all minorities.

One of the league's earliest efforts to break down discriminatory barriers was in education. In the 1920s some of our finest universities virtually closed their doors to Jews and other insular minority groups, allowing only a fixed quota to attend. Given the restrictive policies of many educational institutions, one segment of the Jewish community argued that these quotas should be tolerated because they at least opened the doors for a few. The standard for selection, however—race, religion, ethnicity—as well as the limitations inherent in such a procedure, made quotas unacceptable to ADL. Equal opportunity, as guaranteed by the Constitution, must depend solely on individual merit, or it becomes meaningless.

Over 34 years ago, as the civil rights movement gained momentum, the concept of equality for all men and women was the rallying cry of those who sought to break down prejudicial attitudes and discriminatory barriers. In the 1950s and 1960s, legislative and judicial developments promised to make a reality of our quest for a colorblind society. It seemed as though blatant, often publicly prescribed, discrimination in education, employment, and housing had been laid to rest. The use of invidious quotas, the ignoring of individual merit, the inequality of opportunity that arises from deliberate preference of one skin color, religion, or ethnic background over another had been rejected through the enlightenment of the American people and, at long last, a recognition of the responsibilities of democracy.

Somewhere along the line, in efforts to make amends for the invidious discrimination that had disadvantaged so many, the principles that had motivated the civil rights struggle became distorted and subverted. Dissatisfied with legislative and judicial guarantees of equal *opportunity,* many sought equal *results.* Those who had fought the discriminatory privileges of the majority as illegal and inherently immoral now claimed preferences for themselves. Those who had fought for civil rights became advocates of discriminatory treatment.

ADL's position has remained unchanged: Class-based distinctions are antithetical to the concept of civil rights. Equal protection of the law is not a guarantee that adheres only to certain specified groups in our society; it is a guarantee that *no one's* race will be used as a determining factor in the conferral of benefits or penalties. A solution to discrimination that itself categorizes individuals by race is no solution at all. Professor Thomas Sowell has observed:

> One of the hardest realities to accept is that we cannot prescribe end results but can only initiate process. . . . This means that the specifics of the process determine the actual outcome, *regardless* of the intention of those who created the process. For example, the purpose of employment quotas ("affirmative action") in the United States was to improve the economic condition of various racial and ethnic groups, both absolutely and relative to Americans as a whole. The actual consequences, however, have included a further falling behind of family incomes as regards Puerto Ricans and Mexican Americans, and a more mixed result among blacks as a whole, with the better-off blacks continuing to progress and the poorer blacks falling further behind.[5]

Pro-quota advocates have argued that it should be easy to distinguish between "inclusive" quotas and "exclusive" quotas. The former, they argue, are a legitimate method of redressing past discrimination because they confer benefits and can be considered "benign." Can a quota, an often arbitrary set-aside of benefits for members of a racial or ethnic minority, ever be benign? It is certainly not benign with respect to an innocent third party who is passed over for employment or promotion, or who is dismissed because he or she is not a member of a privileged

[5] Sowell, *The Economics and Politics of Race* (1983), pp. 250–51.

group. The fact that today white males may be the victims of preferential treatment, while 30 years ago it was black males, cannot whitewash the discriminatory procedure. Only the victims have changed. "If the Constitution prohibits exclusion of blacks and other minorities on racial grounds it cannot permit the exclusion of whites on similar grounds; for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded."[6]

More to the point, quotas are far from benign with respect to the group that is preferred. Although remedial education and training target individual merit and abilities, racially based preferential treatment reinforces negative stereotypes that obscure individual characteristics. Dr. Kenneth Clark, the noted educator and psychologist, described the impact of quotas:

> No black can yet be sure that he is being seen, evaluated and reacted to in terms of his qualities and characteristics as an individual rather than categorized and stereotyped as part of a rejected group.

Charles Murray, an author and senior research fellow at the Manhattan Institute for Policy Research, suggests that preferential treatment has produced a "new racism."[7] He describes this phenomenon as containing the "classic behavioral symptoms of racism": treating and thinking about blacks differently from whites. Murray posits that granting preferential treatment to blacks does a great disservice to the specific individuals who are treated differently as well as other members of the minority:

> The most obvious consequence of preferential treatment is that every black professional, no matter how able, is tainted. Every black who is hired by a white-run organization that hires blacks preferentially has to put up with the knowledge that many of his co-workers believe he was hired because of race; and he has to put with the suspicion in his own mind that they might be right.[8]

Preferential treatment encourages a view that members of a minority are a commodity to be highly valued and sought after. When the top graduates of Wharton Business School are aggressively recruited by prestigious corporations, it is based on an employer's decision to attach significant value to the quality of education offered at Wharton and the employer's prediction of the student's abilities to perform in a given job. Under a system of racial quotas, the value of a minority candidate, however, is based largely on skin color. The office must have a sufficient supply of minorities. If those that are available are the best candidates, fine. If not, the standards are lowered, or minority candidates are given an "edge" in the selection procedures. As Murray describes the result:

> It is here that the new racism links up with the old. The old racism has always openly held that blacks are *permanently* less competent than whites. The new racism tacitly accepts that, in the course of overcoming the legacy of the old racism, blacks are *temporarily* less competent than whites. It is an extremely fine distinction. As time goes on, fine distinctions tend to be lost. Preferential treatment is providing persuasive evidence for the old racists, and we can already hear it *sotto voce:* "We gave you your chance, we let you educate them and push them into jobs they couldn't have gotten on their own and coddle them every way you could. And see: they still aren't as good as whites, and you are beginning to admit it yourselves." Sooner or later this message is going to be heard by a white elite that needs to excuse its failure to achieve black equality. [Emphasis added.][9]

Affirmative action programs that recruit disadvantaged individuals (of all races and ethnic backgrounds) for compensatory education and training ensure that all candidates for a job or promotion are qualified. Rather than hiring or promoting minorities under a quota system that, in many cases disregards individual capabilities, an employer will choose from a diverse pool of qualified candidates. The result is that there will be no distinction or differential between the job performance of minorities and nonminorities.

Quotas, so-called "remedies" that parcel out benefits to racial groups on the basis of their proportionate share of the population, promote an arbitrary and divisive focus on race and ethnic origin, rather than fostering equal opportunity. This is evident, for example, in Boston, where in 1981 a fiscal crisis forced the city to reduce the size of the police and fire departments. Ten years earlier, a Federal district court had found that the employment practices of these departments had an adverse impact on minority applicants. The court ordered the implementation of a 50 percent hiring quota until the number of blacks and Hispanics on the force equalled their percentage in the population in the Boston area.

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[6] Bickel, *The Morality of Consent* (1975), pp. 132–33.

[7] "Affirmative Racism," *The New Republic,* Dec. 31, 1984.

[8] Ibid., p. 22.

[9] Ibid., p. 23.

When cutbacks were required, racially segregated layoffs were established to maintain the proportion of blacks and Hispanics that had been achieved. Although the subsequent rehiring of the white municipal employees rendered moot the case that went to the U.S. Supreme Court, it did not destroy the hostility that the layoffs engendered.

Moreover, the reinstatement of racial quotas, with their birth in exclusionary discrimination and their rebirth in inclusionary class-based recompense, weakens this country's commitment to equal protection and erodes every individual's confidence in constitutional guarantees of equal protection. Professor Bickel commented:

> The lessons of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation; discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.
>
> Yet a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can as easily be turned against those it purports to help. This history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.

It is useful at this point to examine the term "affirmative action" so that a common understanding can be reached. In 1965 President Johnson issued Executive Order 11246, which required private businesses that contracted with the Federal Government to take "affirmative action," a term as yet undefined, in order to employ and promote protected minority groups. The simplest and most easily agreed-upon interpretation of the term at that point was that eliminating the doctrine of "separate but equal" and legislating equal opportunity had failed to eliminate discrimination. Refraining from discrimination, even if conscientiously observed and enforced, was not enough. The Nation had to take action to affirmatively eliminate the legacy of discrimination against minorities in this country. Although undefined, clearly, something more was necessary.

Although Executive Order 11246 specifically directed that applicants and employees be treated without regard to their race, color, religion, sex, or national origin, enforcement of the directive by the Office of Federal Contract Compliance quickly became a matter of maintaining numerical "goals" of minority representation on Federal construction contracts. By the late 1960s, the idea of minority representation was firmly entrenched in requirements of "goals" in hiring and promotion to overcome "underutilization" found to exist in the work force.

There are those in the civil rights field, some of them veterans of the battles for equal opportunity in the 1950s and 1960s, men and women with impeccable credentials, who attempt to distinguish racially based quotas from numerical goals and timetables. ADL believes the distinction to be an artificial one. All too often a "goal" operates as the functional equivalent of a quota or, just as perniciously, it functions as a ceiling; an employer's goal is reached, and all efforts at *legitimate* affirmative action fail. In *United Steelworkers of America,* v. *Weber,*[10] the Supreme Court upheld the legality of a collective-bargaining agreement that contained a 50 percent "goal" of minority representation in an employer's craft training program. Justice Rehnquist, dissenting, noted that the lower court had made a finding that the "agreement reflected less of a desire on [the employer's] part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts."[11]

One supporter of goals and timetables explained the system this way:

> All that a contractor has to do to be eligible for a contract is make a *commitment* to seek in good faith to meet his self-imposed goal. There is neither *per se* compliance nor *per se* violation associated with the goals or the ranges. Minority utilization above or below the goals, or above or below the ranges, at most is *presumptive evidence of compliance* on the positive side, and on the negative side, evidence of *probable cause to believe that a review* of a contractor's overall compliance posture is warranted. [Emphasis in original.][12]

[10] 443 U.S. 193 (1979).

[11] 443 U.S. at 223 n.2 (Rehnquist, J., dissenting).

[12] "The Historical Case For Goals and Timetables," 16 *New Perspectives* 20, U.S. Commission on Civil Rights (1984).

Similarly, EEOC regulations for employers state that a selection rate for any minority group that is less than 80 percent of the selection rate for the majority "will generally be regarded by the Federal enforcement agencies as evidence of [discriminatory] adverse impact. . . ."[13] The Uniform Guidelines on Employee Selection Procedures, promulgated in 1978, further specify that where an employer has adopted an affirmative action program, the government will "consider the provisions of that program, including the goals and timetables which the [employer] has adopted and the progress which the [employer] has made in carrying out that program and in meeting the goals and timetables."[14]

The guidelines conclude this result-oriented message to employers with a cautionary afterthought: "While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work."[15] In case any employers have misread the clear directive that the EEOC is concerned solely with *numbers,* the guidelines further specify that, regardless of an employer's affirmative action program, he or she "may choose to utilize *alternative selection procedures* in order to eliminate adverse impact. . . .[Emphasis added.][16] " In other words, if the "goal" (i.e., the right proportionality) is not achieved one way, use any other method that will produce the desired racial mix.

Regulations such as these send the message of "proportionality." If a minority constitutes 3 percent of the population, it can expect that percentage of benefits, and no more, regardless of the abilities, intellect, skills, and potential of any individual member of the group.

The concept of racial proportionality is a dangerous one with unlimited potential for abuse. The charge that a particular minority is "underrepresented" or "underutilized" reflects an assumption that the "appropriate" or "correct" level of its representation can be artificially determined by demographics. Who is to have the responsibility for determining these levels? Does a city have the authority to decide what is the "proper" percentage of black police officers or Asian American schoolteachers in the community? Is the police force of a city with a 5 percent population of Italian Americans to be limited to that percentage of Italian American police officers? According to Professor Sowell, the biggest employment gains for blacks were achieved during the 1960s, when Federal and State laws prohibiting discrimination were enacted, and "the only additional effect of quotas was to undermine the legitimacy of black achievement by making them look like gifts from the government."

The problem in affording identified minorities a set percentage of benefits is that, all too often, those most in need do not receive assistance. Doling out aid (or jobs) on the basis of a group characteristic fails to identify disadvantaged applicants who do not belong to easily recognized predetermined groups. Circumstances such as inadequate education, financial need, or poor job skills should trigger the need for affirmative action, not skin color, surname, or national origin. The answer to this problem is obvious: We must look at individuals *as individuals,* not as group representatives.

Dissenting from the Supreme Court's decision in *Weber,* Justice Rehnquist succinctly described the "evil" of racial quotas:

> In holding that Title VII cannot be interpreted to prohibit use of Kaiser's racially discriminatory admission quota, the Court reasons that it would be "ironic" if a law inspired by the history of racial discrimination in employment against blacks forbade employers from voluntarily discriminating against whites in favor of blacks. I see no irony in a law that prohibits *all* voluntary racial discrimination, even discrimination directed at whites in favor of blacks. The evil inherent in discrimination against Negroes is that it is based on an immutable characteristic utterly irrelevant to employment decisions. The characteristic becomes no less immutable and irrelevant, and discrimination based thereon becomes no less evil simply because the person excluded is a member of one race rather than another. Far from ironic, I find a prohibition on all preferential treatment based on race as elementary and fundamental as the principle that "two wrongs do not make a right." [Emphasis in original.][17]

In an exhaustive review of the legislative history of Title VII, Justice Rehnquist provided ample evidence that an agreement to achieve or maintain racial balance in the work force for its own sake, not only is not required, but would in itself violate Title II. An interpretive memorandum submitted jointly

[13] 29 C.F.R. §1607.4(D).
[14] 29 C.F.R. §1607.4(E).
[15] *Id.*
[16] 29 C.F.R. §1607.6(A).
[17] Weber, 443 U.S. 193, 228 n.10 (Rehnquist, J., dissenting).

to the Senate by Senators Clark and Case, the bipartisan captains shepherding Title VII during the debate, stated:

> There is no requirement in Title VII that an employer maintain a racial balance in his work force. *On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve the violation of Title VII* because maintaining such a balance would require an employer to hire or to refuse to hire on a basis of race. It must be emphasized that discrimination is prohibited as to any individual. [Emphasis supplied.][18]

Responding to a charge that the word "discrimination" in the statute could be interpreted as requiring racial balance, Senator Humphrey stated unequivocally: "the meaning of racial or religious discrimination is prefectly clear. . .it means a distinction in treatment given to different individuals because of their different race, religion, or national origin."[19] Senator Humphrey reiterated: "nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group."[20] Senator Clark, explaining and defending the provisions of the bill, stated succinctly: "Quotas are themselves discriminatory."

Ultimately, Senator Dirksen offered an amendment to the bill that was enacted as section 703(j), specifically directed at the opposition's concerns regarding racial balancing and preferential treatment of minorities:

> Nothing contained in this title shall be interpreted to require any employer. . .to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an "imbalance" in the work force.[21]

In *Weber,* Justice Rehnquist charged, the majority of the Court ignored the clear message of the statute's legislative history and applied an Orwellian interpretation to the word "require," concluding that "Congress chose not to forbid all voluntary race-conscious affirmative action."[22]

The economic effects of quotas are no less suspect. Leaving aside the issue of seniority layoffs, competition for entry-level jobs in the marketplace is fierce. Employers are striving to increase productivity and profits while decreasing production costs. This places the emphasis squarely on individual merit, skills, and ability. Equality of opportunity will not be achieved by forcing a numbers game on employers; it will be achieved if we make sure the the employer is presented with an applicant pool of qualified individuals capable of contributing to the economic well-being of the company. Only then will the fiscal needs of the country coincide with the needs of minorities to succeed on their own merits. Professor Sowell explains:

> What must be understood first about history is that it is irrevocable. Attempts to redress the wrongs of history face the intractable fact that whatever may be done will apply only to the future, not to the past. . . . Symbolic expiation creates new incentives and constraints for the future, and the specific consequences of this need serious consideration. Rewarding those who are adept at evoking guilt promises few benefits to anyone other than themselves. . . . To the extent that such rewards encourage the further politicization of race, they are encouraging a process that has ended in tragedy many times.

The proposition that each identifiable ethnic and racial group is "entitled" to a proportionate share, and only that share, of jobs is repugnant to the Constitution and civil rights laws, as the U.S. Supreme Court has stated:

> It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. [Emphasis in original.][23]

What is apparent, is that "affirmative action" and "quotas" are not interchangeable terms. Far from synonymous, it is our contention that, in theory as well as in practice, the principles are antithetical. It is, at best, an irresponsibility and, at worst, a dangerous distortion to equate quotas with affirmative or antiquotas with antiaffirmative action. ADL's opposition to quotas has in no way diminished its support and struggle for civil rights, and has, in fact, grown out of our commitment to the concept of equal opportunity.

It has often been stated that no matter what position one is advocating, a creative lawyer can find Supreme Court precedent or language to buttress the argument. If that is true, the Court's decisions on affirmative action are particularly

[18] 110 Cong. Rec. 7213 (1964) (remarks of Senators Clark and Case).

[19] 110 Cong. Rec. 5423 (1964)

[20] *Id.*

[21] 42 U.S.C. §2000e-2(j).

[22] 443 U.S. at 222 (Rehnquist, J., dissenting).

[23] Furnco Construction Corp. v. Waters, 438 U.S. 567, 579 (1978).

susceptible to "creative advocacy." Beginning with *Brown* v. *Board of Education,* through the *Bakke-Weber-Fullilove* trilogy, up to the decision last term in *Stotts,* the Court's treatment of various affirmative action plans has been somewhat less than uniform. Had the Court stated in *Brown* that racial distinctions made by government are per se unconstitutional, a precedent would have been established that lower courts would have found difficult to overcome. Unfortunately, *Brown* granted lower courts a substantial measure of flexibility in ruling on matters involving preferential treatment.

Even after the decision reversing the constitutionality of "separate but equal" was handed down, the Court continued to grapple with the issue of appropriate relief. As one commentator described the effect of *Brown,* all the victorious plaintiffs received was a promise that, sometime in the indefinite future, other people would be granted the rights that the Court said the plaintiffs had. The legacy of *Brown,* totally unforeseen at the time, was that the practice of regarding blacks as a group needing different treatment lingered on. This concept of a class-based approach to civil rights became the foundation of the race-preferential policies developed in the aftermath of *Brown.*

Following in the wake of *Brown,* the Court continued to abstain from offering clear, consistent guidelines on permissible and impermissible affirmative action. As each decision is handed down, those involved in civil rights have been quick to extrapolate an interpretation of the Court's holding most favorable to their own position.

The recent decision in *Firefighters Local Union No. 1784* v. *Stotts,*[24] has been hailed by the Justice Department as the most significant victory for civil rights in this country since *Brown.* To be sure, ADL's *amicus* brief urged the Court to decide as it did, arguing:

> The basis for the *amicus'* long-time opposition to racial quotas is made manifest by this case, where innocent employees have been forced out of their jobs on the basis of race. It is not enough to wish to correct racial injustice. The means used must not compound the evil that is sought to be remedied and must not go beyond the law and the Constitution to reach what is thought to be a just result for one class of people at the expense of others.

Quoting language from *Teamsters* v. *United States,*[25] as well as congressional debate over the enactment of Title VII, Justice White held that only identifiable victims of past discrimination are entitled to an award of competitive seniority. Justice Blackmun, who dissented in *Stotts,* is reported to have commented after the decision that it effectively "interred" judicial reliance on quotas or any other kind of preferential relief to nonvictims based on race, sex, religion, or national origin. Only time will determine the accuracy of this prediction.

There are those who argue that a rigid victim specificity approach is excessively harsh and will not ameliorate the lingering effects of past discrimination. The continued vitality of our national antidiscrimination policy compels a serious consideration of this charge.

With respect to granting a job, promotion, seniority rights, or a position in an education program, victim specificity correctly requires that only those individuals who can demonstrate they are victims of discriminatory practices can be awarded relief.[26] "Mere membership in the disadvantaged class is insufficient to warrant a seniority award" or position.[27] The Court's holding in *Stotts* is supported by the authority granted to courts under Title VII to award make-whole relief. Section 706(g) provides that courts are not authorized to grant preferential treatment to nonvictims.

In the absence of identifiable victims of discrimination, is there no opportunity for affirmative action? Is victim specificity to be invoked as a barrier to practical, legitimate, and nondiscriminatory efforts to implement a theoretical principle of equal opportunity? The answer is that no victim specificity is necessary in order to construct and implement programs of outreach, recruitment, training, and education that target disadvantaged individuals. In our impatience to abolish decades of discrimination, there has been a tendency to sacrifice principle for expedience; to reject carefully constructed programs that promise lasting results for the beguiling simplicity of a fixed racial quota. Will such programs be effective? Logic dictates that, given a meaningful chance, they will.

Instituting deliberately discriminating programs has been rationalized by tortured interpretations of

[24] 104 S.Ct. 2576 (1984).

[25] 431 U.S. 324 (1977).

[26] Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984); Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

[27] Stotts, 104 S.Ct. at 2588.

Federal law and policy. These efforts have failed demonstrably. Although there may be slightly higher numbers of minorities enrolled in graduate schools, in too many cases they are treated with a mixture of condescension, hostility, and guilt, and emerge with poor educations. In the corporate world, the increase, if any, of minorities is concentrated, often restricted (in the literal sense) in personnel areas and low-level management. Poor training, resentment by coworkers, and low expectations by employers act as barriers to meaningful advancement. As Charles Murray describes it, preferential treatment "encourages both whites and blacks to behave in ways that create self-fulfilling prophecies even when no real differences exist. . . . For years, we have instinctively sensed this was wrong in principle but intellectualized our support for it as an expedient. I submit that our instincts were right. There is no such thing as good racial discrimination."[28]

In order to formulate an effective remedy, one must study the causes of the problem. Imposing a hiring quota on an employer does not address the fact that many minorities are inadequately prepared to enter the marketplace or the question of why more minorities are not in the applicant pool. Instituting a mandatory percentage of minority faculty ignores the fact that too few minority students attend colleges and graduate schools because they lack financial resources or receive substandard education in public schools. Busing minority students from inner-city ghettos to white suburban neighborhood schools ignores the inability of minorities to attain a higher degree of financial independence and standard of living and fails to examine why, to this day, minorities are unable to rent or buy housing in certain areas. Similarly, setting aside a fixed percentage of business for minority contractors ignores the issue of what is preventing them from competing equally in a fair marketplace.

The true concept of equal opportunity will be implemented only when we discard the artificially constructed remedies and distorted interpretations of Title VII and Executive Order 11246 and return to the letter as well as the spirit of these directives.

Dissenting from the Supreme Court's dismissal on mootness grounds in *DeFunis* v. *Odegaard,*[29] Justice Douglas stated unequivocally:

> There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

What is so controversial and potentially destructive about programs that include fixed set-asides for certain groups, such as those struck down in *Bakke,* is that they utilize racial quotas and preferences, the traditional engines of discrimination, as the vehicle for social progress. But, even assuming that such programs can succeed in producing qualified professional people in large numbers, an assumption that has not yet been proven, their social cost is high indeed. They denigrate the individual, exalt immutable birth characteristics, stigmatize those preferentially admitted, and victimize those excluded because of their race.

All of this might be justified if there were, indeed, no other way to assist minority-group members in participating fully in the mainstream of American life. However, that has yet to be demonstrated. ADL has long advocated employment programs that offer special training to develop requisite skills, as well as remedial education and admissions programs that evaluate an applicant's record and past achievements in light of the disadvantages and the social, educational, or economic barriers he or she may have overcome. These considerations may reveal perseverance, motivation, character, and skills not readily apparent from narrow reliance on grades or employment history, but that demonstrate an applicant's ability to succeed. The crucial difference between such programs and a racial or ethnic quota is that the former results in decisions based on individual attributes, rather than on invidious distinctions of race or national origin.

Justice Douglas offered this guidance on affirmative action remedies:

> The key to the problem is the consideration of each application in a racially neutral way. . . . Minorities in

[28] Murray, "Affirmative Racism," p. 23.

[29] 416 U.S. 312, 336–37 (1974) (Douglas, J., dissenting).

our midst who are to serve actively in our public affairs should be chosen on talent and character. . . .[30]

The stakes are far too high for a society desperately trying to rid itself of racial discrimination to accept on faith the claim that the only way to achieve equality in the professions is by practicing still more racial discrimination.

[30] DeFunis, 416 U.S. 312, 334 (1974) (Douglas, J., dissenting).

Statement of the American Jewish Committee

By Hyman Bookbinder*

The American Jewish Committee (AJC) welcomes this opportunity to express its views on the subject of affirmative action. The AJC is a national organization of approximately 40,000 members that was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been the conviction of this organization that the security and constitutional rights of American Jews can best be protected by helping to preserve the security and constitutional rights of all Americans. The AJC, therefore, is committed to helping eliminate discrimination and achieve full civil rights for all Americans, regardless of race, creed, color, sex, or national origin. Hence, the AJC has vigorously supported the enactment and enforcement of all major civil rights legislation, including Title VII of the 1964 Civil Rights Act and Title IX of the Education Amendments of 1972.

As the past decades clearly demonstrated, however, the legal requirement of nondiscrimination by itself has not always been sufficient to erase the cumulative results of pervasive discrimination against women and minorities of color. For example, despite the very real civil rights gains of the sixties and seventies, the unemployment rate among blacks and Hispanics has consistently been reported to be almost twice that of whites.

The AJC believes that to make the dream of equal opportunity for all Americans a reality, effective affirmative action efforts to enable minorities and women to enter the mainstream of American economic life are still necessary and require continued efforts by both government and private enterprise.

AJC has participated constructively in the national debate over affirmative action for the past 15 years. Although we have rejected the use of group quotas as inimical to individual rights, we have strongly endorsed affirmative action measures to recruit, train, and upgrade those who have been historically disadvantaged or discriminated against. The types of programs we wholeheartedly support are, as follows:

1. Special efforts to recruit qualified members of previously excluded groups for available job openings. This means going beyond the referral sources traditionally used, and especially employing community resources that reach out to members of previously excluded groups.
2. Training programs to help qualifiable minorities, women, and people from disadvantaged

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backgrounds. These should include tutoring, apprenticeship, and inservice training programs, and should be meshed with job placement programs for successful trainees.

3. Continued review of all written tests to make sure they are relevant to the job and as free as possible from cultural and other bias. Objective selection criteria are vital.

4. Continued review of all jobs to make sure that the essential prerequisites for them are valid and actually related to job performance. In some jobs, this may mean that certain academic prejob requirements should be dropped. In other jobs, it may mean that demonstrated experience and ability to work with the minority population should be taken into account. However, we reject the concept that belonging to a particular group is an absolute qualification for any position.

5. Within the context of the affirmative action principle, the granting of special consideration to those applicants from among those discriminated against or disadvantaged who are substantially equal in qualifications to others being considered.

6. A program of continuous dissemination within the company or organization of the objectives and procedures of the affirmative action program.

7. Carefully developed goals and timetables to spur and monitor progress in affirmative action efforts.

In higher education, also, the affirmative action principle requires: (a) scrutiny of admission tests and standards for admission to make sure they contain no cultural or other bias; (b) special recruitment programs to identify and bring into the student bodies members of disadvantaged groups; and (c) special remedial education programs to enable those who need such assistance to meet the existing requirements for graduation and for admission to graduate and professional schools.

We believe that the above programs are essential to enable members of disadvantaged groups to actualize their potentialities and compete on an equal basis within the system. They deserve the highest priority in the allocation of resources.

The Proper Limits of Affirmative Action

The search for means of assuring the effectiveness of affirmative action programs has often led to demands for the imposition of quota remedies. However, we believe that quotas are qualitatively different from other forms of race-conscious relief and that their use undermines the concept of individual merit and the very principle of equal opportunity itself. They are wrong in principle, bad in practice, and antithetical to individual rights.

Although there are those who argue that quotas are necessary on a short term basis to remedy entrenched patterns of discrimination in our work forces, AJC is convinced that their inherent dangers outweigh any temporary gains they might achieve. Indeed, we believe that even temporary quotas sacrifice fundamental precepts of equality, fairness, and individual rights in the interest of expediency and short term advantage. Institutionalized group preferences, in our view, violate both constitutional principles and Title VII, despite their laudable purposes. To the extent that quota systems are approved, to that extent is the fabric of our democratic society damaged, to the detriment of all of our citizens.

Moreover, quotas may stigmatize members of the preferred groups by reinforcing negative stereotypes that they are unable to achieve success without special treatment unrelated to individual worth. Hence, they tend to exacerbate racial and ethnic antagonisms rather than alleviate them. The heated debate over quotas has led to a widespread backlash against other reasonable and less intrusive forms of affirmative action.

A recurrent problem with regard to quota remedies is how to determine exactly who qualifies to receive the quota preference. For example, should a white person who is one-eighth Navajo Indian come within a quota that is designed to benefit Native Americans? Or should a woman named Gonzalez receive a quota preference because she has a Hispanic surname, even though she is only one-fourth Mexican American? Should a recent black immigrant from Jamaica receive a quota preference merely because he is black, although clearly not a victim of prior historical discrimination against blacks in America? If so, on what basis of justice?

In the commendable zeal to remedy past injustices and eradicate the effects of prior discrimination, we must not permit the creation of new injustices and the sanction of new discrimination. Out of a desire for immediate results and short term advantage, quotas may lead in the long run to profound and lasting damage to the foundations of our democratic society.

Goals and Timetables Versus Quotas

Although AJC rejects quotas, we recognize that the use of numerical data and statistical techniques may well be necessary to monitor the effectiveness of legitimate affirmative action programs. Thus, we support the proper use of reasonable goals and timetables.

As opposed to a quota, a goal is a realistic numerical objective, arrived at in terms of the number of vacancies expected and the number of qualified applicants available in the relevant job market. An employer should never be expected to displace existing employees or hire poorly qualified applicants to meet the goal. Goals are flexible and can be adjusted if they are shown to be unrealistic. An employer is not subject to sanction if he or she has demonstrated good-faith outreach efforts to meet the goal.

The use of numerical goals and timetables must not be permitted to disguise a *de facto* quota system. On the other hand, opposition to quotas must not be converted into blind opposition to goals and timetables. We, therefore, urge the government to take appropriate steps to adopt policy that clearly differentiates between good-faith goals and *de facto* quotas, and to communicate this policy clearly to all those responsible for carrying out Federal affirmative action programs.

To help guard against the abuse of goals and timetables and to prevent their conversion into fixed quotas, we offer the following guidelines:

1. The procedures and standards must be clearly spelled out by the enforcing agency and made public in advance of being put into effect.
2. Quantitative measurements should be used only as management tools to assess the overall effectiveness of the programs and the progress achieved, taking into account the availability of qualified or qualifiable talent within the area or job market, and not based on proportional representation.
3. Periodic aggregate enumerations of work forces, student bodies, etc., may be used as bases for evaluating and effectuating compliance with affirmative action policies, provided, however, that: (a) questions as to race, color, ethnicity, nativity, or religion do not appear on application forms; (b) individuals are at no time required to identify themselves by any of the foregoing; and (c) no records are maintained by an employer or educational institution of an individual's race, religion, or ethnic origin.
4. Government has the responsibility to enforce vigorously affirmative action programs. It has equal responsibility to prevent abuses in them. Accordingly, appropriate safeguards and provisions for periodic review that meet both these responsibilities should be built into the programs. In addition, every affirmative action program should also be subject to periodic review to ascertain whether it has attained and maintained its goals with such consistency and reliabilty that continuance of the program as such is no longer required.
5. There should be effective and speedy grievance procedures so as to permit redress to an individual who claims either discrimination or so-called "reverse discrimination" by administrative abuse of the program. Certainly, no one who is performing satisfactorily should be dismissed to make room for a member of a previously disadvantaged group.

The above principles, procedures, and guidelines for affirmative action are essential for the full achievement of equality of opportunity for all Americans—an objective to which AJC remains deeply committed. We must at the same time urge the creation and furtherance of national policies and programs that would greatly expand employment and educational opportunities for individuals from all groups and, thus, diminish the intense competition for scarce existing opportunities.

Programs to Stimulate Economic Growth and Deal with Unemployment

In addition to affirmative action, the AJC urges the use of government programs to stimulate economic growth and decrease unemployment, which continues to hit hardest in the black and Hispanic communities. For one example, the creation of "urban enterprise zones," as set forth in the Kemp-Garcia bill, may well be an idea whose time has come. For another, Federal contracts should be allocated to communities and to those sections of the Nation where unemployment is the highest.

Affirmative action, of course, is most effective in an expanding economy. Unfortunately, many gains won by affirmative action can be lost as a result of

the necessity of layoffs, which have a disproportionate impact on minorities and women, often the last hired and, therefore, the first fired under seniority agreements.

For several years AJC has supported voluntary work sharing coupled with the payment of unemployment benefits to workers laid off only partially. This would enable an employer to spread out a reduced amount of work over an entire work force rather than laying off some of his workers. For example, instead of laying off 10 of a company's 50 workers, an employer could put all on a 4-day week, with each employee receiving 1 day of unemployment insurance. To do this, however, requires modification of State unemployment insurance laws. California has had such a modified law since 1978 and it has worked well. Taking into account the reduction in taxes and transportation and lunch costs, work-sharing employees generally end up with between 90 and 95 percent of their full-time wage, as well as retaining their health insurance and other fringe benefits. And the employer can retain his full work force, while hoping for better days ahead.

Quotas and Affirmative Action

By Albert Shanker*

Awhile ago there was a popular saying that went something like this: "If you're not part of the solution, you're part of the problem." I was always bothered by the suggestion that if you didn't jump on the right bandwagon your name would be mud or something a lot worse. And the neat problem-solution equation usually was accompanied by some gross, self-righteous oversimplification of a complicated social issue. I've learned that a good rule of thumb is that the more complex and controversial the issue, the more one should resist the temptation of simple answers and the harder one must work to maintain a clear perspective. Nowhere is this more evident than with regard to the highly charged question of underrepresentation and underutilization with relation to affirmative action.

Consider, for example, the "problem" of the employment of blacks and women in the academic world. In proportion to their numbers in the general population they are vastly underrepresented in tenured, college-level teaching positions. A simple solution, obviously, would be to hire more. But, as Thomas Sowell pointed out a few years ago, another reading of the statistics shows that blacks and women are actually overrepresented in faculty positions relative to their percentage of the Ph.D. population. Therefore, is there really a problem? If so, the solution doesn't lie with a reformation of hiring practices, but in an area far more difficult to deal with. We have to make sure we do our homework before we presume to prescribe for the ills of the world.

My second caveat is that we have to consider carefully the consequences of the kind of affirmative action we take to bring about better utilization and representation. For instance, I'm opposed to quotas as an affirmative action strategy because of the great potential for harm they have on many levels.

First of all, quotas have what Bayard Rustin called a "devastating psychological effect" on the very people they are designed to help. No matter how benign their intention, those who want to load the dice in favor of one group or another in employment or education, who want to mandate that a person be given a job or admitted to law school because of his or her race or ethnic background, are, in effect, making a statement that some people can't make it on their own and need to be given an absolute advantage over any competition. The result is to confer a quasi-official status of inferiority on the beneficiaries of the favored treatment. Also, members of the targeted group who do succeed on their merits may well find that their achievements will forever be suspect because of an

* President, American Federation of Teachers.

identification with those who were given a "free ride."

Quotas also help create what Sowell describes as a "poisonous atmosphere" in society. All those of the "wrong kind" who failed to get a job or were denied admission to a school, even though their chances might have been slim in the first place, can easily blame their lack of success on the unfairness of the quota systems or on an affirmative action program. Quotas offer a ready-made, highly visible scapegoat for all sorts of frustrations. In this way, racial antagonism and ethnic hostility are perpetuated and intensified; grievances fester and proliferate.

Also, there's something fundamentally contrary to the American spirit in making the group a person belongs to more important than the individual himself, warts and all. Those of us who were active in the civil rights movement of the fifties and sixties wanted to help create a colorblind society in which all people would be judged on their own merits, on whether they could do the job or measure up to the accepted standards. Traditionally, what rights we have adhere to us as individuals. Any insistence that group membership is a paramount qualification or disqualification is divisive, encouraging narrow loyalties and a "Lebanonization" of our social order.

Furthermore, we tend to blunt our sensibility by a preoccupation with quotas or ideal proportions in employment or school enrollment. Numbers become an end in themselves; justice and equity are secondary, and individual people begin to drift into abstractions. We run the danger of losing the sense that we are dealing with the fate of real lives. After all, favoritism for one translates into prejudice against another with the attendant consequences.

In his essay "Marrakech," George Orwell draws a powerful metaphor for an insensitive society. Each afternoon as he sat at the window of his rented house in the heat of the Moroccan summer, the author noticed that several large bundles of sticks passed by in the street outside. It was only after several days that he realized that there was a withered old woman under each bundle serving as a beast of burden. He was disturbed by the realization that he had begun to adopt the perspective of the society he was visiting where poor people simply disappeared into the landscape; suffering and injustice became invisible. Similarly, there is a danger that individuals can disappear into a landscape of quotas or ideology.

Equally ominous are the tactics of those who have a clear and righteous vision of the ideal statistical social order. Their benevolence usually ends in some form of coercion, a Federal fiat or administrative mandate almost always coupled with the threat of the loss of financial support for noncompliance. Whatever the situation, the numbers have to come out right, often in defiance of justice and common sense. We remember, for example, that a few years ago the administrator of desegregation of the Cleveland public school system ordered that all varsity basketball teams in a particular district have two white players on the roster to satisfy a 20 percent quota. There was apparently no concern that perhaps two better black players had to be bumped. Sometimes it's hard to tell the spirit of reform from the spirit of totalitarianism.

The implications of the continuing debate about affirmative action or quotas, or underrepresentation or underutilization or however one defines the issues, go far beyond a particular industry, profession, or academic institution. Our response will define the kind of country we want to live in. The establishment of a favored status for one group inevitably becomes a precedent. Today gender or color may be the decisive factors, but tomorrow others may argue that national origin or religious persuasion are equally worthy of special consideration. This new "tribalism" points the way to fragmentation and discord.

These caveats should not blind us to the conditions that have inspired the call for quotas or other affirmative action programs. Obviously, all too many still remain outside the economic mainstream of American life. There is underrepresentation and underutilization, but I know this not by looking exclusively at graphs or percentages, but by seeing individuals, in the streets, in the schools, and in dead end jobs who, for one reason or another, have not been able to realize their innate potential. They have to be helped. But my interest is in changing people, not changing standards or fiddling with the rules to produce the "right" statistics.

An unfortunate consequence of the legal enforcement of some affirmative action programs has been to reduce standards, to call for the minimum possible. The main problem today about accepting examinations in education or other fields is that minorities do not pass the examinations in the same proportion as nonminority groups. But that only proves that, as a result of previous discrimination

and current disadvantages, we still have a great deal to overcome.

It is very difficult to define precisely what kind of test is exactly relevant to the performance of a particular job. Can anyone really prove that it's good for an elementary school teacher to know something about Shakespeare or about algebra? I can't prove it, but I would not want to send my children to a school where the teacher only knew what had to be taught to the children in that grade.

Fortunately, we have excellent examples of what can be done to change lives for the better without compromising our standards. For example, the United Federation of Teachers-New York City Board of Education career ladder program for paraprofessionals offers many, mostly minority women, the opportunity to leave the welfare rolls for meaningful work in the city's classrooms coupled with the means of achieving full professional status. What began as a pilot project in 1967 with 1,500 participants grew, in less than 5 years, to a highly successful program employing 15,000. By 1974, with tuition reimbursement, almost all of the paraprofessionals had earned their high school equivalency diplomas, 6,000 were enrolled in college, 300 had earned their college diploma, and 100 had gone on to become licensed teachers in the city schools. The effort has been described by one of its participants as "the most successful antipoverty program ever created that is still in existence. . .genuine affirmative action, without racial quotas, goals or any other negative factors."

Another example of the right kind of affirmative action was developed by Ernest Green, then director of the Recruitment and Training Program at the A. Philip Randolph Institute. He placed thousands of minority workers in the construction trade unions. He did this not through quotas or special reserved places but by recruiting promising candidates, many of whom were high school dropouts, and providing special training for them. The approach worked, and thousands of minority youngsters who otherwise might have been social dropouts and a burden to the community were able achieve high scores on qualifying tests.

The importance of such skills-development projects was nicely summed up recently by the historian Diane Ravitch: "In the long run, the ability of minorities to sustain the occupational and educational gains of the past fifteen years depends not only on those who can hold their own academically, and not only on those who win union jobs, but on those who can do the job well."

The key is education, everything from early childhood education (which studies have shown to make significant, positive differences in later life) to job training programs. Progressive spokesmen and organizations should be united on this, particularly in opposing current administration policies that would rip apart proven outreach programs.

Those who insist on quotas weaken our common cause by undermining public support. As Ben Wattenberg pointed out in *The Real America,* Americans want fairness for all citizens and are even willing to go so far as to use their taxes to pay for special treatment like job training for those who have suffered past injustices. But they will not buy anything that smacks of unfairness. Wattenberg argues that segments of the civil rights movement diluted their power and committed a serious tactical blunder by seeking to implement policies like quotas that struck most Americans as being manifestly unfair.

One of the lessons we should have learned from the history of our sad century is that nothing regarding the human condition can be taken for granted, least of all a stable social order. We have to work at preserving the best that we have. The right kind of affirmative action, I think, will make us a stronger, more just and humane society. An essential step in this direction is to keep it fixed in our minds that behind the statistics and the percentages there are real people, all of whom have a claim to fair treatment. If this knowledge does not make us wiser, it should at least make us less rash in our judgment, more willing to see the complexity of our problems, and less eager to right old wrongs with new injustices.

Statement of the Women's Legal Defense Fund

By Claudia Withers*

The Women's Legal Defense Fund appreciates the opportunity to reaffirm publicly its commitment to the concept of affirmative action and to assert the need for its continued use in achieving equal employment opportunity for women and minority males.

The Women's Legal Defense Fund is a private, nonprofit organization founded in 1971 in Washington, D.C., by a group of feminist attorneys. WLDF maintains, as a primary goal, the elimination of discrimination on the basis of sex. Among the activities pursued by WLDF are counseling and representing individual women with employment discrimination problems. In addition, during the past 7 years, WLDF, along with Women Employed of Chicago, has been involved in monitoring the performance of Federal agencies charged with the enforcement of equal employment opportunity laws. Based on these experiences, therefore, we are fully cognizant of, and able to comment on, the status of women in the workplace as well as the efforts of government agencies to improve that status.

"Affirmative action" is a term that is susceptible to a number of meanings. It has been defined by this Commission as:

> [A]ny measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future.[1]

We, of course, support any such measures. But experience has shown that certain kinds of affirmative action are more effective than others. For purposes of this discussion, therefore, we want to focus on one of the most effective—and controversial—kinds of affirmative action measures: the kind that utilize goals and timetables or other kinds of numerical measures as motivators. Thus, in this statement, when we refer to affirmative action, we mean:

> A carefully delineated program of race-, sex-, or national origin-conscious action where success is measured against numerical criteria, and which is designed to create meaningful opportunities for those who are members of identifiable classes that have historically been the subject of pervasive, entrenched discrimination and segregation.

* Staff Attorney, Women's Legal Defense Fund. Did not appear.

[1] U.S. Commission on Civil Rights, *Statement on Affirmative Action* (1977), p. 2.

It is, of course, a given that such plans should last only as long as necessary to achieve the goals set by the employer. Moreover, such affirmative action is not about strict proportional representation of individuals in a particular workplace. It *is* about maximum utilization by an employer of resources that have historically gone untapped.

Women's Employment Status

Working women have achieved some major gains in the last several years. The 1970s was a decade of access, when the vigorous enforcement of EEO laws resulted in the opening of new opportunities. Notwithstanding these successes for women workers, the overall economic status of women has improved very little.

Women accounted for more than three-fifths of the increase in the civilian labor force in the past decade—about 13.7 million women compared with 8.4 million men. Women accounted for nearly 44 percent of all persons in the civilian labor force in 1983. Nearly half (49 percent) of all black workers were women; 43 percent of all white workers were women; and 40 percent of all Hispanic workers were women.

Although the percentage of women in the labor force is increasing, they are still concentrated in a relatively few low-paying occupations. Women continue to constitute large proportions of workers in traditionally female occupations. In 1983 they were 80 percent of all administrative support (including clerical) workers, but only 8 percent of precision production, craft, and repair workers; and 70 percent of retail and personal sales workers, but only 32 percent of managers, administrators, and executives.[2]

Women workers have achieved some progress. One of the important shifts that occurred between 1960 and 1970 was the influx of women into the skilled trades. The Department of Labor notes that by 1981 there were more than 802,000 women employed in the skilled trades, more than double the number in 1970 and almost four times the number in 1960. Altogether, however, women still hold less than one of every five skilled jobs. Women have also made gains in other predominantly male professions such as law. From 1972 to 1981 women more than tripled their proportion of all employed lawyers from 4 to 14 percent. The number of women physicians nearly doubled. Women in engineering increased from 9,000 to about 68,000 between 1972 and 1981, an 800 percent increase, compared with a 33 percent growth rate for men. The category of bank officers and financial managers was the fastest growing managerial occupation for women. By 1981 women made up about 38 percent of all workers employed as bank officers and financial managers.[3]

It is necessary, however, for us to put these figures in perspective. Notwithstanding the inroads of women into occupations formerly closed to them, clerical work is still the single largest occupational group for women. Service occupations make up the second largest sector of women's employment. Women are still much more likely than are men to be employed as registered nurses, health technicians, teachers (except for college), librarians, and social workers. Women are still vastly underrepresented in such traditionally male jobs as police officers, detectives, firefighters, architects, electricians, aircraft mechanics, and plumbers. Women still earn about 63 cents for every dollar earned by the average man when both are working year round, full time. The median wage or salary income of year-round, full-time workers in 1983 was lowest for black women.

The overrepresentation of women—and especially of women of color—among the very poor is another reflection of the fact that the few positive changes that have occurred simply do not go deeply enough. Women represented 61 percent of all persons aged 16 and over who had incomes below the poverty level in 1983. The proportion of poor families maintained by women was 47 percent in 1983, up from 43 percent. Nearly 72 percent of black families with incomes below the poverty level, including 3.2 million related children, were headed by women. Forty-six percent of Hispanic families, including almost one million related children, and 37 percent of white families, including 3.4 million related children, were in similar situations.[4] These figures illustrate that affirmative action is needed to help women achieve economic equity.

These figures also illustrate that it is women of color in particular who are in real need of affirma-

[2] U.S. Department of Labor, Women's Bureau, *20 Facts on Women Workers* (1984).

[3] U.S. Department of Labor, Women's Bureau, *Time of Change: 1983 Handbook on Women Workers,* Bulletin 298 (1983).

[4] U.S. Department of Labor, Women's Bureau, *20 Facts on Women Workers.*

tive action. They suffer from the burden of double discrimination, that is, discrimination based on sex *and* race or national origin. Women of color are more likely to be crowded into female-dominated occupations and are less likely to be represented among those occupations in which women, in general, have made some inroads, such as the skilled trades or managerial positions. It is clear that, for these women, current affirmative action efforts are not enough, but need to be redoubled in order that they, too, will be able to achieve equal employment opportunity.

The progress achieved to date by women in the workplace has been due in large part to the enforcement of Title VII of the Civil Rights Act of 1964 by the Equal Employment Opportunity Commission and to enforcement of Executive Order 11246, as amended, by the Department of Labor's Office of Federal Contract Compliance Programs. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment by all employers with 15 or more employees. Its reach extends to unions and employment agencies as well. Executive Order 11246, as amended, forbids discrimination in employment by Federal contractors and, further, requires them to undertake affirmative action in hiring, promotion, pay, and training for women and minorities.

Title VII of the Civil Rights Act of 1964 has two purposes: (1) "to make persons whole for injuries suffered on account of unlawful employment discrimination," and (2) to "provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[5] Courts in Title VII cases have ordered employees to develop affirmative action plans in order to ensure that the complained-of discrimination does not recur. Courts in Title VII cases have ordered plans that include numerical criteria to overcome the underutilization of women and minorities by employers.[6] And it is undisputed that Title VII encourages voluntary affirmative action by employers.[7] Finally, section 717 of Title VII, added by the 1972 amendments, made Federal agencies responsible for implementing affirmative action plans for minorities and women.[8] Title VII, as it is interpreted by the courts and enforced by the EEOC, has been a crucial underpinning in the legal scheme that encourages and sometimes requires the continued use of affirmative action as we have here defined it and, thus, has had a positive impact on the increased employment opportunities for women and minority males.

In this statement, however, we focus the bulk of our remarks on the affirmative action program mandated of Federal contractors by Executive Order 11246, as amended. We have chosen this focus for two reasons: first, because there are recent studies of the effect of Executive order enforcement, in particular, on the employment status of women and minority males; and second, because Executive order enforcement need not depend on the filing of complaints by individuals, but can and should be a proactive program affecting a large segment of the work force.

The affirmative action regulations of the Executive order provide that within 120 days of a contract award the contractor must create and adopt an affirmative action plan (AAP). Elements of the AAP include:

a. Self-assessment: The contractor must look at its own employment profile of women and minorities (utilization).

b. Determination of availability: The contractor must estimate the availability of qualified women and minorities for its jobs.

c. Identification of underutilization: The contractor must compare utilization in its own work force with availability.

d. Establishment of the affirmative action program: The contractor must identify specific steps to take to bring utilization up to availability in the future, including setting goals and timetables to measure the success of those steps that are undertaken.[9]

Recently completed studies indicate that enforcement of Executive Order 11246 has resulted in the increased presence of minority males and women in

[5] U.S. Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* (Clearinghouse Publication 70, November 1981), p. 23, quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975).

[6] These cases are cited and discussed in n.41, below.

[7] Albermarle Paper Co. v. Moody, above n.5; *see also* discussion of United Steelworkers of America v. Weber, below in text following note 38.

[8] Section 717(b)(a) of title VII, 42 U.S.C. §2000e–16(b).

[9] 41 CFR Part 60–2 (1978).

Federal contractors' work forces. In 1981 the OFCCP commissioned a study entitled "A Review of the Effect of the Executive Order 11246 and the Federal Contract Compliance Program on the Employment Opportunities of Minorities and Women." The study was conducted by V. Griffin Crump, special assistant to then OFCCP Director Ellen Shong Bergman (the Crump study). The study was released by OFCCP in June 1984. Also useful is a study entitled "The Impact of Affirmative Action" by Professor Jonathan Leonard of the School of Business Administration of the University of California at Berkeley (the Leonard study). This study was completed in 1983. The major premise of the Crump study was that "federal contractor establishments as a group should, over a period of time show greater changes in. . .participation rates."[10] Participation rates, as used in the Crump study, mean the proportion of women or minorities in a particular occupational category. The study conducted by Jonathan Leonard also compares the status of women and minorities in contractor and noncontractor establishments.

Both Leonard and Crump look at the performance data of contractor establishments during the period of 1974 through 1980. The Crump study notes that this period was chosen because it utilized the most reliable current data (1980 EEO-1 reports) and coincided with the implementation of the requirement of written affirmative action plans, which began in 1971, and the implementation of compliance activity regarding equal employment opportunity for women, which began in 1972.

Both studies conclude that the employment status of women and minorities has improved in companies that are covered by the Executive order program. Crump concludes that "Executive Order establishments posted significantly greater gains in employment and advancement of women and minorities than those not covered. . . ."[11] Leonard finds that "[t]he federal contract compliance program has substantially improved employment opportunities for blacks,"[12] and that contract compliance has had a positive impact on both minority and female employment between 1974 and 1980.[13] Given the aforementioned results, it is apparent that affirmative action has been successful in providing equal employment opportunity for minorities and women.

For example, without the Executive order and strong enforcement of its implementing regulations, there would be no women in the coal mines. In the coal industry, affirmative action increased the number of women miners from 1 percent in 1972 to 11 percent in 1979. Through affirmative action, the number of women employed in the construction industry increased nationwide by 30 percent between April 1978 and September 1979. Because of affirmative action, too, the banking industry began, albeit slowly, to change its hiring and promotion practices. In 1960, 12.2 percent of bank officials-financial managers were women—only one-half percent more than there were 10 years earlier in 1950. By 1970 the percentage had increased to 17.6 percent. By 1979 it had nearly doubled to 31.6 percent. By 1981 the percentage had climbed to 38 percent. Executive Order 11246, as amended, played a major role in the improvement in these industries; indeed, banking and coal mining had been targeted by OFCCP for stepped-up enforcement efforts in the late 1970s.

History of the Contract Compliance Program

The Executive order program has evolved over a period of over 40 years and reflects a recognition by Republican and Democratic presidents alike that the Federal Government must ensure that the companies with which it contracts are held to a high standard of equal employment opportunity. As the Federal contract compliance program evolved, increasingly specific requirements were imposed on the contractors because experience showed that mere exhortations not to discriminate did not work.

The first Executive order barring discrimination in employment by war contractors was signed by President Roosevelt in 1941.[14] The order made no provision for actual enforcement of the equal employment requirement. Two years later, Roosevelt

[10] U.S. Department of Labor, Office of Federal Contract Compliance Programs, "A Review of the Effect of Executive Order 11246 and the Federal Contract Compliance Program on the Employment Opportunities of Minorities and Women," June 1984, p. 32.

[11] Ibid, p. 37.

[12] Jonathan Leonard, "The Impact of Affirmative Action," 1983, p. 144.

[13] Ibid, p. 362. Neither Leonard nor Crump deals specifically with the progress achieved by minority women as a separate category.

[14] Executive Order No. 8802. This Executive order was issued by President Roosevelt in order to forestall a planned march on Washington by blacks that was planned by A. Phillip Randolph.

extended coverage of the Executive order to cover all Federal contractors or subcontractors.[15]

Presidents Truman and Eisenhower followed with Executive orders that expanded the nondiscriminatory provisions. President Truman's 1945 Executive Order No. 9004 directed the Fair Employment Practices Committee established by Roosevelt to "investigate, make findings and recommendations, and report to the President with respect to discrimination in industries. . . ." This Committee noted in its *Final Report*[16] that the Executive order program had been beneficial for employment for minority workers. It found further, however, that discriminatory practices were too entrenched to "be wholly carved out by patriotism and presidential authority,"[17] and that the advances made by minority workers diminished as soon as wartime controls were relaxed.[18]

Because Congress denied it money for implementation, the Executive order program stagnated from 1946 to 1951. As the Korean conflict escalated, President Truman, under authority of the war power, issued Executive orders in February and December 1951 requiring defense contractors to promise nondiscrimination on the basis of race, creed, color, or national origin.[19]

During his first term, President Eisenhower established a Committee on Government Contracts composed of representatives of industry, labor, and government, as well as citizens.[20] The Committee was chaired by Vice President Richard M. Nixon. The resulting Executive order reaffirmed that it was U.S. policy to promote equal employment opportunity by government contractors. President Eisenhower issued an additional Executive order in 1954 that became the first to specify the text of the nondiscrimination provision to be included in government contracts and subcontracts.[21]

Although there were few tangible increases in the employment of black workers under President Eisenhower's Executive order program, his Committee was instrumental in promoting the concept of equal employment opportunity in a variety of ways. The Committee established the machinery necessary for the implementation of the nondiscrimination provision. It publicized the program and, through negotiations with contractors, actually provided some jobs and training opportunities. The Committee urged, in some situations, the hiring of blacks on a limited "preferential" basis—that is, giving preference to a black applicant where he and a white applicant were equally qualified.[22] In its *Final Report,* the Committee noted that the barrier to increased minority employment was *not* overt discrimination. It was *"the indifference of employers to establishing a positive policy* of nondiscrimination."[23] (Emphasis in the original.)

President Kennedy issued Executive Order No. 10925 in 1961 establishing the President's Committee on Fair Employment Practices. The President ordered further that not only should contractors be required to pledge nondiscrimination, but that they should take affirmative action to ensure equal employment opportunity on the basis of race, creed, color, or national origin. In addition to the requirement of affirmative action, the Kennedy order set out penalties for noncompliance with contractual obligations. The Attorney General of the United States, in response to a request from Vice President Lyndon Johnson in his capacity as Chairman of the President's Committee, concluded that the provisions of the Executive order requiring affirmative action and providing for penalties were lawful.[24]

Executive Order 11246, issued by President Johnson, built upon the contract compliance program as envisioned and initiated by President Kennedy. This order continued the affirmative action requirement and sanctions initiated by Kennedy. President Johnson assigned responsibility for the Executive order program to the Secretary of Labor. The Secretary of Labor then created the Office of Federal Contract Compliance (OFCC) to administer the Executive order program. After pressure from the National Organization for Women, President Johnson issued Executive Order 11375 in 1967, which amended Executive Order 11246 to add "sex" to the list of prohibited bases of discrimination.

[15] Executive Order No. 9346.

[16] *Final Report of the President's Committee on Fair Employment Practices* (Washington, D.C.: Government Printing Office, 1947).

[17] Ibid., at VI.

[18] Ibid., at VIII.

[19] "Affirmative Action to Open the Doors of Job Opportunity," Report of the Citizens' Commission on Civil Rights, June 1984, p. 34. (Hereafter cited as Report of Citizens' Commission).

[20] Executive Order No. 10479 (Aug. 13, 1953).

[21] Executive Order No. 10557 (Sept. 3, 1954).

[22] Report of Citizens' Commission, pp. 35-36.

[23] Committee on Government Contracts, *Pattern for Progress, Final Report to President Eisenhower* (Washington D.C.: Government Printing Office, 1959-60).

[24] 42 Op. Atty. Gen. 97 (Sept. 26, 1961).

As of 1961 Federal contractors became obligated to use affirmative action. The concept was not initially defined. In 1967, OFCC Director Edward C. Sylvester, Jr., attempted to do so:

> There is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything that you have to do to get results. . . . Affirmative action is really designed to get employers to apply the same kind of imagination and ingenuity that they apply to any other phase of their operation.[25]

This result-oriented approach to affirmative action received more precise definition with the establishment in 1965 of the four "special area programs" for the construction industry in St. Louis, San Francisco, Cleveland, and Philadelphia. These programs were intended to "assure minority group representation in all trades and in all phases of the work."[26] In May 1968 the OFCC issued its first regulations describing the affirmative action obligations of nonconstruction contractors. For the first time, the concept of goals and timetables was introduced into the Executive order program.[27] In 1970 President Nixon's Secretary of Labor Schultz issued Order No. 4, which described in greater detail the nature of contractors' affirmative action plans and the steps which the OFCC required and recommended for implementation of the plan.[28] Revised Order No. 4 was issued by Secretary of Labor J.D. Hodgson in December 1971. The revised order included women for the first time in contractor's affirmative action obligations.[29]

In recent years, the Federal contract compliance program has undergone further changes. In early 1979 President Carter announced a total reorganization of civil rights agencies.[30] Before reorganization, the OFCC had *overall* responsibility for reviewing Federal contractors and enforcing Executive Order 11246, as amended, but 11 different compliance programs within each of the contracting agencies (e.g., Treasury, HEW, Defense, etc.) had the actual responsibility for monitoring specific industries. As a result of the reorganization, on October 1, 1978, the entire contract compliance program was consolidated in the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The new OFCCP got off to a slow start, bogged down by untrained staff inherited from other agencies and its own lack of creative enforcement approaches. By 1980, however, the agency had developed an enforcement apparatus with the potential for investigating and dealing with problems of discrimination.

Thus, in FY 1980, over 4,000 persons were awarded nearly $9.3 million in backpay through increased conciliation agreements and use of sanctions. This is more than the total backpay awarded in the 2 years preceding consolidation. Since 1965, 27 Federal contractors have been debarred from doing business with the government because they discriminated unlawfully. Fully one-half of those debarments occurred in the years from 1977 to 1981.

Of particular importance was the investigation of affected classes of women and minorities who suffer from the effects of past discriminatory treatment. Essentially, affected class analysis is the key to attacking systemic discrimination by Federal contractors. In FY 1980, 391 affected class cases were being handled, almost all of which were initiated after consolidation.

The OFCCP Today

In the years since 1981, there has been a shift in emphasis by OFCCP from a spirit of tough enforcement to an effort to reduce the agency's purported "adversarial" stance. The overall result has been an agency that is less concerned with achieving equal employment opportunity for women and minorities and more concerned with lessening the "burdens" on Federal contractors.

As its first step upon assuming control of OFCCP, the Reagan administration suspended implementation of revisions to the OFCCP affirmative action regulations. The revisions had been promulgated by the Carter administration after extensive consultation with a cross section of the agency's constituents. However, instead of issuing these regulations, Reagan OFCCP officials suspended them and proposed substantial other changes to them.[31] They proposed to release 75 percent of currently covered Federal contractors from the requirement of preparing written AAPs. For the remaining contractors subject to the AAP requirements, other cutback measures

[25] Report of the Citizens' Commission, p. 41.

[26] Barry L. Goldstein, "The Historical Case for Goals and Timetables," *New Perspectives,* Summer 1984, p. 20.

[27] 33 Fed. Reg. 7804 (May 28, 1968).

[28] 35 Fed. Reg. 2586 (Feb. 5, 1970).

[29] 36 Fed. Reg. 23, 152 (Dec. 4, 1971).

[30] Executive Order No. 12086.

[31] 36 Fed. Reg. 42968 (Aug. 25, 1981); 47 Fed. Reg. 1770 (Apr. 23, 1982).

were proposed: Contractors with approved long term AAPs were to receive 5-year exemptions from routine compliance reviews; compliance reviews prior to the award of large contracts were to be eliminated, although such reviews had been used to secure specific commitments for improvements from employers with poor employment records; and employment goals for women in construction were to be established on an aggregate basis rather than craft basis (e.g., that 6.9 percent of persons employed by a contractor within each craft: carpenters, bricklayers), *inter alia.* The proposed regulations were criticized by both the business and the civil rights communities. In addition, the EEOC and the U.S. Commission on Civil Rights were also critical of the proposed regulations. To date, these proposed regulations have been neither finalized nor replaced by other affirmative action proposals.

Failure to finalize these regulations, however, has not prevented OFCCP from altering the contract compliance program without benefit of the procedural niceties of the Administrative Procedure Act. The OFCCP has significantly reduced the impact of the Executive order program by the use of internal directives and oral instructions to regional offices.[32] The agency has narrowed the standards for eligibility for backpay by limiting the period of harm for which backpay will be sought.[33] It has also made it more difficult to prove patterns and practices of discrimination by statistical evidence.[34] It has instituted the national self-monitoring reporting system, a program under which large multifacility contractors may effectively monitor their own affirmative action performance with little or no oversight by the OFCCP.[35] OFCCP has instituted a number of other measures that have also had a devastating impact on the employment status of minorities and women.[36]

Legal Bases of Affirmative Action

The Executive order has been upheld as valid. It is authorized by at least two independent sources: (1) the President's power to oversee the Federal procurement authority under the Federal Property and Administrative Services Act of 1949,[37] and (2) Congress's ratification of the Executive order program in 1972 when it extensively amended Title VII of the Civil Rights Act by explicitly deciding to leave the Executive order program intact.[38] No courts have invalidated the basic structure of the program or the core contractual obligation upon Federal contractors not to discriminate and to take affirmative action when necessary.

Indeed, the OFCCP, itself, has recently rejected a challenge to the constitutionality of Executive Order 11246 and its affirmative action regulations.[39]

Furthermore, the United States Supreme Court has upheld the use of race-conscious programs in education, contracting, and employment. These cases leave no doubt that affirmative action programs are constitutional.

Probably the best known of the cases is *Regents of California* v. *Bakke* (438 U.S. 265 (1978)). In *Bakke,* the University of California's medical school admissions program was struck down. Although there were six separate opinions in this case, five of the nine Justices held that race can be a factor in professional school admissions programs.

The second of the major Supreme Court cases decided in this area was *United Steelworkers* v. *Weber* (443 U.S. 193 (1979)). In *Weber,* the Court upheld, under the Civil Rights Act, an affirmative action program that had been negotiated by the Steelworkers Union and Kaiser Aluminum Company to provide training opportunities for skilled crafts jobs. Entry into the program was based on race and seniority: For each white person admitted into the program, one black person was required to be admitted until the representation of blacks in the skilled crafts jobs equaled their representation in the work force at large.

It is important to note that the plan in *Weber* was negotiated voluntarily, as part of an industrywide collective-bargaining agreement between the Steel-

[32] Report of the Citizens' Commission, p. 93.
[33] OFCCP Order No. 760al (Mar. 10, 1983).
[34] Ibid.
[35] See, Women Employed, "Analysis of National Self-Monitoring Reporting System," March 1984 (unpublished memorandum).
[36] Report of the Citizens' Commission, pp. 93–95.
[37] 40 U.S.C. 471 *et seq. See, e.g.,* United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459 (5th Cir. 1977), *vacated on other grounds,* 436 U.S. 942 (1978); Contractors' Ass'n of Eastern Penn. v. Secretary of Labor, 442 F.2d 159 (3d dir.) *cert. denied,* 404 U.S. 854 (1971).
[38] See Goldstein, "The Historical Case for Goals and Timetables," pp. 23–26.
[39] OFCCP v. National Bank of Commerce of San Antonio, DOL No. 77–OFCCP–2, Dec. 11, 1984. The bank claimed that the Executive order violated both the Constitution and Title VII. Undersecretary of Labor Ford B. Ford disagreed, noting that "affirmative action goals and timetables do not require that one person be preferred over another because of his race or sex, and are not to be interpreted or applied as inflexible quotas."

workers and all of the aluminum manufacturing companies. It was designed to end automatically when racial balance was achieved. No whites were displaced because of this program; to the contrary, both whites and blacks benefited from the creation of a new training program to which they otherwise would not have had access.

The Supreme Court upheld this program and, with it, any "affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." The Court noted that this kind of plan was not reverse discrimination, declaring:

> It would be ironic indeed if a law [the Civil Rights Act] triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long". . .constituted the first legislative prohibition of all voluntary, private, race conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[40]

In *Fullilove* v. *Klutznick* (448 U.S. 448 (1980)), the Court upheld Federal legislation that set aside a minimum percentage of Federal funds for State and local government work projects for contract awards to minority business enterprises. The set-aside was mandated because of the near-complete lack of federally assisted public works contracts awarded to minority businesses.

Each of the above cited cases is based, in part, on the Supreme Court's recognition that our country's long history of discriminatory exclusion of blacks (and other racial and ethnic minorities) from participation in the program involved—medical schools, the skilled trades, public contracting—has a present-day legacy.

In addition to the recognition by the Supreme Court of the legality of affirmative action, virtually all the Federal courts of appeal that have considered the legality of fixed numerical requirements in hiring and promotion have found them lawful when necessary to remedy proven discrimination.[41]

On June 12, 1984, the Supreme Court decided *Stotts* v. *Firefighters Local No. 184,* (104 S.Ct. 2576, 34 FEP Cases 1702). The plaintiff in *Stotts* had alleged that the city of Memphis was engaged in a pattern or practice of making hiring and promotion decisions on the basis of race in violation of Title VII and of 42 U.S.C. §§1981 and 1983. The district court certified a class and, in due course, approved a consent decree in the spring of 1980. The decree adopted a long term goal of increasing the proportion of minority representation in a number of job classifications. There was an explicit denial of discrimination by the city. Neither the 1980 nor an earlier 1974 decree covering similar issues dealt with what would happen in the event of layoff or reductions in rank. Neither decree awarded competitive seniority.

In 1981 the city, for budget reasons, announced layoffs. The layoffs were to be made on the basis of the "last hired, first fired" rule of seniority. Stotts then sought, and received from the district court, a temporary restraining order forbidding the layoff of any black employee; the court ordered the city not to apply the seniority policy in any way that would decrease the percentage of black employees in several categories. Layoffs continued in compliance with the injunction and, in some cases, resulted in the layoff of nonminority employees with more seniority than minority employees. On appeal, the Court of Appeals for the Sixth Circuit affirmed, even though it concluded that the district court had erred in holding that the city's seniority system was not bona fide. The Supreme Court reversed the judgment of the court of appeals. Justice White stated in the majority opinion that:

> Title VII precludes a district court from displacing a nonminority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination.[42]

In a separate opinion, Justice Stevens suggested that he would have upheld the order if the lower court had concluded that it was necessary to effectuate the consent decree.[43] Justice O'Connor also viewed the case narrowly. She stated that a court may use its remedial powers not only to compensate identified

[40] 443 U.S. at 204.

[41] See cases cited at p. 22, n.60, in U.S. Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination. See also* Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), *cert. denied,* 104 S.Ct. 703 (1984), and Boston Chapter NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), *cert.* granted, 1012 S.Ct. 293, *cert. vacated,* 103 S.Ct. 2076 (1983).

[42] 34 FEP Cases at 1710, n.9.

[43] *Id.* at 1716. Stevens also noted that he found the majority's discussion of Title VII to be "wholly advisory." 34 FEP Cases at 1715.

victims of unlawful discrimination, but also "to prevent future violations."[44] This language suggests that she would, in the appropriate case, approve race- or sex-conscious relief as a remedy.

Thus, the opinion in *Stotts* in no way precludes the use of race- or sex-conscious relief in an affirmative action plan, as is claimed by the Justice Department. The majority did not even mention its prior rulings on the issue of affirmative action, let alone announce any modifications of the legal principles established by those cases. Certainly, the majority opinion left open the question of whether the city of Memphis could have acted voluntarily to assure the retention of minorities during a layoff. And Justice Blackmun noted in his dissent, joined by Justices Brennan and Marshall, that the majority opinion is a statement that the race-conscious relief, in this case, was broader than necessary, *not* that race-conscious relief is never appropriate under Title VII.[45]

The opinion in *Stotts* is, thus, of limited impact on the law regarding affirmative action as a remedy. Notwithstanding the language in the majority opinion concerning identifiable victims of discrimination, the case can, by no stretch of the imagination, be deemed to prohibit race- or sex-conscious measures to achieve equal employment opportunity. And, thus far at least, the lower courts that have had an opportunity to consider *Stotts* have generally agreed with this assessment.[46]

We feel secure in our assessment that affirmative action and the use of race- and sex-conscious relief is not only legitimate, but recognized by the courts as necessary in certain situations. Our concern, however, is a present administration that seeks to reverse the gains that have been achieved by women and minorities under the guise of "colorblind" and "gender neutral" strategies for equal employment opportunity.

The Reagan Administration

In its role both as chief lawyer for the Federal Government and as a statutorily mandated public prosecutor of employment discrimination cases, the Department of Justice has traditionally been in the forefront of enforcing the mandate of equal employment opportunity contained in Title VII of the Civil Rights Act of 1964. But the present Attorney General and the Assistant Attorney General for Civil Rights have adopted policies that reverse this tradition. This Justice Department has explicitly rejected the use of race- or sex-conscious measures to remedy discrimination. Although such a policy was not adopted by the EEOC in the first administration, recent comments by EEOC Chair Clarence Thomas indicate that this agency may follow the lead of the Justice Department in eschewing the use of race- and sex-conscious remedies in employment discrimination. Mr. Thomas has stated that "relief should be victim-specific and that 'affirmative action' should consist of outreach efforts rather than numerical goals and timetables."[47] As the EEOC was, during the last administration, the only Federal agency willing to uphold the law in employment discrimination cases, this apparent change in policy is disturbing. If implemented, such a change will be ruinous to the continued advancement of women and minority males in the American workplace.[48]

The refusal by the Federal Government to use race- and gender-conscious affirmative action policies removes from the arsenal of weapons used to fight employment discrimination those that have proved to be most effective in achieving equal employment opportunity. As a legal matter, it conflicts squarely with the weight of judicial precedent. As a matter of policy leadership, it sends a signal to American business and the American people that the achievement of the *reality* of equal employment opportunity is no longer a matter of national priority.[49]

Conclusion

In an earlier congressional hearing on affirmative action, then-acting Chair of the EEOC, Clay Smith, Jr., noted that:

It is fallacious to argue that the interpretations of our laws must remain colorblind when in fact they have never been

[44] *Id.* at 1714.

[45] *Id.* at 1727.

[46] Wygant v. Jackson Bd. of Educ., 36 FEP Cases 153 (6th Cir. 1984); Van Aken v. Young, 36 FEP Cases 777 (6th Cir. 1984); Deveraux v. Geary, 36 FEP Cases 415 (D. Mass., 1984); Britton v. South Bend School Corp., 35 FEP Cases 1527 (N.D. Ind., 1984); NAACP v. Detroit Police Officers Ass'n, 35 FEP Cases 630 (E.D. Mich. 1984).

[47] See Daily Labor Report (DLR No. 227 at A-6).

[48] For a more detailed discussion of the apparent reversal in EEOC policy see Barry Goldstein, Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc., statement regarding equal employment opportunity policy before the House Subcommittee on Employment Opportunities, Dec. 14, 1984.

[49] See the WLDF publication, "Equal Employment Opportunity: A Critique of Department of Justice Policy and Enforcement Testimony before the U.S. House of Representatives, 1982."

applied in a neutral manner. The founders of this nation proclaimed that "all men are equal" but gave us a Constitution which designated Blacks as 3/5 of a person. Until 1920, women citizens were denied the right to vote. Until the middle of this century, the Equal Protection Clause to the Constitution meant only that Blacks were entitled to separate but manifestly unequal treatment. It wasn't until 20 short years ago that the law of the land forbade discrimination in employment. We cannot, therefore, suddenly make the Constitution color and sex blind.[50]

We concur with Mr. Smith's statement. Neutrality is fine in theory, but it fails to take into account the historical discrimination suffered by women and minorities in this country. Neutrality will most certainly be of little use to women of color who are seldom, if ever, viewed as architects, engineers, police officers, or corporate vice presidents. Merely calling for colorblind and sex-neutral policies, without more, will only maintain the status quo, a status quo that is white and male. History tells us that they have not worked in the past, and they will not work now.

Affirmative action—that is, the use of race- and sex-conscious measures—works. The studies done by V. Griffin Crump and Jonathan Leonard demonstrate that it works. The history of the contract compliance program teaches that it works, and that it is necessary.

[50] Clay Smith, Jr., Acting Chair of the EEOC, statement at Hearings on Affirmative Action before the House Subcommittee on Employment Opportunities, 1981.

Statement of the Mexican American Legal Defense and Education Fund

By Joaquin Avila*

Introduction

I am the president and general counsel of the Mexican American Legal Defense and Educational Fund (MALDEF). MALDEF is a national civil rights organization dedicated to protecting the rights of and advocating on behalf of Hispanics. We currently have offices in San Francisco, Los Angeles, Denver, Chicago, San Antonio, and Washington, D.C. Our efforts, on behalf of the Hispanic community, are concentrated in the areas of employment, education, immigration, voting rights, and political access. I appreciate this invitation to address an issue of such pervasive importance in today's political climate as affirmative action.

Underrepresentation and Underutilization: Does It Reflect Discrimination?

Underrepresentation and underutilization do not *necessarily* reflect discrimination—but they are often telltale signs that discriminatory practices are at work.

The terms underrepresentation and underutilization immediately call to mind the emotional debate about the desirability of purely statistical parity among different groups in an employer's work force—or, for opponents of affirmative action, "racial balance." But the terms also fairly pose the issue of what types and levels of jobs certain segments of the work force occupy—of the profile of, for example, the Hispanic work force, rather than a snapshot of the composition of a particular employer's work force in a particular position, or overall. I would like to explore this profile concept briefly as it applies to Hispanics before turning to the debate concerning the terms underrepresentation and underutilization.

In order to understand the role of statistical disparities in relation to discrimination, it is important to take a brief look back in history. In the not-too-distant past, overt discrimination in the workplace against minorities and women was an accepted manner of conducting business. It was accepted because no one questioned the effects of the discrimination, namely, the concentration of minorities and women into lower paying positions that provided little room for advancement. For example, a 1919 study of laundry workers in El Paso, Texas, found that non-Hispanic workers were given the desirable jobs and Hispanic workers were relegated to the

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jobs non-Hispanics rejected. This example was repeated throughout the Southwest.[1]

The long history of overt discrimination in the work force has created an entrenched concentration of minorities and women in more menial positions. With the passage of the Civil Rights Act of 1964, Executive orders prohibiting discrimination by government contractors, and other laws, this country began to question the segregation of minorities and women into the less desirable jobs. As a result, intolerance for overt discrimination in the workplace has, for the most part, become a societal norm. However, minorities and women remain concentrated in unacceptable numbers in lower paying jobs that provide little room for advancement.

Social scientists have found that adequate employment is critical for minorities. In *The Chicano Worker,* Vernon M. Briggs, Jr., Walter Fogel, and Fred H. Schmidt discuss the link between adequate employment and full participation in other aspects of American society:[2]

> Chicanos are becoming increasingly aware of the problems they face in their efforts to obtain an equitable share of the benefits of American society—problems of schooling, housing, health, employment, social status, and cultural identity. . . .
>
> One of the greatest needs of Chicanos is improvement in their labor-market experiences—better jobs and incomes. Good jobs with adequate incomes help to provide better schooling, health, and other benefits.

Underemployment figures for purposes of understanding the role of underrepresentation and underutilization in reflecting discrimination are more useful than unemployment figures. The unemployment rate of a minority group or women can be attributed to many factors. Based solely upon such evidence, it is difficult to discern the quantifiable effects of discrimination. Table 1 illustrates the extent of the underemployment of Hispanics, as of March 1980.[3]

As the table indicates, underemployment includes an assessment of such factors as those engaged in involuntary part-time work, marginal jobs, workers in poverty households, overeducation, and inequitable pay. Involuntary part-time workers are most often found in clerical jobs, retail sales, and services.[4] Historically, minorities and women have been disproportionately represented in these occupations and, as the table indicates, overrepresented in this category. The percentage of Hispanics and blacks who were involuntarily working parttime was roughly double that of majority males. The interrelationship between traditional concentrations of minorities and women into certain job categories and the sad economic effect of that concentration can be seen in these figures.

The category of marginal jobs reflects the historical category that women and minorities were relegated to due to the effects of unquestioned historical employment discrimination. These jobs have been described by economist Harold Wool as the "jobs of last resort," positions people take, for the most part, not because they want them or because they are lacking in ability, but because they are denied access to better jobs that provide training and opportunities for career advancement.[5] In this category, minorities and women are, again, overrepresented.

Historically, workers in poverty households were more likely to be blacks or Hispanics than majority males for two reasons. First, majority males were usually paid more than those in other groups for doing identical or similar work. Second, as discussed previously, blacks and Hispanics were subject to legally sanctioned discrimination that restricted their movement into high-paying occupations. Recent studies have found that male and female Hispanics and blacks continue to be more often in low-paid occupations than majority males.[6] Therefore, although evidence indicates that there is a higher participation of blacks and Hispanics in the labor market, the crucial statistic is the high concentration of black and Hispanic workers who remain in poverty.

Perhaps the most striking statistic in table 1 in terms of evidencing a direct relationship of the present effects of historical discrimination upon the underemployment of minorities and women, is overeducation. Traditionally, the link between formal

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[1] Mario Barrera, *Race and Class in the Southwest* (Notre Dame, Indiana: University Press, 1979), p. 105.

[2] Vernon M. Briggs, Jr., Walter Fogel, and Fred H. Schmidt, *The Chicano Worker* (Austin: University of Texas Press, 1977), p. xiv.

[3] U.S. Commission on Civil Rights, *Unemployment and Underemployment Among Blacks, Hispanics, and Women* (Clearinghouse Publication 74, November 1982).

[4] Sylvia Lozos Terry, "Involuntary Part-Time Work: New Information from CPS," *Monthly Labor Review,* vol. 104 (February 1981), p. 73.

[5] U.S. Commission on Civil Rights, *Unemployment and Underemployment Among Blacks, Hispanics, and Women* (Clearinghouse Publication 74, November 1982).

[6] Ibid. p. 9.

TABLE 1

	Males		Females	
	Majority[1]	Hispanics	Majority	Hispanics
Number in the labor force (thousands)	50,363	3,329	36,668	2,035
Percentage of the labor force	—	—	—	—
Unemployed	6.0%	8.1%	5.6%	10.3%
Underemployed through:				
Intermittent employment[2]	5.3	9.0	4.0	7.4
Involuntary part-time work	2.7	5.7	3.6	5.5
Marginal jobs[3]	5.3	11.2	13.9	18.5
Workers in poverty households	2.1	5.4	1.8	3.6
Overeducation[4]	23.4	31.2	20.3	23.2
Inequitable pay[5]	13.8	18.9	27.0	30.0
Neither unemployed nor underemployed	65.2	58.3	55.4	48.6

[1] "Majority refers to white, not of Hispanic origin.
[2] Intermittent employment is defined as persons who were unemployed for at least 15 weeks or had at least 3 separate spells of unemployment during the past year.
[3] Marginal jobs are defined as jobs with low wages and fringe benefits, poor working conditions, high labor turnover, little chance of advancement, and often arbitrary and capricious supervisors.
[4] Overeducation is defined as persons whose formal education and skills are not adequately used.
[5] Inequitable pay refers to earnings that are not commensurate with a person's qualifications.

education and employment in American society has been a direct link. Overeducation will, of course, affect all groups to some degree; but the fact that it so strikingly affects minority males is probative of the difficulty encountered by minorities in using their educations to obtain the more desirable positions in society. The overeducation figures for women are not as illustrative of this point due to the fact that, traditionally, they have been concentrated into jobs with low remuneration, but requiring some degree of formal education such as nurses, teachers, and secretaries.

The inequitable pay figures are the telltale statistics that illustrate the historical concentration of women into low-paying positions. The figures in table 1 were derived after using a complex analysis that figured in differences in the levels of education, job experience, age, and geographical region. The following illustrates some of the differences that were figured in: (1) Majority males, who have higher levels of education than other groups, can expect to receive higher earnings as a result; (2) since younger workers, on the average, earn less than older workers, the average age of workers would affect their average earnings; and (3) people who work longer hours or in areas with higher pay rates can be expected to have higher average earnings.

Multiple regression, a common method of statistical analysis, was used to determine and control for the effects on earnings of various individual characteristics (education, age, general educational development, and specific vocational training) in determining earnings as well as employment characteristics (local pay rate, number of weeks worked, and average number of hours worked). If the actual earnings for an individual were under half of the earnings expected on the basis of individual and employment characteristics, the person was considered to be "inequitably paid."[7]

[7] Ibid. p. 10.

Inequitable pay is a problem for minority males, but it is an even more serious problem for women. The figures in the table are not surprising if one approaches the subject from an historical viewpoint. The underemployment table, viewed as a whole, shows the lingering effects of historical discrimination upon minorities and women today.

The remaining issue is whether a statistical analysis showing underrepresentation or underutilization constitutes reliable evidence of the current effects of historical discrimination. In this connection, the panelists have also been asked specifically to analyze or react to a quote taken from *International Brotherhood of Teamsters* v. *United States* (431 U.S. 342, 340 n.20 (1977)):

> Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; [a]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. . . .

In the foregoing quote, the United States Supreme Court was responding to the argument of petitioners that statistics evidencing disparities should never be given decisive weight in a Title VII case because it would conflict with section 703(j) of the act by granting preferential treatment to an individual or group. Statistics showing substantive underrepresentation and underutilization are evidence of discrimination—not conclusive, but certainly indicative. However, the employer must always be afforded the opportunity to set forth nondiscriminatory reasons for any statistical disparity.

The Supreme Court quote, taken out of context from *Teamsters* as it was in the outline prepared for the panelists, suggests the attack leveled by some critics of affirmative action—namely, that, through time, nondiscriminatory hiring practices, without corrective measures, will result in a work force at or near parity with the available work force in the recruiting area. That attack blinks at the reality of the entrenched effects of past discrimination. Mere neutrality has been shown to be inadequate to reverse the consequences of institutional and covert discrimination. Affirmative action is a practical response to the need to intervene on behalf of minorities and women who either directly or indirectly have suffered from discrimination and to give them the opportunity to succeed. Statistical disparities in this context are often the indication that discrimination is at work in producing unequal results. An underutilization analysis of the work force is the starting point for seeking out possible areas of discrimination.

Legal Perspectives: The Current State of Affirmative Action Law Regarding Employment

Race- and sex-conscious remedies force the focus of the employer upon the institutional structure rather than upon individuals. The remedy of setting goals and timetables developed gradually over the past 15 years in recognition of the entrenched state of institutional discrimination.

The first Executive order barring employment by government contractors was issued by President Roosevelt in 1941. Over the next 9 years, Presidents Truman and Eisenhower expanded the nondiscriminatory provisions. The Contract Compliance Committee, chaired by Vice President Nixon, issued a report in 1959 that stated that the primary hindrance to the development of equal employment opportunity was "the indifference of employers to establish a positive policy of non-discrimination."[8] This was the first recognition that judicial and executive pronouncements against discrimination in the workplace, with no effort to remedy the present effects of past discrimination, leave Hispanics, other minorities, and women concentrated in low-paying positions that have little room for advancement. As long as decisions such as hiring, promotion, training, and recruitment are affected by historical discrimination that decreases the level of competition for some by excluding others, then such discrimination must be addressed with the same vigor to remedy overt discrimination.

The next issue the panelists have been asked to address is what an employer's obligations are when faced with underrepresentation and underutilizaton in the work force. In the case of *United Steelworkers of America* v. *Weber* (443 U.S. 193, (1979)), the employer (Kaiser Aluminum and Chemical Corporation) and the union (United Steelworkers) agreed to establish an in-plant program to train assembly line workers for jobs and skilled crafts. It was agreed

[8] Barry L. Goldstein, "The Historical Case for Goals and Timetables," *New Perspectives* (U.S. Commission on Civil Rights, Summer 1984).

that 50 percent of the positions in the training program were to go to black employees and 50 percent to white employees. Within each racial group, a position would be filled on the basis of seniority, but it was foreseen that junior blacks, in some cases, would be admitted to the program ahead of most of the senior white employees. This arrangement was to continue until the percentage of black skilled craft workers at Kaiser's Gramercy, Louisiana, plant approximated the percentage of blacks in the local labor market.

Brian Weber, a white employee, sued the company and the union when a black employee with less seniority was admitted to the training program ahead of him. He charged that the racial arrangement violated Title VII of the 1964 Civil Rights Act. Though recognizing that Title VII bars discrimination against whites as well as minorities, the 5 to 2 majority of the Court upheld the agreement. The Court ruled that Title VII does not prohibit "all voluntary race conscious affirmative action."

The Court held that Title VII permits affirmative action efforts by private parties to eliminate traditional patterns of racial segregation such as existed in Louisiana where the plant was located. The Supreme Court stated, as follows:

> Given this legislative history, we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this Country's history." *Albemarle Paper Co.* v. *Moody,* cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic, indeed, if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy. (Citations omitted.)

The Court also recognized that an employer's voluntary affirmative action plan need not be premised on a finding or admission of unlawful discrimination—that a mere indication or prima facie pattern of such discrimination is sufficient to place the employer in legal jeopardy should Title VII be invoked against it, and would suffice to uphold a voluntary plan.

The Court went on to articulate the counterbalancing factors that were considered in determining the appropriateness of the voluntary affirmative action plan: The plan does not unnecessarily "trammel" the interest of the white employees—it does not require the discharge of white workers and their replacement with new black hires; the plan does not include an absolute bar to the advancement of white employees—half of those trained in the program were white; the plan is not intended to maintain a racial balance, but simply to eliminate a manifest racial imbalance; and preferential selection of craft trainees will end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force.

Weber settled the basic legal issue regarding the appropriateness of private, voluntary affirmative action—and, we think, suggests sound answers to the policy issue as well. The Supreme Court in *Weber* recognized that voluntary, race-conscious affirmative action by an employer that, by its very nature, affects, to some degree, the interests of white employees is not prohibited by Title VII. The questions not completely addressed by the Supreme Court are the line of demarcation between permissible and impermissible affirmative action plans, and the constitutionality of affirmative action plans by public employers. The Supreme Court approved private employers' use of race-conscious affirmative action in response to a case of institutional discrimination. The Court recognized the appropriateness of such remedies when addressing institutional discrimination.

The issue of the appropriateness of a public employer's instituting voluntary, race- and sex-conscious affirmative action was recently addressed by both the Seventh and Ninth Circuits in the cases of: *Janowiak* v. *City of South Bend, Indiana* (53 U.S.L.W. 2311, (CA 7, Jan. 1, 1985)), and *Johnson* v. *Santa Clara County Transportation Agency* (53 U.S.L.W. 2312, (CA 9, Jan. 1, 1985)). The U.S. Court of Appeals for the Seventh Circuit found that statistical evidence of disparities between the percentage of minorities employed by city police and fire departments and the percentage of minorities in the city's population is, without more evidence, insufficient to prove past discrimination that will justify the city's adoption of an affirmative action

program. The U.S. Court of Appeals for the Ninth Circuit held that the county agency's affirmative action plan that focused on attaining a balance of the male-female makeup of the work force—which statistics show to be conspicuously imbalanced and will end once women achieve parity—is sufficiently temporary to be valid under *Weber.*

The Seventh Circuit notes that in the *Weber* decision the Supreme Court relied upon more than the glaring statistical disparity between the percentage of black craft workers employed and the percentage of blacks in the work force. The court indicates that the Supreme Court took judicial notice of the craft unions' history of excluding blacks from membership. In *Janowiak* the court concludes that an employer must proffer something more than the finding of statistical disparity between the percentage of minorities employed and the percentage of minorities in the community to justify the adoption of an affirmative action program.

The Ninth Circuit took a slightly different view. It held that in order to demonstrate that an affirmative action plan is remedial, an employer need not show its own history of purposeful discrimination; it is sufficient for the employer to show a conspicuous imbalance in its work force. The court went on to state that a "plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation." The court also notes that the entire focus of the affirmative action plan is on attaining rather than maintaining a balance. The court indicates that this emphasis upon the attainment of the representative work force has the effect of ending preferential treatment of women once parity is achieved.

In both the *Janowiak* case and the *Johnson* case, both employers were public employers and, as such, a different standard of review is applied. However, both cases are illustrative of the different analyses the courts of appeal are applying in the area of voluntary adoption of race- and sex-conscious affirmative action remedies. The underlying issue addressed by both courts of appeal was the role of statistical disparity in proving the present effects of past discrimination. In my view, the Ninth Circuit has charted the truer course.

The Seventh Circuit took a very restrictive approach to its analysis and held that, because the city found its current hiring practices reasonable and nondiscriminatory, the evidence of statistical disparity was insufficient to prove past discrimination. What the court and the city failed to address was whether the lingering effects of historical discrimination were causing the statistical disparity. It is not enough for an employer to determine that the present hiring or promotion practices are neutral and nondiscriminatory. Historical discrimination in hiring, recruitment, promotion, and training are not alleviated by the mere adoption of neutral policies.

The Ninth Circuit in *Johnson* recognized the difficulty in proving historical discrimination. The court based its decision upon evidence that out of 238 skilled craft workers, not one was a woman, and that, historically, women have been discouraged from participating in such positions, and determined that this was the only evidence necessary to justify a tailored, voluntary remedial agreement. The effects of historical discrimination in the workplace can only be detected, in most instances, by statistical disparities. Whether a statistical disparity constitutes discrimination depends upon a balancing and analysis of the severity of the discrimination and an analysis into the possible causes. But that complex analysis need not be undertaken or resolved in order to justify a public employer's voluntary action to rectify racial or sex-based disparities in its work force. Given the subtle nature of historical and covert discrimination, the importance of statistical evidence cannot be ignored, and that evidence, alone, is a sufficient basis for appropriately tailored affirmative action.

The other important case handed down recently from the United States Supreme Court regarding affirmative action is the decision of *Firefighters Local Union No. 1784* v. *Stotts* (104 S.Ct. 2576 (1984)). *Stotts* concerned a court's power under Title VII to modify a consent decree in order to require a city to retain, in a layoff situation, junior black employees who are displacing senior white employees where there had been no proof of a violation of law or showing that any blacks were the victims of discrimination. The Court held, based on very narrow and specific factors in the case before it, that the trial court exceeded its power in modifying the consent decree in such a way as to override the contractual seniority provisions regarding layoff. Justice Blackmun, in dissent, quite correctly noted that the majority opinion "is a statement that the race-conscious relief ordered in these cases was broader than necessary, but not that race-conscious relief is never appropriate under Title VII."

We seriously disagree with those that argue that *Stotts* stands for the proposition that race-conscious relief on a class basis is never appropriate and that the only appropriate relief is victim-specific relief to *proven victims of discrimination.* No such standard was enunciated in broadly defined terms in *Stotts.* Such a holding would threaten to undermine *Weber*—a step the Court did not indicate it was prepared to take. Moreover, such a standard would seriously undermine settlement. In every settlement agreement, defendants generally insist that a nonadmission of liability clause be included. A requirement that consent decrees or settlement agreements provide for a determination of liability, in order to support a basis for relief in the agreement seriously undermines the possibility of settlement. Not only are defendants unwilling in a settlement to admit to any liability, but if the defendant were to admit to liability, a plaintiff—if not the settling plaintiffs, then an intervening plaintiff—would certainly, at that point, request full relief. In such a situation, there could plainly be no room for compromise or settlement, contrary to the strong policy that Title VII cases be resolved by settlement whenever possible. (See *Carson* v. *American Brand,* 450 U.S. 79, (1981)).

Affirmative Action as a Remedy for Discrimination in Employment

There have been two studies that have been conducted recently that address the question of whether equal employment opportunity and affirmative action are, in fact, causally connected to the observed changes in the economy. Simply because there have been gains for minority groups and women in the period of intense Federal activity does not mean that EEO or affirmative action policies caused the observed changes. Professor Richard B. Freeman, an economist at Harvard University and at the National Bureau of Economic Research, in a recent article noted the following:

> In spite of the controversy, the evidence from all vigorous research studies shows that affirmative action or EEO activities are, indeed, operating to accomplish the purpose of shifting demand for labor to minorities or women. . . .The recent analysis of employment patterns in some 68,000 establishments by Jonathan Leonard provides what is perhaps our best scientific evidence on the extent to which affirmative action has raised employment of protected groups. Leonard compares the employment and occupation position of minorities and women in federal contract establishments (those subject to affirmative action) with that of minorities and women in other establishments in the period between 1974–1980 and finds powerful evidence that the federal affirmative action effort raised the overall employment in better occupations for protected groups.[9]

Professor Freeman also notes, in response to the argument that affirmative action reduces efficiency and wastes resources in business, that the only significant empirical study, also conducted by Leonard, shows no substantial effect one way or the other. The redistribution of the labor demand toward minorities and women does not appear to have had discernible effects on overall labor productivity.

A 1983 study conducted by OFCCP found that minorities and women made greater gains in employment at those establishments contracting with the Federal Government than at noncontractor companies. Based upon a review of more than 77,000 companies with over 20 million employees, the study found minority employment to have increased 20.1 percent and female employment 15.2 percent between 1974 and 1980 for Federal contractors despite a total employment growth of only 3 percent. For noncontracting companies, minority employment increased 12.3 percent and female employment 2.2 percent with an 8.2 percent growth in total employment over the same period.

The study also showed that among contractors the proportion of minority employees who performed white-collar jobs rose 25 percent over a 6-year period from 1974 through 1980. In noncontractor companies the movement of minorities into white-collar positions during the same period was 8.9 percent.[10]

A random review of private sector companies subject to affirmative action requirements confirms the direct effect to affirmative action on the employment opportunities of women and minorities.

IBM, for example, since 1968 when the company set up its equal opportunity department, noted the following dramatic changes: In 1971 IBM had 429 black, 83 Hispanic, and 471 female officials and

[9] Richard B. Freeman, "Affirmative Action: Good, Bad, or Relevant?" *New Perspectives* (Fall 1984), pp. 23, 25.

[10] Office of Federal Contract Compliance Programs, Employment Standards Administration, U.S. Department of Labor, "A Review of the Effect of Executive Order 11246 and the Federal Contract Compliance Program on Employment Opportunities of Minorities and Women" (1983).

managers; by 1980 the numbers were 1,596, 436, and 2,350, respectively. From a work force where minorities comprised only 1.5 percent of the total and women 12.7 percent in 1962, IBM has moved, in 1980, to a minority employment rate of 13.7 percent and 22.2 percent for women.[11]

Sears, Roebuck and Co. has increased its Hispanic representation in the fields of management, professional, technical, operative, and craft positions from 8.1 percent in 1966 to 15.12 percent in 1981.[12]

Preferential affirmative action has worked in creating more opportunities for minorities and women. In comparison, nonpreferential affirmative action has resulted in minimal changes for minorities and women. However, there is more to be accomplished before the history book can be closed on discrimination. For example, in the areas of remedies, Title VII provides only limited monetary relief. A victim may only receive backpay for a 2-year period, and Title VII precludes compensatory and punitive damages. The victims of discrimination must also wait for a vacancy to occur before they may be placed in positions denied them due to acts of discrimination. Victim-specific remedies under Title VII are clearly inadequate to afford full individual relief.

Remedies that are geared to neutrality are inadequate because, by their very nature, they do not attempt to alter, in a positive manner, the effects of historical discrimination. Race, ethnic, and sex-conscious remedies may not be preferred because of their effects upon white males, but the effect of prohibiting their use is a tolerance for minorities and women to continue to suffer from the effects of past discrimination. In conclusion, affirmative action is not a simple or perfect solution, but it has proven to be effective. And, if our society is to arrive at the goal of a truly colorblind (and sex-blind) workplace in our lifetime, affirmative action is both a necessary and an appropriate temporary means of approach.

[11] Affirmative Action Coordinating Center, "A Statement in Support of Affirmative Action: The IBM Story" (1981) (unpublished paper).

[12] A. Flores, "How Hispanics Have Benefited from Affirmative Action" (1981) (unpublished paper–MALDEF).

Testimony of the National Organization for Women

By Judy Goldsmith*

My name is Judy Goldsmith and I am president of the National Organization for Women, the Nation's largest feminist organization with 250,000 members. I am pleased to have the opportunity to present NOW's views on affirmative action.

The legacy of unequal treatment of women in our society is painful and deep. Although wage discrimination is illegal today, it continues to pervade our economy.

A full-time working woman is still paid about 60 cents for every dollar paid to a full-time working man. In 1983 the Census Bureau reported that nearly half of all women had incomes of less than $6,000 per year; 26 percent of men, but only 5 percent of women had incomes of $25,000 per year or more. The disparities between men's and women's salaries exist even when discrepancies in education and length of service are considered.

Eighty percent of employed women are currently segregated into 20 of the 427 job classifications listed by the Census Bureau. In 1983, 36 percent of female heads of household and 11 percent of American children lived in poverty.

Those stark realities make it painfully clear that our Nation cannot overcome decades of discrimination overnight. We *have* made gains during the past 20 years, and in large part those gains are due to the prodding of a Federal Government that had made the elimination of sex and race discrimination a priority. But two centuries of discrimination, underpayment, underutilization, and exclusion of women and minorities have had a pernicious and lasting effect. For the government to abandon or reduce the scope of affirmative action now would make a mockery of our Nation's commitment to fairness and equality.

The term affirmative action is used by different people to mean different things. NOW believes it connotes a carefully designed program to create a heightened sensitivity to the needs of people who have suffered discrimination based on their sex, race, or national origin, and that enables them to take full advantage of opportunities heretofore denied to them, basing its success on numerical data. Such an approach has been necessary because promises of stopping discriminatory practices have not been sufficient.

The need for affirmative action was articulated by President Lyndon Johnson 20 years ago in a commencement address at Howard University:

* President, National Organization for Women. Did not appear.

You do not take a person, who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say you are free to compete with all the others, and still just believe that you have been completely fair.[1]

In employment, affirmative action may refer to a wide variety of measures, including development by employers of specific policies to ensure equal employment opportunities; analysis of employment practices to see if they have a discriminatory impact, intentional or unintentional; outreach and recruitment efforts by employers; training programs for employees; monitoring the impact of employment practices on women and minorities; and the establishment of numerical goals and timetables for employment or promotion of individuals who belong to a group that has historically suffered discrimination. Any or all may be employed, since all play a part in going beyond the elimination of discriminatory practices to address the institutional aspects of discrimination that remain after more obvious practices or policies have been eliminated.

Affirmative action programs can be utilized in several different ways, including admission to educational programs, hiring or promotions in employment, or through the award of Federal or State contracts. They do not have to be imposed by statute or regulation, but can be voluntarily initiated by a company or educational institution. One example is the affirmative action plan negotiated voluntarily as part of a collective-bargaining agreement between the Steelworkers Union and Kaiser Aluminum Company to provide training opportunities for skilled jobs. The training program required the admission of one black person for every white person in the program until the black skilled crafts representation equaled that of blacks in the overall work force. This program had no adverse effect on whites; rather, it provided both blacks and whites the benefits of the newly created training program that they otherwise would not have had. This plan was upheld by the Supreme Court *(United Steelworkers* v. *Weber)*[2] under the Civil Rights Act, noting that:

it would be ironic indeed if a law [the Civil Rights Act] triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long". . .constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[3]

Companies may develop their own affirmative action plan to identify any racial or sex-based imbalance that exists and to implement corrective measures to prevent the perpetuation of the imbalance. However, it is unlikely that employers would act on their own to correct inequalities in the work force if they did not face the alternative of government intervention.

Women and minorities are making progress through the application of affirmative action, but a great deal more still needs to be done. Women of all races constitute the majority of poor in this country, and much of this poverty can be traced directly to discrimination in the workplace. Women are woefully underrepresented in both white-collar managerial jobs and in skilled blue-collar jobs. Both of these job areas are dominated by males and both pay better than those job categories that women usually occupy. In fact, extreme job segregation is still rampant. Nearly two-thirds of working women are classified as clerical, service workers, or operatives, and 60 percent of all female full-time, year-round workers are paid less than $15,000 annually, as compared to 28 percent of all men who work comparable full-time schedules.

In 1960, 52 percent of all women worked at only four occupations: clerks, hairdressers, saleswomen, and waitresses. In 1982 these occupations still employed 46 percent of all women who worked outside the home. Twenty years ago, 5 percent of all women held managerial jobs; today that figure is only 7 percent.[4]

In addition, women and minorities are also typically the first to be laid off either because they lack seniority or because of the jobs they occupy. One particular example of the disproportionate impact on women and minorities is the reduction in the Federal work force instituted by the Reagan administration in its first 4 years. In its attempt to cut the rate of growth of the Federal Government through a reduction in force (RIF) of those then employed by the Federal Government, thousands of workers were downgraded, reassigned, or were simply

[1] Lyndon Baines Johnson, *Public Papers of the President,* 1965, p. 636.

[2] United Steelworkers v. Weber, 443 U.S. 193 (1979).

[3] *Id.*

[4] Women Employed Institute, *Working Women: Challenging the Status Quo,* 1983, p. 9.

forced to retire. In 1983, 6,170 of the approximately 2.8 million Federal employees were RIF'd.[5] A disproportionate percentage of women and minorities were affected. Ironically, despite the administration's stated intent to reduce the size of the work force, agencies pertaining to the national defense and international affairs saw increases in employment, and these agencies, in fact, have been shown to have the worst record of affirmative action for women and minorities.[6]

Thus, the small amount of progress that has taken place in terms of access to opportunity has not been sufficient to ensure job security or economic equality with white men.

Discrimination based on both sex and race has been the operative reality in our society for many years and is not likely to be eradicated in a generation. Tools are available to help eliminate discrimination, but they have not been fully utilized. Regulations must be enforced to be effective. Any policy, despite its best intention, is only as good as its implementation.

One of the major weapons that can be used against discrimination is Executive Order 11246, which prohibits discrimination in employment by Federal contractors and requires that steps be taken to hire, promote, train, and pay women and minorities according to the hiring, promotion, and training policy for nonminority males. Strong enforcement of this Executive order in the past has provided women with the opportunities to work in areas where they were not previously allowed access. This Executive order has required that educational institutions, the banking industry, the construction industry, and the coal industry, to name a few, change their hiring and promotion practices. Without the impetus provided by the Executive order and its vigorous enforcement, there is no evidence to suggest that these institutions would have expanded the opportunities available to women.

The rationale offered by such traditionally male industries as the construction trades, that women were not available to work at these jobs, flies in the face of the increasing number of women who have completed or entered training programs to learn these same skills. The alleged lack of experience in construction cited by many employers is nothing more than an excuse not to recruit or hire women for nontraditional jobs. The Office of Federal Contract Compliance Programs (OFCCP) at the Department of Labor, the agency that enforces Executive Order 11246, has itself found that male construction workers are often hired without previous experience or with experience in an unrelated field.[7] The absence of women in the construction field, traditionally the exclusive bastion of men, is not due to the lack of women who are qualified for or who desire to work in these jobs, but to the lack of commitment on the part of employers to make such jobs and on-the-job training opportunities available to them. The promulgation by the Department of Labor of regulations in 1978 requiring affirmative action, including goals and timetables, for women by covered construction contractors is one example of the improvement in the opportunities for women that was mandated by the government where change was not initiated voluntarily.

Unfortunately, the record of the Reagan administration on the enforcement of affirmative action is dismal. Let us look at two examples of government agencies charged with instituting and implementing Federal policy regarding affirmative action in employment.

The Equal Employment Opportunity Commission (EEOC) is the principal agency charged with investigating job discrimination and enforcing equal opportunity regulations. The Reagan administration's blatant disregard for the work of this agency was demonstrated by its failure to appoint a chair for the first 15 months of its first administration.

The EEOC continues to attempt to fulfill its mandate by refusing to change its guidelines on voluntary affirmative action by retaining the requirement that all Federal agencies must submit affirmative action plans for their own employment discrimination. These actions are in direct opposition to the position of the Department of Justice.

Although the EEOC has resisted, attempts by the administration to undermine its authority have had an effect. The rate of successful settlements has decreased from 50 percent in fiscal year 1980 (before

[5] Report prepared by the Subcommittee on Employment Opportunities of the Committee on Education and Labor of the U.S. House of Representatives, *The State of Affirmative Action in the Federal Government: Staff Report Analyzing 1980 and 1983 Employment Profiles,* August 1984, p. 2.

[6] Ibid., p. 3.

[7] Special Studies Section Branch, Special Analysis Division of Program Analysis, Office of Federal Contract Compliance Programs, *Women in Construction,* May 7, 1981.

the Reagan administration took office) to 38 percent in fiscal year 1983.[8] During this same period, the rate of charge dismissals rose: in fiscal year 1980, 23 percent of charges resolved were determined to be unfounded; in fiscal year 1983 the percentage increased to 41 percent.[9] There were fewer than 200 new case filings in fiscal year 1983, a significant drop from the 358 cases filed in fiscal year 1981.[10]

The EEOC is not the sole enforcement agency within the Federal Government on this matter. The Department of Justice has challenged the EEOC's interpretation of the affirmative action program and has hindered attempts to maintain a coherent, unified government policy in keeping with the employment policies of the last four administrations, two Democratic and two Republican.

Shortly after his arrival at the Department of Justice, Assistant Attorney General William Bradford Reynolds announced that affirmative action remedies, which have been approved by the courts, Congress, and Federal agencies for the last 20 years, would be rejected by this administration. It was made clear that the Department of Justice would no longer apply the principles of goals and ratios because of the administration's contention that the application of such race-conscious measures would be "preferential treatment" in violation of the Constitution and Title VII of the Civil Rights Act.[11]

In a number of instances, the Department of Justice has sought to undo gains made over the past two decades by undermining established policy affirming the benefits of race-conscious remedies as well as attempting to seek reversal of Supreme Court decisions that have defended the positive results of affirmative action.

Although the Justice Department *does* use race-conscious numerical goals regarding the racial composition of its applicant pool for employment, it argues that hiring goals should not be used to benefit *groups* that have suffered discrimination, but should benefit only the *individual* directly shown to have been the victim of such discrimination. To do otherwise, the Department argues, would be to aid a whole class or category of people, thereby providing preferential treatment to that group.[12]

To insist that group-based discrimination that has existed for the past 200 years should be corrected "one person at a time" is logically inconsistent and morally untenable. The black man was not discriminated against because he was Joe Smith, but because he was black. The woman was not discriminated against because she was Mary Doe, but because she was a woman. (Minority women, of course, labor under the burden of double discrimination.)

It is also myopic and insensitive to insist upon identifying "direct" victims of discrimination. We would all likely agree that a woman who applies for a job and is turned down in favor of a less qualified man is the direct, identifiable, or actual victim of discrimination. But is that woman's child, raised in poverty, without decent meals, warm clothes, books, adequate parental supervision, or a safe neighborhood any less a victim of that discrimination? When a woman who is the head of her household cannot find a decent-paying job and has to work double shifts at Burger King to pay the rent, is her child any less directly a victim of discrimination?

We are raising millions of those children today in female-headed households, where children, especially girls, are deprived both materially and psychologically because their mother's employment experience teaches them more about their limitations than about their possibilities. Unless we become more vigilant and increase the pressure for affirmative action and equal opportunity, we will continue that cycle for another generation.

The courts' clear support for hiring and promotional goals is documented; they have employed race-conscious numerical remedies that benefited members of victimized racial or sexual groups without requiring that each individual prove that he or she had been the target of discrimination by a particular employer. The National Organization for Women shares the courts' interpretation of the Constitution and Title VII. It is also interesting to note that the Department of Justice prior to the

[8] *Washington Post,* Mar. 12, 1984, p. A24 (col. 1).
[9] Ibid.
[10] Ibid.
[11] Testimony of Assistant Attorney General for Civil Rights William Bradford Reynolds before the House of Representatives Subcommittee on Employment Opportunities, 1981 Housing Report, pp. 131–56.
[12] Regarding the position of the Department of Justice:

> We are concerned about the adoption of race-conscious, nonvictim-specific remedies, particularly by any institution other than Congress. We have profound doubts whether the Constitution permits governments to adopt remedies involving racial quotas to benefit persons who are not themselves the victims of discrimination—at least in the absence of a clear statement by Congress itself, acting pursuant to its broad remedial authority under the Thirteenth and Fourteenth Amendments, requiring the use of such remedies.

arrival of Assistant Attorney General Reynolds consistently sought the use of race-conscious numerical goals and timetables to remedy past discrimination in employment. Not only is the Justice Department's position on the equal employment policy of affirmative action puzzling, but it causes confusion among employers and the general population over which interpretation of government policy—that of the Justice Department or of the Equal Employment Opportunity Commission—is the correct one. An inconsistent perception of government policy allows employers to pursue discriminatory practices pending an investigation and translates into an inconsistent enforcement standard of affirmative action. It also lends an air of legitimacy to those who oppose race-based and sex-based numerical relief and who can cite the Justice Department as holding that same view.

Although increased enforcement of affirmative action is essential, the presence of affirmative action programs has had a beneficial effect. The greatest progress has been made in professional and craft areas, but progress has also occurred in other occupational categories. Whether it is attorneys or bus drivers, the percentage of women—minorities, too—has increased. Some job categories have gone from being exclusively male to including an increasing number of women, and minorities have been integrated into a significant number of job categories.

One example of an industry with a growing number of employed women is the coal mining industry. In 1953 there were no female coal miners in the United States. In 1980, 3,295 women were coal miners and 8.7 percent of all coal miners being hired were women. The fact that a few women pushed for employment opportunities and, given the opportunity, were found capable opened the door for others to join them. In fact, it is significant that the number of women coal miners increased dramatically after the Coal Employment Project filed a complaint with the Office of Federal Contract Compliance Programs in 1978 and the coal industry was targeted by the OFCCP for a review of its employment practices.

Affirmative action has had a beneficial effect not only on women's opportunities in the workplace. Women's proven ability to perform capably in nontraditional areas struck down the perception that their employment possibilities were restricted to certain job categories.

There are some who question whether or not affirmative action is really necessary. Does it not constitute "special treatment" to bring about changes that might have happened anyway? The National Organization for Women believes strongly that affirmative action is necessary and that the changes it has helped to bring about would not have taken place on their own. Before regulations were instituted to require businesses to open their doors to people who had been excluded, the opportunities for these nonmale, nonwhite individuals simply did not exist. For the disenfranchised, advances don't just happen; they must assertively pursue their rights.

Affirmative action plans are designed to undo both historic and present discrimination, some of it unconscious and some of it built into our institutions. Those realities continue to place victims of discrimination at a disadvantage. The reinforcement of the "old boy network" by "word of mouth" recruitment limits the applicant pool to those who have a professional connection or a shared educational background or outside interest with those hiring. These individuals are notified of openings as they become available and are given the advantage of first consideration in filling the jobs. In addition, supervisors tend to hire or promote individuals with whom they can identify, usually people just like themselves and usually *not* women and minorities. The above examples constitute a subtle, unarticulated (but very real) discrimination that is difficult to document or prove. Affirmative action is precisely what is needed to address the legacy of discriminatory attitudes that lies beneath the surface as well as active antipathy toward or disregard for those who have been harmed by a cultural bias against them.

Some people would argue that numerical measurements imposed as part of affirmative action plans are not accurate indicators of discriminatory hiring or promotion practices. They are, however, a revealing tool that, absent any other explanation, can be used to establish the need for remedial action.

Statistics can be useful in measuring the successes as well as the failures of affirmative action programs. Unless a company monitors the progress it has made in recruiting and promoting women and minorities, it is impossible to establish if its program has accomplished what it set out to do or if other measures are necessary to bring about the desired change in the population of the work force. The beneficial effects of goals and timetables as numerical measures have been indisputable. They are

central to the intent of Executive Order 11246, and they have been found to be the most effective way of improving the status of women and minorities in areas of employment from which they have previously been barred or in which they have been vastly underrepresented.

Some of those who oppose affirmative action claim that such remedies are designed to put women or minorities into jobs for which they are not qualified; that, in effect, they merely constitute window dressing. In reality, this viewpoint argues persuasively for just such remedies. The attitude presumes that women and minorities are automatically less qualified than any white male who may have gotten that position.

Opponents of affirmative action also claim that women and minorities are concentrated in lower paying jobs with less chance for advancement because "they want to be there." The real cause of that reality for women is job segregation; these are frequently the only jobs that are available to them or for which they are even considered. Given the proper training, they are able to move up in the work force to other occupations. This can only happen, however, if they are first allowed to compete. By preventing them from having the chance to do so, we rob them of the opportunity to develop their skills and to make the fullest contribution they feel capable of making. But more than that, we rob our country of their knowledge and their talents. In addition, if women and minorities are not granted promotional opportunities for which they are qualified, it becomes harder to convince the workers who follow them that hard work is rewarded.

Critics of affirmative action usually respond in one of two ways to what can be viewed as the real, though limited, progress women and minorities have made over the past two decades. They may throw their hands in the air and claim that remedies instituted by the government have not been effective in eradicating discrimination. Otherwise, they say, more progress would have been made by now, and they advocate that these remedies should, therefore, no longer be pursued. Or they may cite the increased number of women in the work force (whatever positions they occupy) as an increased pool of qualified women workers from which future promotions will be made—eventually. In so doing, they are agreeing that the system works, but that affirmative action remedies are no longer needed.

Though separate and distinct, both may be addressed in the same way. Discrimination based on sex and race continues to be a reality of the employment situation in this country. Underutilization and underrepresentation exist because the weapons used to combat them are still relatively new. The discrimination they seek to eradicate did not develop in a generation; it will not be purged in a generation. It will take time and vigorous enforcement. The fact that we are here before you today to discuss the need for plans to correct past inequality of treatment is indication enough that discrimination is not simply a historic relic; it is a present problem as well. We may be on our way to becoming a colorblind society and sex-neutral in our employment policies, but we are not there yet.

No change ever occurs without some attendant discomfort, especially when it is economically painful for some. Because the enforcement of the Executive order and other court remedies have resulted in the award of backpay, for example, employers have denounced the effectiveness of or necessity for affirmative action requirements. However, the accomplishments of women and minorities have demonstrated that programs with specific goals and timetables have produced results that will ultimately result in a healthier economy from which all will benefit. It is essential that sanctions be available to require that employers provide equal opportunity to employees, when they have repeatedly failed to do so.

Does affirmative action, in the process of providing access to opportunities previously denied to minorities and women, necessarily disadvantage some other group? The answer is no. An affirmative action program that is properly developed and carried out is neither reverse discrimination nor preferential treatment. Courts have made it very clear that affirmative action may, in fact, result in disappointing the *expectations* of white male workers, but it will not displace men to make room for minorities and women. Affirmative action would not be necessary if historic employment patterns had not awarded white males an automatic, if uncodified, preference. It can be justly argued that the greater economic status of white men was the result of reduced competition in the labor market caused by the discrimination leveled at others.

It should be emphasized, however, that remedies have been tailored to fit the situation in which the discrimination occurred. Even in cases where a

worker may have benefited from discrimination himself, courts have been careful to ensure that the advantaged worker did not share in the blame or penalty placed on the employer. To have done so would have unacceptably pitted one employee against another.

The relationship of affirmative action to seniority is also important to the discussion of this issue. Although women and minorities infrequently have seniority in the workplace due to past discrimination, affirmative action rarely takes precedence over established seniority systems as a fundamental protection for workers. However, NOW also supports affirmative action as an appropriate balance to modify seniority plans when their effect has been to entrench past discriminatory patterns of employment.

Affirmative action cannot, nor was it ever intended to, take the place of training or qualifications. It is clear that affirmative action is intended to provide an environment conducive to success based on merit and one in which discrimination—intentional or unintentional—is not allowed to continue. In fact, the possibility that the affirmative action system might be reconstructed to require those who suffer discrimination to prove *intent* to discriminate, as well as the effect of discrimination, is unacceptable. To require intent would be in direct opposition to Supreme Court rulings interpreting the scope of Title VII. The Supreme Court ruled in *Griggs* v. *Duke Power Company* (1971) that under Title VII: "practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices. . . ."[13] In this decision, the Supreme Court recognized that discrimination occurs when a practice negatively affects members of a particular race, sex, or ethnic group *regardless* of intent.

The National Organization for Women agrees wholeheartedly with the concept and practice of affirmative action, believes that we should continue to pursue it as an integral part of our national commitment to equality of opportunity for all, and feels strongly that it should be vigorously enforced with the necessary support to do so given to the appropriate Federal agencies. Women and minorities have taken a long time to get where they are today, and there is still much farther to go.

White men, as well as women and Hispanics, have benefited when equal employment laws have invalidated height and weight requirements that are not specifically required for the successful completion of a job. In fact, fair treatment of *all* workers—including white males—has been the result of affirmative action proposals initiated to eliminate the disadvantages caused by discrimination against women and minorities.

Blacks and Hispanics, who in the past were historically and legally considered to be second-class citizens and who were the victims of segregation in schools and other public accommodations, are entitled to the remedial measures provided by affirmative action. Women who were "protected" from equal access to education and higher paying jobs are also entitled to affirmative action remedies to ensure that they have full and equal access to educational and job opportunities. Affirmative action has stimulated creative changes in many employers' management of their personnel practices. Firms have overhauled their personnel offices and policies. Recruitment of minorities and women has expanded. Job openings are posted so that all may be aware of them and compete fairly. Qualifications are the primary consideration.

Affirmative action and the principles on which it is based must not be abandoned. It is imperative that the program be strengthened and that those responsible for carrying it out do so in a direct and unequivocal manner.

NOW believes that the Federal Government should provide the appropriate agencies with the necessary monetary and human resources to enforce programs already in place in order to track progress and failure or noncompliance. This will serve as a deterrent to employers who are not inclined to eliminate voluntarily discriminatory practices in their companies or agencies.

In addition, Congress should institute affirmative action requirements in its own employment practices to serve as a model. We support the appointment of individuals with demonstrated commitments to civil rights and enforcement of civil rights laws to positions in the Federal Government with jurisdiction over equal opportunity in employment and education. Further, accurate and complete records on successful affirmative action plans should be kept so they can be used as models for other employers

[13] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

who seek to comply with affirmative action principles.

The first 20 years of affirmative action have meant significant firsts for women and minorities, and many barriers have been broken. We have learned that women are capable of being nuclear physicists, college presidents, astronauts, and vice presidential candidates. But we must not be blinded by the glare of the publicity that has accompanied those historic breakthroughs to the reality that for most women, the employment situation is, in fact, little changed from 20 years ago.

But employers have learned too. And while some have designed forward-looking programs that provide maximum opportunity for all, others have learned how to discriminate more subtly and how to keep women in low paying, dead-end jobs without blatantly and obviously discriminating.

We have succeeded in sweeping away the discrimination that is visible; help-wanted ads are no longer divided between "male" and "female," and women have entered many job areas previously designated as male only. But we are far from achieving parity in top-level jobs and unacceptably far from closing the wage gap between men's and women's salaries.

It would be naive to think that because the discrimination beneath the surface is harder to see, it is not there. On the contrary, it is more insidious, and the temptation is greater than ever to blame the victims for their own predicament. Our greatest challenge for the remainder of this century is to avoid that temptation and to follow through with what we have begun: the systematic effort by the Federal Government to require employers to remove bias from their hiring and promotion practices through continued affirmative action.

MINORITY AND WOMEN'S BUSINESS SET-ASIDES

Testimony of the National Association of Minority Contractors

By Dewey Thomas, Jr.*

Mr. Chairman and members of the Commission, on behalf of our president, James H. Chandler, board of directors, national membership, and constituents, I would like to thank you for the opportunity to testify before you today on the issue of "Minority Set-Asides: An Appropriate Response To Discrimination."

Introduction: Overview of NAMC

The National Association of Minority Contractors (NAMC) is a full service, nonprofit, minority business trade association established in 1969 to address the needs and concerns of minority construction contractors nationwide. NAMC's membership, comprised of black, Hispanic, Mexican American, women, Asian American, and Indian American contractors, own and operate small and minority businesses in 40 States, the District of Columbia, and the Virgin Islands. NAMC is headquartered in the Nation's Capital and acts as a spokesman for its members: minority and women general contractors, subcontractors, construction managers, manufacturers, construction suppliers, and local minority contractor associations.

* Executive Director, National Association of Minority Contractors.

The Intent of Set-Asides

The history and foundation of our country has been based on a twofold ideal: social equality, and an economic system where investments in and ownership of the means of production, distribution, and exchange of wealth is maintained chiefly by private individuals and corporations; a system that must assure that opportunities are available for those who qualify; and a system where individuals or business enterprises are allowed to develop and become competitive in selling goods and services to meet market demands of both the public and private sectors.

However, when it is established that, either overtly or covertly, opportunities are being denied any segment of our population, due to monopolies, price rigging, prejudices, or even unfair business practices, it is the responsibility of the government to take the necessary corrective actions.

It has been clearly established that opportunities are being denied minority business enterprises (MBEs) for reasons other than their business capabilities. Existing set-aside programs were established by the Federal Government with the intent of assuring a fair and equal opportunity for all and the support of a receptive marketplace as a corrective action based on past and current inequities.

The most prevalent examples of Federal set-asides established by Congress and enforced through Federal regulation are:

The Small Business Act (Public Law 85–536): "It is the declared policy of the Congress that the government should. . .ensure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the government. . .be placed with small business enterprises. . . ."

Small business set-asides: A certain proportion of all government purchases and contracts for property and services are required to be placed with small firms. Criteria are established to permit the entire amount of an individual procurement or class of procurements for the exclusive competitive bidding participation of small business. These set-asides can only be made when there are qualified small businesses to assure adequate competition.

Labor surplus area set-asides: A surplus area is a geographical section of the country determined by the Department of Labor to have a higher-than-normal rate of unemployment. It is government policy to encourage the placement or performance of contracts in areas of unemployment or underemployment.

Certificate of competency program: The U.S. Small Business Administration (SBA) is exclusively empowered to certify that a small business has the financial and technical ability to perform a specific contract. If any agency contracting officer declares a small business to be nonresponsive because of a perceived deficiency in capabilities or credit, the matter is referred to the SBA. If the SBA grants a certificate of competency to the firm, then the company is considered responsive. A certification of competency overrides any agency's determination of nonresponsiveness.

Property sales assistance program: The Federal Government, each year, sells surplus real and personal property, including material resources such as timber. This program makes sure that small businesses have an opportunity to bid on such government property whether it is being sold or leased.

Minority small business-capital ownership development program (Public Law 95–507, section 8(a)): In 1978 the Small Business Act was amended to read: "It is therefore, the purpose of Section 8(a) to— A) foster business ownership by individuals who are both socially and economically disadvantaged; B) promote the competitive viability of such firms by providing such contract assistance as may be necessary; and C) clarify and expand the program for the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from small business concerns owned and controlled by socially and economically disadvantaged individuals. . . ."

Surface Transportation Assistance Act of 1982 (Public Law 97–424, section 105(f)): provides that: "except to the extent that the Secretary determines otherwise, not less than ten percent (10%) of the amount authorized to be appropriated under this act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. . . ."

The Necessity of Set-Asides

The construction industry is the largest and most viable industry in the United States. True, industry fluctuations exist in the market due to economic conditions, but because the industry is highly diversified, there are many areas of it that are in constant demand.

For years it was said of the construction industry that all one needed was an old pick-up truck and a wheelbarrow to become a contractor; of course, this wasn't, and isn't, true. But those saying it were making a point—that the industry is potentially fruitful for a businessman who is willing to begin with some very basic tools, then add a lot of hard work, financial risk taking, performance, and business judgment to build a successful construction company.

However, because of racial and economic inequities, minority and small contractors continue to receive far less than a fair share of receipts emanating from Federal, public, and private sector marketplaces.

Data released by the U.S. Congressional Committee on Small Business reflected that, of all businesses, 99 percent are classified as small and minority businesses, while only 1 percent are classified as large businesses.

In 1983, out of the $155 billion of prime contracts awarded, large businesses, which make up 1 percent of the business community, shared in approximately $126 billion, or 81.4 percent, of the total Federal prime contract awards, while the remaining $29 billion, or 18.6 percent, was shared by both small and minority businesses. The very existence of set-asides and/or preference programs, whether they be instituted at the Federal, State, or local levels, by

private industry or by Congress, is a universal recognition of the reality that the continuation of discriminatory practices is preventing an important segment of our population from effectively participating in the mainstream of our economy.

However, the term "preference programs" is a misnomer; it implies the need for minorities to be given preferential treatment to obtain work. More aptly, the programs and policies were designed to provide minority firms with economic development assistance and access to federally funded purchases for goods and services. The "fruits" of the assistance—economically and competitively viable firms—would, in turn, serve to strengthen respective industries, as well as the American economy on the whole.

Mr. Frank Aceves, NAMC board member and president of Aceves Construction and Maintenance Company, currently employs 50 persons in the Tidewater area. Aceves, at a recent meeting relating to set-asides, stated that: "The industry in Norfolk is quite competitive and there is an unspoken buddy system at work against the small/minority business. . . .It's quite difficult for an MBE who lacks a track record, experience or capital equipment to float sales and revenue income, when, more often than not, private sector prime contractors will pay their buddies first and the MBE when it's convenient."

The 8(a) program offers the necessary support mechanisms (business development and procurement opportunities) to MBEs that ensure their participation in the mainstream of the industry. It also provides an equitable opportunity to become competitive and remain viable over a period of time by developing a track record and capital assets.

The continuation of discriminatory practices, a lack of resources to enforce and implement set-asides established under 95–507, continued difficulties in obtaining adequate capital and/or bonding, lack of consistency and limited size of contracts, and the inability to establish and maintain direct access to procurement representatives continue to plague the MBE.

Set-aside programs recognize the past and present discrimination and inequities imposed by our social and economic systems. The continuing need for programs to overcome discrimination remains predominant throughout the industry.

Preference programs established by Public Law 95–507, section 8(a), Public Law 97–424, STAA of 1982, and the affirmative action guidelines prescribed by Executive Order 11246 (regulating government-subsidized contracting) are means of improving contract opportunities for minority contractors.

NAMC member Pat Frances (president, J.P. Frances Construction Company, Seattle, Washington) has an annual payroll of $250,000 and currently employs 25 people. However, if opportunities and a receptive market are not provided, his firm would lose approximately 75 percent of its business portfolio. Frances stated that: "If set-asides are abolished, I will not be able to compete with the more established firms. The results will be higher unemployment, loss of tax revenue, and ultimately, a weakened economy."

NAMC member Joe Craig (president, Joe Craig Construction Company, Edwardville, Illinois) recently stated that: "Over the past decade, MBEs have been allowed to participate in the industry because of set-asides. Since 1980, there has been a steady decline in the percent of total Federal prime contracts awarded to small and minority businesses."

If the trend continues, small and minority business entrepreneurs may not be afforded opportunities as is intended by set-aside legislation. To ensure the continuation of corrective actions, our association supports existing and pending legislation that would continue to weigh the unique problems of minority contractors in the construction trades and attempt to offset deficiencies such as: a lack of access to the Federal and private procurement markets, lack of financial and business management assistance, and the "Catch 22" of obtaining bonding. All of these things hold back even the average contractor.

NAMC recognizes that the intent and implementation of set-asides are two different things. As previously discussed, the intent of such programs is to assist minority firms in identifying a receptive marketplace and carrying out contract awards.

The emphasis on developing a receptive market and to assist in the growth of an emerging firm from a skilled, yet non- to semifunctional, business to a prime professional enterprise is the purpose of set-asides. Unfortunately, the implementation of the programs is, more often than not, inefficiently executed and, subsequently, becomes the target of those who wish to thwart the intent of the laws and minimize the overall benefit to the country.

For example, the graduation schedule imposed under Public Law 96–581 attempted to correct one problem area; in doing so, it, in effect, created a situation where projects previously offered to the program are now being placed on the open market.

This will continue to occur because minority contractors who had previously participated in the program are graduated, and emerging firms lack the business sophistication to implement contracts offered to the Small Business Administration.

The SBA 8(a) program is a classic example of the point that the implementation of a program or policy can undermine its original intent and make it seem less effective than it actually is. As in any program established by law and implemented with regulations, problems will exist in the administration and implementation, and will continue to arouse the criticism of those persons and businesses not eligible to participate.

But the fact remains that minority business is good business because:

- Most minority firms specialize in sub- and speciality contracting and provide an excellent complement to majority contractors;
- The utilization of minority contractors in urban areas and enterprise zones helps to promote the urban development thrust of the administration; and
- It allows a segment of our population to obtain self-sufficiency.

Recommendations

Preference programs should not be nullified and/or allowed to fall into disuse—they are a necessary mechanism for the development and continued growth of minority and small businesses. The scope of work of preference programs must be redefined and reworked to maximize their benefit to the healthy growth of the American economy.

Collectively, the Federal Government and the private sector must identify areas of poor management, investigate abuses, and seek changes in the laws and regulations to ensure, for eligible firms, that the opportunities intended through set-asides are created.

NAMC makes the following recommendations to improve the quality of services provided to assist in the development of minority and small businesses.

Recommendation 1: Redefining the scope of work as it relates to the implementation of the set-aside program to include the establishment of a definitive value for program objectives.

Recommendation 2: Provide Federal procurement representatives charged with implementing program objectives a preestablished employee incentive based on achievements.

Recommendation 3: Increase business incentives to majority firms supporting MBE subcontracting and/or joint venture opportunities that will encourage long term contract commitment and continuity between MBEs and public or private sector contracts.

Recommendation 4: Better utilization of appropriated technical assistance funds to meet program scope of work.

Recommendation 5: Expansion of resources for technical assistance and training in all areas of business development.

Recommendation 6: Centralization of all MBE programs and development of an accurate data retrieval program.

Recommendation 7: Conduct formal annual impact studies on set-aside programs.

Recommendation 8: Further develop programs that provide equity capital to MBEs.

Summary

The commitment to aiding the minority small business contractor emanates from the fundamental belief that minority business is an integral part of the American economic system—a segment that, to overcome past inequities, must be given every opportunity to compete and participate fully in the free enterprise system. We realize preference programs are not a panacea for the problems of minority contractors; however, they do provide a firm foundation where companies can branch out and become competitive.

As stated by the Chairman, it is the objective of the Commission to assist in developing a "color-blind" society; we at NAMC express our concerns that the Federal and private sector not be blind to the needs of minority small business.

The benefits of assisting the disenfranchised entrepreneur, who has the desire and capability, will far outweigh the investment we make in the most integral and important segment of our economy—the minority and small business entrepreneur.

The proper implementation of set-asides will achieve the intended result: the creation of jobs for skilled and unskilled laborers, capital development,

and expansion of Federal and private sector contracting with the small business community.

America cannot allow a single business, or its contribution, to be wasted.

Statement of the Associated Specialty Contractors, Inc.

By Kurt A.J. Monier*

The Associated Specialty Contractors, Inc. (ASC), is an "umbrella" organization of eight national associations† of construction specialty employer contractors. The combined membership of these eight associations equals nearly 26,000 business firms, but the segments of the industry represented by these associations, according to the 1982 census of construction, consists of about 166,000 business establishments with annual sales of about $80 billion and 1,459,000 employees. We estimate that from 95 to 98 percent of the member firms fall in the category of small businesses under Small Business Administration definitions, because smallness is generally the nature of specialty contracting firms. Of the entire 166,000 establishments, probably 95.5 percent or more would be classified as small business. Our remarks pertain only to the construction industry.

The civil rights of a significant number of citizens of the United States have been abridged for some years in violation of the equal protection provisions of the Constitution and section 601 of Title VI of the Civil Rights Act of 1964. Persons are being excluded from participation in programs or activities receiving Federal financial assistance, although this is forbidden by section 601. The perpetrators are not business firms motivated by profit, but are the United States Congress, various agencies in the executive department that procure construction services and supervise grants to States and other political subdivisions, and the States and political subdivisions that are spending the grant funds.

In section 103(f)(2) of the Public Works Employment Act of 1977 (42 U.S.C. §6705(f)(2)), Congress assured discrimination against businesses owned more than 50 percent by anyone who is not Negro, Spanish speaking, Oriental, Indian, Eskimo, or Aleut. This was done by the provision that "no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." This section, in fact, is inconsistent with section 207 of the same act, which states:

* Associated Specialty Contractors, Inc.

† Mason Contractors Association of America; Mechanical Contractors Association of America, Inc.; National Association of Plumbing, Heating, and Cooling Contractors; National Electrical Contractors Association; National Insulation Contractors Association; National Roofing Contractors Association; Painting and Decorating Contractors of America; and Sheet Metal and Air Conditioning Contractors National Association, Inc.

(a)(1) No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a state government or unit of local government, which government or unit receives funds made available under this Subchapter (42 U.S.C. 672(a)(1)).

A prime contractor is required to violate this provision of the law in order to get a contract for certain work.

Congress acted in a similar way in adopting the Surface Transportation Assistance Act of 1982 by requiring in section 105(f) that not less than 10 percent of funds authorized for the repair and rebuilding of highways, bridges, and mass transit facilities would be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. State and local governments utilizing these grants have, in some cases, enlarged the requirements for minority-owned business involvement and, thus, denied other contractors the opportunity to participate in this work.

Section 8(a) of the Small Business Act, as amended by the 95th Congress, has been interpreted by the Small Business Administration as permitting the setting aside of procurement selected by the SBA and awarding of contracts for the performance of the construction services or supply involved under negotiated contracts with "socially and economically disadvantaged" business enterprises, often in sole-source procurements, and thus denying all other competitors the right to compete.

Although the devastating pattern of preferential procurement is built around a skeleton of laws, Executive orders, and regulations, it is certainly not irreversible. A commission with the expertise and special interests of the Commission on Civil Rights, America's "conscience" in matters relating to discrimination, can probably start a trend away from these preferential programs so that minority and other contractors will compete on an even basis, and the minority contractors will grow at a sound rate of expansion based on their own capabilities. Courts, legislators, and administrators need such expert guidance.

Facts About Construction Contractors

With the few exceptions of very large engineering-type projects for private customers, construction contracts and subcontracts have traditionally been awarded on the basis of competitive bids by general and specialty prime contractors and their subcontractors. Successful bidders must be capable of estimating their costs, managing the construction, and financing payments to labor, material suppliers, subcontractors, and suppliers of construction equipment between periodic progress payments.

No prime contractor can afford to refuse to accept bids of low subcontract bidders because of race or national origin. This is not only true now; it was true before the emphasis was placed on civil rights in the United States. This is because the largest amount of the prime contract cost is made up of subcontracts, and for a general contractor to use the bid of someone other than the low bidder because of prejudice would, in all probability, result in the general contractor's not having a low bid himself.

Almost all existing contractors and subcontractors earned their way to their present status by investing the savings they and their families accumulated while working for others, struggling for several years to learn both the technical and general management elements of their businesses, and working long and hard to estimate their costs, market their services, collect their bills, and satisfy bankers and sureties of their viability. It is normal for contractors to start with smaller jobs, frequently residential and service-type work, and, as they acquire more financial stability, capital, and know-how, to expand into progressively larger contracts.

Subcontractors are not and should not be selected on the basis of race, sex, or other nonrelevant criteria by any prime contractors with enough good judgment to remain in business unless such selection is mandated by government edict. In practice, the subcontractors are selected on the basis of their competitive price and ability to perform the work. The arrangements now being tried by various government agencies through quotas, goals, set-asides, and subsidies are nonsolutions to nonproblems that threaten to eliminate subcontractor competition on government work.

It is true that minority-controlled contracting companies have difficulty getting established in business; however, so do all other subcontractors. They all suffer the same problems of shortages of capital, market recognition, knowledge of available jobs, and technical and management know-how gained only by extensive experience. Virtually all contractors have gone through the same growing pains to get where they are. This assures that the

survivors are competent contractors. Minorities' problems in this regard are related only to the time they have been in business and the extent of their capital and personal expertise, not to racist attitudes on the part of those with whom they want to do business. There is not enough work to keep everyone in business who wants to be a subcontractor, and many fail in the process. There is no reason why minority-controlled firms should not have the same right to succeed *or* fail as nonminority firms, and it does not behoove the government to use set-asides, quotas, and subsidies as a temporary economic prop for firms that would not otherwise succeed, and to mislead them into the assumption that they will not ultimately have to compete on equal terms to stay in business.

As a result of the emphasis being placed by government bodies on getting greater participation of minority business enterprises through set-asides, quotas, goals, and subsidies, new minority businesses, or businesses with some minority ownership, are being created just to take advantage of these opportunities for what is often a sole-source, negotiated procurement. Because minority contractors are able to get such contracts through negotiation with the SBA or because prime contract bidders are required to use a certain percentage of minority subcontractors even if they are not low bidders, the minority subcontractors, themselves, are not learning to compete in the real world. They may, in some cases, be building their capital—and almost surely are building their profits substantially—on sole-source procurements and negotiated contracts, but any such gains are at the expense of taxpayers, few of whom are being given any handouts by anybody. Efforts to achieve social ends through the contracting mechanism are counterproductive and indefensible.

Weakness of Proponents' Logic

A typical type of argument of those who promote preferential procurement was reported in *The Wall Street Journal* of July 12, 1982. The General Accounting Office had recently concluded that any firm the SBA has identified as too big to qualify as a "small business" under SBA rules cannot receive further 8(a) contracts for disadvantaged business enterprises. The SBA had previously adopted a similar policy, but had told the 8(a) firms affected that they had a year or so to prepare for leaving the program. An aide to a Congressman was quoted in the article as saying, "Cutting off the 23 firms will put 4,000 people on the streets and deny the minority community $250,000,000."

In the first place, 4,000 people are certainly not sharing in the profits being realized by 23 private firms on the basis of set-aside contracts. Presumably, the aide was referring to employees, but the contracts being done under the 8(a) program by the 23 firms will continue to be done, either by other 8(a) contractors or by other contractors, and the employees will still have job opportunities. In the second place, if the 8(a) program has accomplished its purpose, these firms that have grown beyond the limits of small business (which few nonminority firms achieve after 30 or 40 years in business) should be capable of competing without preferential treatment and still provide their employees with jobs. In the third place, it has been observed that minority firms frequently do not hire minority employees, perhaps because they are less subject to scrutiny by the Department of Labor's Office of Federal Contract Compliance Programs than firms owned by nonminorities. Finally, the "minority community" did not own the $250 million that the aide said would be denied. The 23 contractors have been getting the $250 million apparently at an average rate of about $11 million per year, each. It is doubtful they have shared much of it with the remainder of the minority community.

Very few nonminority specialty contractors have been able to reach annual sales of $10 or 11 million after many years in business, during which they took substantial risks in lump-sum competitive contracting. If these "advantaged contractors" had been able to negotiate sole-source procurement contracts with the government or with a prime contractor compelled to do business with them and with no need to bid lower than anyone else, they could have built this volume of business too.

The 1982 census of construction indicates that only 472 of 39,563 electrical contractors had reached the "very large" classification. These 472 contractors had average net construction receipts of $9,444,419. If the mean and median are of similar magnitude, which is probable in this type of array, fewer than one-half of the 472, about 230 or less, would be in the $10 million per year bracket, even though many of these contractors have been growing for years. Large contractors (making up 8 percent of the total) had average net construction receipts of less than $8 million. Small contractors (58

percent of the total) averaged about $2 million, and medium contractors (33 percent) averaged under $6 million.

Set-Asides

The Small Business Administration 8(a) set-aside program has received considerable notoriety in the past few years because of abuses caused by the unsoundness of the law and the SBA's implementation, the generally noncompetitive nature of the contracts negotiated between the SBA and "disadvantaged" contractors, and the remarkable authority of the SBA to decide which contractors are entitled to the largess of negotiated Federal contracts for which less-favored contractors are not even permitted to bid.

A letter from the SBA's legislative counsel to the Mechanical Contractors Association of America in March 1975 explained that the purpose of the 8(a) program was to "bring 'disadvantaged' concerns, which have in the past been deprived of full opportunities to participate in the Nation's economic life, more fully into the economic mainstream." Of course, many "advantaged" concerns have not had as full an opportunity to participate in the Nation's economic life as they would like to have if they had more capital or less competition. What the government's programs have done is put into business new firms that are ostensibly more than 50 percent owned by members of minorities by eliminating their competition. They certainly have a right to go into business; but without the government set-asides and subcontracting goals, it is doubtful whether some of them would have been willing to take the risks and the personal deprivations that small businessmen traditionally have had to take to establish a new concern in a competitive industry. Michael Cardenas, then Administrator of the U.S. Small Business Administration, stated in a remarkably candid news release May 1, 1981:

> The 8(a) Procurement Program is replete with problems and inequities. A major change in policy and program structure is necessary if 8(a) is to serve disadvantaged small firms. As it stands now, it's a program that benefits relatively few companies.

Cardenas said that the great difficulties have been lack of program termination or completion, questionable use of business development expense funds, questionable use of advance payments, inappropriate program goals, lack of access to the program by eligible new firms, and the presence of large business in the 8(a) program.

> Two percent of the firms in the program have received $1.7 billion, or a whopping 31 percent of all 8(a) awards to date. While receiving the lion's share of the contracts, many of these same firms have received multiple string-free funds called Business Development Expense. Old policies have resulted in many firms staying in the program long after they had exceeded small business size standards.

An article in the *Washington Post* at about the same time reported on a General Accounting Office report:

> the SBA 8(a) program was "a promise unfulfilled" in which a handful of firms with powerful political connections have received nearly one-third of the programmed government contracts. The congressional watchdog found that $1.7 billion of the $5.5 billion worth of contracts handed out by the Small Business Administration since the program began has gone to 50 firms—1 percent of the 4,598 participants. . . .
>
> Many firms in the program—known as Section 8(a) of the Small Business Act—have participated as long as eight or nine years, the GAO said. The log-jams of firms has caused the SBA to reject the applicants of 400 disadvantaged businesses while failing to remove "questionable" firms from the program, the study found. . . .
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> In one of a series of articles entitled "Government Out of Control," the *Washington Post* reported last September that increasing examples had become known of SBA contracts going to unqualified companies, among them organizations headed by wealthy white businessmen who used poor blacks and other minority persons as fronts.
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> The new GAO study found that minority companies participating in the program tend to look on the awarding of 8(a) contracts as an end in itself rather than using the contracts as stepping stones to open competition. As a result, of the 4,598 participants nationwide, only 166 have "graduated" into unassisted enterprise in 12 years, the GAO said.

The same article quoted a minority contractor (apparently not a construction contractor) who had received over $68 million in noncompetitive government contracts. This supposedly disadvantaged contractor stated: "The 8(a) program is probably the only program that I know of in current existence that really puts any part of the economic fruits of this country in the hands of the minorities. . .if it were eliminated 'we'd all die'." This type of statement overlooks the fact that every contract awarded to a minority contractor by negotiation is being denied to some other contractor, and that those who

have been eliminated from competition also could claim that they cannot survive without the work being handed to a select few. If discriminatory advantages were eliminated, the "disadvantaged" contractor may still be the successful bidder, perhaps at a lower, competitive price.

Although defenders of the set-aside and quota programs argue that only a certain percentage of contracts is being set aside and the remainder is available for open competition, contractors in communities where significant Federal construction expenditures are made have relied for years on a share of this Federal work. Even if "only" 10 percent, or some other percentage, of the total construction work in the United States is being set aside, this is hardly any solace if most of the Federal work in their communities is set aside. For example, a subcontractor in Utah reports a drop in normal work under contract from $3 million to $500,000 per year as a result of MBE subcontracting quotas.

The large "disadvantaged" contractor quoted in the article, who started with 2 employees in 1974 and in 1981 had nearly 300, said SBA's own studies showed that it takes 9 to 20 years to become a "mature" business. "If all the best studies say it takes 20 years, how can anyone expect us to do less? Why do we have to be superstars?" Although 20 years is rather an exaggeration, and determining when a business is mature is certainly a subjective judgment, the fact is that other businessmen have had the same growing pains and have had to survive through hard work and good management or have gone out of business.

Many horror stories in the abuse of the SBA 8(a) program have previously been publicized. We will describe one that is especially well documented over a period of years. This example refers to an MBE mechanical construction contractor in Texas. The SBA says the firm has been participating in the 8(a) program since June 1971. At least through 1983, it was still receiving noncompetitive negotiated contracts through the SBA. This is despite the fact that an SBA letter of March 12, 1975, predicted that the company would soon be "graduated" from the 8(a) program, and Kurt A.J. Monier was told during a visit to the SBA district office in 1975 that the company had been terminated.

The excessive costs to the taxpayer of keeping firms such as this as recipients of government largess can be determined from the results of a contract award to install fire sprinkling systems in the Audie Murphy Veterans Administration Hospital in San Antonio. This $3.58 million prime contract was to sprinkle an area of approximately 700,000 square feet; thus, the unit price was slightly in excess of $5 per square foot. Competitive prices on commercial buildings in San Antonio for sprinkler work were—at least in 1983—under $1 per square foot. A company specializing in automatic sprinkler installations which prepared initial budget data for the project, considered a price of $1.50 per square foot to be fair and competitive because the work could be installed in interstitial work areas between the floors and the ceilings and, thus, was not as expensive as some renovation jobs in existing buildings would be. The cost to the U.S. taxpayers for this assistance to bring one minority contractor into the "mainstream of economic life," after 12 years of noncompetitive work for the government, was, therefore, about $2.5 million.

Fire sprinkler work is a highly specialized part of mechanical contracting. Few mechanical contractors perform such work with their own forces; they subcontract to specialty subcontractors. To the best of our knowledge, the company given this highly lucrative and important contract has had no previous experience with fire sprinkler work.

Part of the problem may be rather ill-defined standards by the SBA as to who should be graduated from the 8(a) program. The extensive correspondence file in this case, written by protesters and their Congressmen and Senators and answered by the SBA, is enlightening. In a letter to the Mechanical Contractors Association at San Antonio on October 15, 1980, Cesarea Guadarrama, Jr. (business development specialist, San Antonio district office of the SBA), said: "Our Central office is the only office that can approve, terminate, or graduate 8(a) contractors." In a November 26, 1980, letter to the same association, Julio G. Perez, SBA district director in San Antonio (and thus Mr. Guadarrama's superior), said: "Annually these firms are reviewed by Field, Regional, and Central Office personnel. When the SBA determines that an 8(a) firm has reached viability, that firm will be graduated from the 8(a) program."

On December 12, 1980, Mercurio Martinez, Jr., regional administrator of Region VI of the SBA in Dallas, told the association that "we will be reviewing all firms in the 8(a) Program for progress in achieving their business plan objectives, and those firms that are not making progress will be terminat-

Prime contract	*DBE goal*	*WBE goal*
General construction	11.8	7.0
HVAC	6.0	3.7
Plumbing	6.0	3.7
Electrical	6.0	3.7

ed." A December 16, 1980, letter from the SBA Administrator to Congressman Loeffler stated that the annual review determination is up to district and regional offices. On January 29, 1981, Paul R. Browne, Associate Administrator for Business Development, SBA, stated in a letter to Sen. John Tower that "the Small Business Administration now has some 2,000 8(a) firms in its portfolio, and our regions and districts must make individual assessments of each to determine program participation."

Apparently the district office personnel believed the determinations were being made in Washington, D.C., and the Washington, D.C., officials thought they were being made by the district and regional offices. With this type of confusion over responsibility, it is evident why only 166 out of 4,598 participants have graduated. It appears that the SBA has delegated an amazing amount of power to district officers who apparently do not recognize the extent of their responsibilities.

Mr. Martinez' statement is of interest because he refers to the progress of 8(a) firms in "achieving their business plan objectives." Achieving a business plan objective is a lifetime proposition for anyone, and if these firms are going to continue to get noncompetitive contracts until *their* objectives are met—as long as they are still "making progress"—there are not likely to be many graduations.

Although administrative tightening has taken place in the SBA from time to time and is a first step in correction of abuses, the fundamental flaws in the law and SBA's implementation must be blamed for the continuing unfairness and excess cost of the 8(a) program. A concerted effort needs to be made to convince Congress that this is an improper way to assist one group at the expense of others.

Subcontracting Goals and Quotas

Members of the Black Coalition in the House of Representatives have used some brilliant legislative strategy in establishing a different type of reverse discrimination in the expenditure of Federal grant funds going to State and local governments for construction. Having been assured by black Congressmen that there is nothing unfair or even controversial about setting MBE goals, such as that prime contractors must subcontract at least 10 percent of every contract to minorities, Members of Congress have quickly voted for floor amendments to add such requirements to authorization bills. Not having been a part of the original bill on which the applicable committees have held hearings, the Members of Congress have not been exposed to the vigorous objections that would have been made at such hearings. The acts of Congress are then expanded by eager regulation writers for the Federal agencies controlling the grants, such as the Department of Transportation, and they can defend their position against charges of unfairness and waste by stating that this is the congressional policy. In turn, the various States and municipalities, subjected to their own political pressures, "improve" on the regulations for spending the grant money by adopting higher goals for minority subcontracting and more difficult administrative requirements than the regulations require. Not only has this raised costs of construction projects funded by Federal grants, but it has substantially delayed award of contracts and progress on construction. For example, the following requirements were placed in the contract documents for the Hart bus operations and maintenance facility for the town of Huntington, Suffolk County, New York, using Department of Transportation funds raised through a 5 cent per gallon gasoline tax imposed on all of us:

1. In compliance with the aforementioned policy, each prime contract under this project includes goals of awarding the following percentages of the total contract dollar amount to subcontractors and/or suppliers who qualify as disadvantaged business enterprises (DBEs) and women's business enterprises (WBEs) respectively:

2. If any competitor offering a reasonable price meets the DBE/WBE contract goals, the Town of Huntington shall presume conclusively that all competitors that failed to meet the goals and have failed to exert sufficient reasonable efforts and consequently are ineligible to be awarded the contract. The initial efforts shall be based on the above stated percentage of the Gross Sum Bid. These goals shall also apply to any Contract Amendment entered into after

the award of the Contract and which affect the amount of the Contract.

3. Agreements between a bidder/proposer and an MBE in which the MBE promises not to provide subcontracting quotations to other biders/proposers are prohibited.

4. The contractor shall, at a minimum, seek MBEs in the same geographic area in which they seek subcontractors generally for a given solicitation. If the contractor cannot meet the goals using MBEs from this geographic area, the contractor, as part of its efforts to meet the goals, shall expand their [sic] search to a reasonable wider geographic area.

5. In furtherance of these goals, price alone shall not be an acceptable basis for the rejecting of the MBE subcontractors' bids, unless the contractor evidences to the Town of Huntington satisfaction that no reasonable price could be obtained from the MBEs.

6. The prime contractor shall make good faith effort to replace an MBE subcontractor that is unable to perform successfully with another MBE. The Town of Huntington shall approve all substitutions of subcontractors during contract performance, in order to ensure that the substitute firms are eligible MBEs. The contractor is advised that failure to carry out the requirements set forth in the appropriate Federal Regulations shall constitute a breach of contract and, after the notification of the Department of Transportation, may result in termination of the agreement or contract by the Town of Huntington or such remedy as the town deems appropriate. (Note Paragraph 23.43a in Regulations 49 CFR Part 23.)

7. An MBE Liaison Officer must be designated by the Contractor to be responsible for implementation of the Contractor's MBE Program. The name of this individual must accompany the bid.

It should be recognized that fulfillment of a quota of this type involves more disruption than having a prime contractor give up some of his work to a subcontractor who qualifies as a DBE or WBE. The subcontractors who are residents of the local community and contributors to local tax money being used for the contracts with Federal grants are being denied an opportunity even to compete, while prime contractors are searching far outside of their communities, in many cases, for minority contractors who will meet the requirements. It should be evident in looking at the goals established that only by coincidence could each of the four prime contractors locate competent subcontractors or suppliers to meet these goals in the Town of Huntington, or in all of Suffolk County.

Plumbing and electrical contractors seldom subcontract any work to others. The nature of their work is such that it is unwieldy and expensive to involve subcontractors in what is fundamentally done by the members of one skilled trade employed by one contractor. It is almost impossible to find subcontractors and then divide up the work in a reasonably efficient manner to give 6 percent or more to a DBE and 3.7 or more to a WBE. A few minority-owned wholesale suppliers profit handsomely from these requirements, but even these are difficult to find in most parts of the country. Substantial administrative delays as well as inequities result.

Confusion of MBE with EEO

Part of the reason for acceptance by legislative bodies and administrators of these unfair and impracticable preferential procurement programs may lie in a widespread assumption that these programs are akin to affirmative action and equal opportunity activities. In truth, there is no connection between the two.

There is no reason why a minority business enterprise will hire more minority employees than a competitor would or that a women-owned enterprise will hire only women. Furthermore, affirmative action employment regulations have been grounded on the assumption that, over the years, members of minorities have had fewer opportunities to learn certain trades or have been discriminated against in hiring and promotion by people who think that members of such races are not as qualified as others. In construction contracting, however, the selection of subcontractors is not made on the basis of a personal preference or social friendship basis. The only way a general contractor can get a contract is to be low bidder unless the contract has been set aside. The only way it is going to be low bidder is if it gets the lowest bids being offered by prospective subcontractors, because the total of these bids generally determines much of a general contract price. Thus, it would be economically untenable and highly unlikely that, even in the past, minority subcontractors were denied an opportunity to bid and receive subcontracts because they were minorities. Certainly, the Federal Government and the States and municipalities did not discriminate against prime contractors because of race or national origin in past procurement, but the philosophies of the set-aside and DBE goals suggest that these radical steps are necessary to overcome past discrimination.

Lawful affirmative action employment programs do not usually require denial of the right of nonminority persons to apply for work or for promotions. They pertain to steps to be taken to seek out minority applicants who can compete for available employment.

Rectifying Past Wrongs

The general thinking behind preferential procurement is apparently to make up for slights and denial of opportunities suffered by the owners of these firms or, more often, their ancestors. This is not a reason for just recompense. Some of those now being denied opportunities have suffered discrimination; the ancestors of many of the owners of these businesses have also suffered discrimination—Jews, Irish, Italians, Greeks, Poles, immigrants from Balkan countries, and probably all other ethnic minorities at one time or another, as well as, in earlier days, Roman Catholics, Mormons, and members of other "minority" religious denominations.

The recompense is not being made by the government representing the people as a whole, except to the extent that the government is often paying higher prices than would be necessary with free competition. Nevertheless, the first burden is being borne by those private citizens who are not named among the favored races entitled to discriminatory treatment. It is unlikely that the individuals affected, or their ancestors, have been doing the discriminating that the preferential procurement is supposed to make up for; but even if they had, the loss of normal business opportunities by a contemporary business to make up for actions taken by the ancestors of the owners of the business—which were legal at the time they were taken—is not an appropriate remedy for anything.

The Time for Silence Has Ended

Minority advocates have been skillful and successful in legislating preferential procurement programs. Meanwhile, until fairly recently the contractors who do not qualify for these handouts have remained fairly silent on the subject as they have watched their businesses being eroded. One reason is that they have been busy trying to keep afloat with what is left, but perhaps a more important reason is a fear that opposition to these programs will appear racist. It is time that this matter be corrected and that people realize that it is the preferential regulations that are racist and not the attitude of contractors who want to be able to compete on a local level with all competitors, minority or otherwise. Racism is an ugly word and an ugly concept, and it is unfair and inaccurate to characterize as racist those who want to do away with preferences for *any* race in the expenditure of government funds.

As the agency most likely to reflect the conscience of the American people and American government in matters of discrimination on account of race, national origin, or gender, the U.S. Commission on Civil Rights can provide a significant benefit to the Nation and the Federal budget by taking a stand against preferential procurement and articulating this position to the President, executive branch agencies responsible for construction, procurement, and grants, and the Congress. In the process, the "disadvantaged" will ultimately be well served by having to earn their business success in the same way as their competitors and in not being induced into a business for which they may not be suited by the opportunity to take advantage of government handouts.

Most construction contractors learned how to be construction contractors through employment by other contractors in increasingly responsible positions. Many have college degrees, generally in engineering subjects such as civil engineering for general contractors, electrical engineering for electrical contractors, and mechanical engineering for mechanical, sheet metal, and plumbing and heating contractors; but they did not learn how to be contractors in college. Many, including quite a few who have been to college previously or subsequently, have also had some years of trade experience during which they have learned as apprentices and journeymen how to do the skilled work of their particular trade. This often involves 4 years of apprenticeship with on-the-job training and night school education followed by several years' experience as a journeyman, then as a foreman, general foreman, superintendent, field engineer, estimator, or in other such capacities in which they become intimately acquainted with the problems and techniques of contractors in that particular contracting discipline.

It is possible that minorities and women have had a somewhat later start in getting this type of on-the-job experience because—until the passage of the Civil Rights Act and the issuance of Executive orders dealing with minority employment on government-financed contracts—in some areas in the

country there were few minority apprentices or journeymen in construction trades. This occurred, not because of discrimination on account of race, color, national origin, religion, or sex, but primarily because for centuries in most nations, including our own, trade skills were passed down from fathers to sons. In some parts of the country, it was accepted practice until 1964 to exclude from apprenticeship anyone who was not the son of a journeyman member of the sponsoring union or of one of the sponsoring employers participating in the apprenticeship training program. This practice was not founded on racism or prejudice, but nepotism, which was an accepted practice at that time. Therefore, these sons of owners or of journeymen, having had opportunities to learn the trade in which they were specializing, were most likely to be qualified to eventually become contractors. Only a small percentage ever found the capital or were willing to take the risks or to give up the security of high wages for the meager earnings and long hours of newly established small businessmen.

Although minorities were delayed in getting this necessary on-the-job experience by the practice of nepotism in some areas, this time has long since passed. In the 20 years since the Civil Rights Act was adopted, there have been many minority apprentices who have graduated to journeyman and are working at the trade or in supervisory or executive positions in their companies. As in the case of nonmajority tradesmen, many are understandably unwilling to give up the security of employment by others at high wages for the insecurities of being in business for themselves. However, those who have the desire and drive to take such risks have the same opportunities as others and many will succeed without special help because of the on-the-job experience and training they have received.

Employers' associations are willing to help in training prospective minority contractors to the extent feasible. Several associations have foremen and other supervisory training programs as well as training in estimating, business management, and other subjects that are available for employees having the desire to learn more about their business. Joint apprenticeship and training committees not only sponsor apprentice training, but also continuing training for journeymen, foremen, estimators, and other programs. Unlike apprentice night school training, which is mandatory to remain in the programs, journeyman programs are voluntary, but they are certainly not, in any way, discriminatory in admissions.

The U.S. and State governments could accomplish the objectives of preparing those minorities and women who seek help in becoming independent business owners at a fraction of the cost of administering and subsidizing set-asides. This could best be done in cooperation with knowledgeable associations in the construction industry, including the following: National Association of Minority Contractors; Associate Specialty Contractors; Mason Contractors Association of America; Mechanical Contractors Association of America; National Association of Plumbing, Heating, and Cooling Contractors; National Electrical Contractors Association; National Insulation Contractors Association; National Roofing Contractors Association; Painting and Decorating Contractors of America; Sheet Metal and Air Conditioning Contractors National Association; Associated General Contractors of America; American Subcontractors Association; American Builders and Contractors; and other associations of specialty contractors. Without quotas, goals, or set-asides, reliable publicity could be given to prime contractors and higher tier subcontractors of minority and WBE firms that are qualified by experience, organization, financial stability, and bonding capacity to do work in various specialties, size levels, and localities.

Minority- and women-owned contractors should know of bidding opportunities and the names and addresses of plan-holding prime bidders. MBE and WBE owners might be invited to classes conducted by bankers and surety companies to learn how to qualify for loans and bonds, to community college courses on business management and supervision, to conferences conducted by public officials to explain future construction plans of their agencies, to classes held by inspection authorities on installation codes and specifications and common failures in compliance, to seminars conducted by OSHA on job-site safety, to courses conducted by insurance experts, and to other such classes offering the type of knowledge every contractor must acquire in addition to trade expertise. Mentor-protege relationships, between experienced or retired contractors and newly established MBE and WBE owners, might be fostered by SBA.

These approaches will produce adequate numbers of MBEs and WBEs qualified to compete on equal terms and grow by the abilities of their owners and

employees, some of whom will, in turn, spin off to start their own businesses. They will have a much sounder basis for future success as a result of this type of voluntary training.

New York Investigation Commission Findings

We strongly commend to the Commission's attention the June 1984 report of the State of New York Commission of Investigation on "Investigation of the Building and Construction Industry: Minority Business Enterprise Program"—it does not apply to SBA 8(a) set-asides. Ten different firms and their constituents and spin-offs were carefully investigated, including quoted testimony of principals and others, and the cases are effectively documented in the 125-page report. The report covers the types of abuses classified by the investigation commission as: (a) in-house MBEs owned by minority figureheads, usually willing employees of the majority firms; (b) MBE "brokers"—5 or 10 percenters; and (c) legitimate MBE firms that do little or no work on particular construction projects, but whose names are used by the nonminority firms that are actually in control in order to satisfy MBE goals.

In referring to one minority person who was involved in numerous schemes to which he contributed little or no actual money (except unpaid noninterest-bearing promissory notes) and no construction expertise, the report said:

> The Commission believes that an in-depth review of the. . .[MBE] companies and the non-minority firms that dealt with them, provides a clear example of the reasoning behind much of the cynicism that exists among non-minority contractors regarding MBE programs and the problems of governmental administration and review.

> Simply stated,. . .[the minority business enterprise] took advantage of confusing MBE programs, which were administered by inexperienced and overwhelmed government officials, to sell to nonminority contractors faced with often unrealistic rules and regulations, not his construction knowledge, but his minority status and the knowledge of MBE regulations and the contacts he had developed as a result.

We are in no position to judge the conduct of minority or nonminority firms involved in shells and cosmetic compliance with the regulations. The desperation to keep existing businesses going by being able to participate in public works causes officials of existing companies to offer tempting propositions to minorities or existing MBEs to become involved in schemes that are generally not violations of the law, although they violate the intent. The problem is not with the individuals who have been drawn into these conditions, but with the regulations that have induced their conduct.

Testimony of the National Association of Women Business Owners

By Laura Henderson*

The National Association of Women Business Owners (NAWBO) is pleased to have the opportunity to testify before the United States Commission on Civil Rights on the issue of affirmative action and business set-aside programs for woman-owned businesses.† We are encouraged by the Commission's interest regarding access to the Federal procurement market by woman-owned businesses, and we thank you for inviting NAWBO to present our views on women's business set-aside programs.

The National Association of Women Business Owners is the only dues-based national organization whose sole purpose is to work full time, nationwide, on behalf of women entrepreneurs in a myriad of businesses. Established in Washington, D.C., in 1974, NAWBO is a leader in the movement in which women are establishing new businesses at a revolutionary rate. One of NAWBO's focuses is on lobbying in the national and State capitals to facilitate the movement of women business owners into the mainstream of the economy.

Over the past 11 years, NAWBO has become a rapidly expanding network with thousands of women business owners constituting 25 chapter affiliates, operating in cities and States from California to New York and Minnesota to Florida. An international affiliation has recently been established with Les Femmes Chefs d'Entreprises Mondiales (Women Business Owners of the World), now a 17-country association of women business owners. Through its many programs, publications, and advocacy activities, NAWBO:

- *Encourages business ownership among women* and promotes economic opportunities for women business owners.
- *Strengthens the network of professional contacts* that businesswomen can draw upon to improve and expand their own enterprises and personal growth.
- *Lobbies for legislation* on behalf of business owners who are women.
- *Expands the strong, collective voice for women entrepreneurs* to help shape national economic policy.
- *Provides an environment* in which women business owners can move up and move ahead as leaders, board members, and policymakers in the business and political worlds.
- *Offers a wide range of educational and training programs* that women business owners can use to compete even more successfully in the economy.

To prepare this testimony relating NAWBO's views on business set-aside programs for woman-owned businesses, we took note of the current lack

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† In this paper, the term "woman-owned business" means businesses that are woman owned *and* woman operated.

of governmentwide set-aside programs specifically for woman-owned businesses, reviewed the characteristics and contributions of these businesses to our economy, identified significant barriers that businesswomen face when selling to the government, and developed a perspective on current Federal Government procurement programs in which women can participate. Our analysis shows that the Federal Government market remains virtually closed to businesses owned by women.

The limited access of woman-owned businesses to the Federal procurements represents a loss of excellent resources to the government and a severe impediment to the viability of the female entrepreneur and business owner. We believe that something should be done, and on the basis of our analysis, NAWBO has developed recommendations for a two-phase program to increase Federal procurement opportunities for woman-owned businesses. In the pages that follow, we present our findings and then discuss our recommendations.

Contribution of Woman-Owned Businesses to the Economy

The importance of women to our economy was the subject of the January 28, 1985, cover article of *Business Week* entitled "Women At Work." *Business Week* stated:

> Because a rapidly expanding labor force is a principal element in propelling an economy onto a fast-growth track, the influx of women into the job market may be the major reason that the U.S. has emerged so much healthier than other countries from the economic shock of the 1970s. Real gross national product has risen faster in the U.S. than in all other major industrialized nations, with the exception of Japan, during the past decade. And recently, the U.S. advantage has widened. "To the degree that women are getting an opportunity that they didn't have in the past, the economy is tapping an important and previously wasted resource," says Nobel laureate Paul A. Samuelson, professor of economics at Massachusetts Institute of Technology.[1]

Woman-owned businesses are the fastest growing segment of the entrepreneurial community. Today, women own at least 25 percent of all small businesses in the country and are going into business at a rate four times faster than men.[2]

Small business, in which women are establishing a stronger and more vital presence, plays a major role in the Nation's economy. According to *The State of Small Business: A Report of the President,* submitted to Congress in 1984, when a size standard of fewer than 500 employees is used, over 99 percent of all enterprises are small; approximately 38 percent of the gross national product is attributed to small business.[3] The same report states that the 2.5 million woman-owned sole proprietorships in the United States accounted for $40.1 billion in sales in 1980, a figure that does not include partnerships or corporations.[4]

Characteristics of Woman-Owned Businesses

Small business, and thus woman-owned business, is notably labor intensive. Research at the Massachusetts Institute of Technology indicates that 66 percent of the new jobs in the United States are provided by businesses with fewer than 20 employees; 75 percent of the new jobs are provided by those that are less than 5 years old.[5]

About half of the businesses owned by women are in the services sector. As of 1982, services employment accounted for 74 percent of all occupations in the United States, up from 62 percent in 1960. And since 1960, 86 percent of the job growth in this country has occurred in the service-producing sector.[6]

Women go into business for the same reason that men do: to make money and to have direct control over their career lives. The rapidly growing number of female entrepreneurs is a clear indication that women seek financial independence and are entering the business world to accomplish this. As women continue to establish businesses at a rapid rate, the impact they have on the small business sector grows.

Woman-owned businesses are spreading into all areas of the economy at a rapid rate, although the heaviest concentrations are in the service and retail areas. The procurement awards that have been made

[1] Karen Pennar and Edward Mervosh, "Women at Work," *Business Week,* Jan. 28, 1985, pp. 80–85.

[2] Office of Women's Business Ownership, Small Business Administration.

[3] U.S. Small Business Administration, *The State of Small Business: A Report of the President; Annual Report on Small Business and Competition,* 1984, p. 9.

[4] Ibid., p. 348.

[5] David L. Birch, "Who Creates Jobs?" *The Public Interest,* no. 65, Fall 1981, p. 7.

[6] Steven Benz, "High Technology Occupation Lead Growth in Services Employment," *Business America,* Sept. 3, 1984, p. 20.

to woman-owned businesses attest to the diversity of these businesses and the relevance of these businesses to government needs—operation of government facilities, management and professional services, training, construction, and provision of such goods as ammunition and explosives, vehicular equipment components, furniture, and communications equipment.[7]

In 1981, to delineate more accurately the characteristics of woman-owned businesses by developing a statistical profile of its constituency, NAWBO funded an original research project aimed at identifying the Nation's leading women entrepreneurs. The research, conducted over a 9-month period, pinpointed more than 1,700 women in the United States who are running companies that gross more than $1 million annually. These women not only own major businesses, but are also actively controlling them. These woman are engaged in a variety of traditional and nontraditional businesses, including venture capital, construction, manufacturing, oil and gas, and finance.[8]

A more recent study, conducted by NAWBO in 1984, reveals that among the 766 women business owners surveyed in this study, 25 percent had gross annual sales of over $800,000, and 75 percent had gross annual sales of over $80,000.

The study also showed that these women business owners:

- Have combined total revenues of more than half a billion dollars a year.
- Have average annual revenues of $425,000 per company.
- Average 11 full-time employees, with an additional 14 part-time or contract employees.
- Are concentrated in professional services—a section of the economy where most of the Nation's jobs are now being created, e.g., as consultants, accountants, and lawyers—and in communications, distribution, and financial services.
- Include manufacturers, contractors, truckers, airport and train operators, robotics experts, and other nontraditional women's occupations.[9]

NAWBO has conducted its own surveys of woman-owned businesses primarily because of the flaws in the data collection systems of both the Bureau of the Census and the Internal Revenue Service (IRS), which have led to misconceptions about the number and kind of woman-owned businesses. The basic problem lies in the system's exclusion of partnerships and corporations when reporting sales.

In both 1972 and 1977, the Bureau of the Census counted the number of woman-owned sole proprietorships in its economic censuses. The primary source of information for those reports was Federal income tax returns where business interests reported on the tax returns of married individuals were attributed to the first taxpayer on the return, usually the husband. The Bureau of the Census reported approximately 700,000 woman-owned sole proprietorships for 1977.[10]

The IRS drew a sample of tax returns for the same year, 1977, and from that sample estimated that there were approximately 1.9 million woman-owned sole proprietorships, indicating that the Bureau of the Census figures had differed by approximately 1.2 million. Even these more complete data published by the IRS in 1977 and again in 1979 and 1980, showing a 33.4 percent increase in the number of businesses owned by women, may represent no more than three-fourths of total female-operated firms.[11] Three million, or one-quarter of all small businesses in the country, is a more likely estimate when partnerships and corporations are included. Corroborating this estimate, a recent NAWBO survey of its members indicated that 60 percent of its members were corporations, as opposed to sole proprietorships and partnerships.[12]

Thus, despite almost a decade of efforts to focus attention on woman-owned businesses, their charac-

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[7] U.S. Small Business Administration, *The State of Small Business: A Report of the President,* pp. 353–54.

[8] National Association of Women Business Owners, *A NAWBO Plan: A New Organization with an Established Name* (Chicago, Illinois, 1981).

[9] U.S. Small Business Administration, Office of Women's Business Ownership, *National Association of Women Business Owners (NAWBO) Report,* January 1984, 2M00456-01.

[10] U.S. Department of Commerce, Bureau of the Census, "Woman-Owned Businesses, 1977 Economic Census," p. 5.
The Bureau of the Census also conducts the Current Population Survey, a monthly survey done for the Department of Labor's Bureau of Labor Statistics. Its questionnaire, which is directed primarily at issues of employment and unemployment, asks whether the respondent is self-employed in his or her own business, profession, or firm, and whether the business is incorporated. These data permit no detailed analysis of the business itself.

[11] U.S. Small Business Administration, *The State of Small Business: A Report of the President,* p. 348.

[12] U.S. Small Business Administration, *National Association of Women Business Owners (NAWBO) Report.*

teristics, their value, and their needs, government agencies have not provided even a reliable count of the number of these businesses in the United States.

To improve the national data on women business owners, NAWBO recommends that the government (1) establish initiatives to ensure the regular collection of reliable national data on women business owners and (2) revise and update the Standard Industrial Classification codes to reflect the dynamic changes in the services sector, including professional and technical services, where the preponderance of women owners is concentrated.

Status of Woman-Owned Businesses in Federal Procurements

Only $584 million, or four-tenths of 1 percent of the 1982 value of Federal prime contracts of over $10,000, were awarded to woman-owned firms,[13] even though women are playing an increasingly important role in the economy of the United States through the ownership of businesses.

The accessibility of the Federal Government procurement market to these woman-owned businesses is crucial to their viability and to their ability to contribute to the economy and to the creation of new jobs, especially because the United States Government is the country's largest purchaser of goods and services, with purchases amounting to more than $159 billion in 1982.[14]

For over 10 years, the Federal Government has verbally encouraged full participation of woman-owned businesses in the procurement process. For the most part, however, this encouragement has remained at the level of lipservice, because the spirit and mechanisms to implement this policy have been lacking. No preferential contracting programs have been established for woman-owned business, and all initiatives to date have been largely ineffective, with the result that the Federal Government has been essentially a closed market to woman-owned businesses. As our analysis indicates, it is in the best interests of the Nation's economy to support women business owners as an evolving entrepreneurial sector and to increase the resources available to the government through the use of these highly qualified enterprises.

[13] U.S. Small Business Administration, *The State of Small Business: A Report of the President,* p. 347.

Barriers Facing Woman-Owned Businesses in Federal Procurements

Three significant barriers face women business owners who are seeking to increase their award and dollar participation in Federal procurements:

- Most are small businesses in the entry stage of doing business with the government.
- Misconceptions about woman-owned businesses persist.
- Women have unequal access to credit.

Entry-Stage Barriers

Woman-owned firms are generally small businesses, often in an entry stage with the government in regard to the procurement process. As with any new business, these firms encounter barriers that make competition difficult. They are hampered by the lack of available information, do not have a track record to facilitate favorable contract award decisions, are unfamiliar with the procurement process and how to work within it, and lack effective contacts in agencies.

Woman-owned businesses often do not possess the financial stability to withstand the extended procurement award cycle (often 12 to 18 months), and, once a contract is awarded, these firms must cope with the cash flow implications of doing business within a system where payment often lags significantly behind incurring costs to provide goods and services. Further, financing costs are not recoverable under government procurement regulations.

No special set-aside programs exist specifically for woman-owned businesses that would enable these businesses to get their "foot in the door." Available information on how to sell to the government is often overwhelming to the uninitiated. Further, the information available gives little insight into the realities of the Federal procurement process, namely, how to develop technical and cost strategies, where to find the background necessary to prepare a bid or proposal, and how to negotiate contract terms.

Subcontracting with larger, more experienced firms could facilitate efforts by these entry-level woman-owned businesses to overcome some of the barriers and to develop the track record and contracts necessary for success in the procurement process. However, procurement plans required by

[14] Ibid., p. 315.

Public Law 95–507 for utilizing small and minority-owned businesses as subcontractors are not legally required to utilize woman-owned businesses. The only procurement requirement for prime contractors to develop plans utilizing woman-owned businesses is an Office of Federal Procurement Policy (OFPP) Policy Letter 80–2, dated May 1980, that requires prime contractors to develop plans for subcontracting with woman-owned firms. Moreover, there are no mechanisms to monitor implementation or even review of these plans. In many cases, naming woman-owned firms in a plan is merely done to meet the OFPP requirement and rarely results in any business for woman-owned companies. Perhaps more troubling, a large number of contracting officers and large prime contractors are totally unaware of the existence of this requirement for subcontracting plans for woman-owned businesses.

Even when agency-set goals for awards to woman-owned businesses are established and there is motivation to achieve them, government officials lack the tools to implement the policies effectively. With the exception of the 8(a) program through which minority woman-owned businesses may participate, there are no procurement mechanisms in place to directly increase the number of awards made to woman-owned businesses. Furthermore, there are no incentives or accountability for contracting officers to take actions to meet agency goals for contracting with woman-owned businesses.

Persistent Misconceptions

In addition to these problems faced by businesses entering the Federal procurement market, woman-owned businesses face sociological barriers in the form of persistent misconceptions and biases. These barriers have been verified time and time again by every study examining the role of woman-owned businesses in government procurement. For example, the 1975 report of the U.S. Civil Rights Commission on *Minorities and Women as Government Contractors* states: "Woman-owned businesses are hampered in the procurement process by the unavailability of information and biases built into the procurement system."[15] Hearings before the Senate Select Committee on Small Business in February 1976 created an official record of the discrimination encountered by women business owners under the prevailing credit and procurement systems. In 1978 the President's Interagency Task Force on Women Business Owners reported: "women-owned businesses receive a very small share of the Federal procurement dollar and may be experiencing discrimination in their efforts to do business with the Government."[16] NAWBO members report numerous examples of bias and sex-based discrimination that they have experienced as women business owners from government program and contracting officials. Examples reported by NAWBO members include:

- Many women business owners reporting the most significant problem they face in doing with the government to be the widespread biases of the government contracting officials. Contracting officials have labeled them as emotional during contract negotiations when the women have been tough negotiators and have dismissed their contracting concerns as "just another complaint," not to be taken seriously. Some NAWBO members have found the problem sufficiently serious to hire men to handle their company's contract negotiations.
- Technical review committees questioning the ability of a woman to do the job.
- Program and contracting staff questioning the ability of a woman to manage money and handle numbers.
- Women in nontraditional occupations being questioned as to the appropriateness of their position and their ability to do a "man's job."

Both the subtle biases and the more open forms of discrimination that woman-owned businesses face in the government business environment are substantial barriers to full access by these businesses to the Federal procurement market.

The misconceptions that persist about women business owners, as exemplified above, are in part due to the lack of data about woman-owned businesses. One commonly heard explanation for the small number of government procurement awards is the assertion that woman-owned businesses are too small—"cottage industries"—to compete and have concentrated their efforts in goods and services the

[15] U.S. Civil Rights Commission, *Minorities and Women as Government Contractors,* 1975.

[16] *The Bottom Line: Unequal Enterprise in America, Report of the President's Task Force on Women Business Owners* (Washington, D.C.: U.S. Government Printing Office, 1978), p. 73.

government does not need. This simply is not true, as shown in the NAWBO survey cited earlier.

A recent article in *Savvy Magazine* helps dispel such misconceptions by identifying the top 60 companies in the United States headed by women. The article provides concrete information about woman-owned firms in areas where recognized procurement opportunities exist, such as manufacturing and production, construction, and high-tech fields.[17]

The Committee of 200, a national group of top woman-owned businesses, created as an outgrowth of a NAWBO project to identify highly successful women business owners, provides us with another sample of such businesses. Membership in the Committee of 200 requires a woman to own and have active control over a business with annual sales in excess of $5 million. According to information supplied by the committee on its members, a significant number of them own businesses in fields in which the government engages in procurement from the private sector. These businesses include general contracting, heavy construction, electronics distribution, industrial tool distribution, industrial chemical distribution, steel contracting, mapping and natural resource information, analytical chemical laboratories, petroleum refining, oil drilling supplies, metal fabrication, manufacture of products such as chemicals, institutional health care products, laboratory supplies, and plumbing and lighting fixtures, and such high-tech businesses as telecommunications and computers.

Unequal Access to Credit

A third barrier, unequal access to credit, was reconfirmed in a 1984 survey of NAWBO members that disclosed that women business owners still consider acquiring financing a major business problem. The report of President Reagan's Advisory Committee on Women Business Owners, to be released shortly, is expected to identify the same problem. Both the National Association of Women Business Owners and the Small Business Administration's Office of Women's Business Ownership continue to receive complaints of credit discrimination.

These current reports echo earlier findings. The 1978 Presidential Task Force found that women seeking capital from financial institutions have faced problems "over and above those normally faced by any new or small business person" and have encountered "subtle discrimination." It based these findings in part on an American Management Association survey in which a majority of women believed that inability to obtain adequate financing is a signficant and special problem for women business owners. Many women "found obstacles disappearing when they approached the banking environment with support or assistance from spouses, family members, or male friends and found that borrowing had suddenly become possible."[18]

The Equal Opportunity Act of 1972 (15 U.S.C. §1691 *et seq.)* should have eradicated barriers that have adversely affected the ability of woman-owned businesses to secure business credit, but unfortunately it did not. Although the act requires financial credit institutions to make credit available equally to all credit-worthy customers without regard to sex or marital status, many of its provisions have been interpreted not to apply to business transactions.

The Federal Reserve Board was given the authority to prescribe regulations to carry out the purposes of the act. Its main regulation, Regulation B, amplifies the basic requirements of the act. Regulation B prohibits a creditor from asking about an applicant's sex, race, color, and national origin. It also restricts creditors from asking an applicant questions relating to birth control practices and family planning. The act restricts a creditor's ability to seek information about an applicant's spouse and assures that each credit-worthy individual can obtain separate credit. The act also requires creditors to inform unsuccessful applicants of the specific reasons for an adverse action or of their right to request the reasons.

Despite the existence of safeguards, the Federal Reserve Board's rules generally exempt business credit transactions from the rules requiring notification, retention of records, and inquiries about marital status. These exemptions, in the context of legislative history, appear contrary to congressional intent. Commenting on the Board's power to grant exemptions from the act, the Senate Committee on Banking, Housing, and Urban Affairs wrote:

> The Board would have to make an express finding that there was no evidence or likelihood of discrimination in that class of transactions, nor would the potential for

[17] "The Savvy 60," *Savvy Magazine,* February 1984, pp. 32–43.
[18] *The Bottom Line: Unequal Enterprise in America, Report of the President's Task Force on Women Business Owners,* p. 73.

discrimination be greater if the Board were to exempt that class of transactions from compliance with one or more provisions of the Act. . . .The committee intends to indicate to the Board that it should not grant broad exemptions.

Similar language appears in the conference report on the 1976 Amendments to the act (Conference Report S.865, 94th Cong., 2nd Sess. 9 (1976)).

As the courts have recognized in the employment context, discrimination is often subtle and hard to detect and prove. Exempting business credit transactions from the requirements of the act hampers the ability of enforcement agencies and women entrepreneurs to detect illegal discrimination, eliminates incentives for financial institutions to monitor their own practices, and makes it impossible for public policymakers to know whether they need to address discriminatory practices or other types of barriers to full access to credit. The rapid growth of woman-owned businesses and the evidence that their problems with financing continue make action on this issue vitally important.

Although outside the scope of this hearing, NAWBO urges that the Commission recommend that the exemption of business credit transactions from provisions of the Equal Credit Opportunity Act be repealed to ensure access of woman-owned businesses to credit.

NAWBO Perspective on Current Set-Aside Programs

NAWBO believes in, and supports, government procurement policies that foster competition. However, procurement history indicates that, left unconstrained, the government would procure the vast majority of its goods and services from large established companies in spite of the documented efficiencies and cost savings that result from procurements with small businesses. Examples of government attitude that hinder small, minority, and woman-owned businesses are discussed in President Reagan's 1984 report on small business. It points out that the most common method of spending Federal procurement dollars—noncompetitive procurement actions—is the one in which small business participates least. It further states: "when contracts are subject to competition, the proportion of contracts awarded to small business is significantly larger."[19]

Set-aside programs have not been applied evenly across all procurement areas. For example, the Federal Procurement Data System, which divides procurements into three broad groups (services, research and development (R&D), and goods and materials), reports that small businesses secured 24 percent of total prime contracts for services procurements and only 4 percent of R&D prime contract procurements—in spite of the fact that government-sponsored studies show that small firms are between 1.8 and 2.8 times as innovative as large firms per employee.[20] This unequal application of set-aside programs results in set-aside programs focusing on procurement areas that are inherently competitive and thus easier to enter. Other procurement areas where competition is limited and difficult to break into, thus, remain virtually closed to small, minority, and woman-owned businesses. NAWBO believes that set-aside programs should facilitate access to all Federal procurement markets.

Small and newly formed businesses realistically need to achieve a certain level of stability to enable them to survive during the lengthy competitive procurement process. Survival is a very real concern to the newly formed small business. An estimated one-fourth to one-third of all new businesses fail within the first 2 years of operation.[21] Although business bankruptcies decreased slightly in 1983, small business bankruptcies were on the increase again by 7 percent by 1984, according to unpublished data obtained from the SBA's Office of Advocacy.

To be truly beneficial to both the government and the private sector, NAWBO believes that procurement set-aside programs should be designed to:

- Facilitate the development of small business capabilities and enhance the probability of survival of the firm.
- Use competition as a driving force.
- Provide an environment that enhances initial growth and allows for fair and equitable competition.
- Reward excellence and growth rather than penalize the successful firm by excluding it from

[19] U.S. Small Business Administration, *The State of Small Business: A Report of the President,* p. 320.

[20] "The Relationship Between Industrial Concentration, Firm Size, and Technical Innovation," by Gellman Research Associates, Inc. (Jenkintown, Pa.: May 11, 1982), pp. 2-3. 2652-0A-79.

[21] U.S. Small Business Administration, *The State of Small Business: A Report of the President,* p. 40.

its established client base when it exceeds a size standard.

- Prepare companies to compete in open procurement competition.
- Provide incentives for program and contracting officers for use of the set-aside mechanism to award contacts.

As we examine set-aside programs, we must view them within the context of the issues discussed above, as well as within the context of the operating environment facing today's entrepreneurs. Today's marketplace poses a new set of challenges to the enterprising business person:

- The cost of borrowing money is very high, and most new businesses need borrowed money to survive in the initial stages of operations.
- The cost of personnel, equipment, and resources requires substantial capitalization that is often unavailable to women.
- The procurement system is extremely complex and can be overwhelming to the business owner when first considering working with the government.
- The time lag between submission of a proposal and award of contract for Federal procurements is excessively long. It often takes 12 to 18 months, during which time the small business must keep staff, equipment, and other resources available to qualify for procurements.

For the growing enterprise, it is especially important to have access to the largest purchaser of goods and services in the United States, the government market. Set-aside programs help provide this necessary access to certain areas of the government market—access that NAWBO is convinced would not otherwise exist if not for these programs. Currently, no governmentwide set-aside programs exist for woman-owned businesses, although woman-owned businesses do qualify for the set-aside programs discussed below.

Small Business Set-Aside Program

The small business set-aside (SBSA) program has a track record of effectiveness in getting procurement to small firms. The SBSA program is a governmentwide program in which agencies, on a voluntary basis (with some persuasion from SBA), designate certain contracts as set aside for small businesses only.

The program is particularly valuable in that competition is restricted to firms with similar capabilities, but duplicates the processs larger firms participate in to compete for Federal dollars.

The nature of the SBSA program requires that the competing small business become adept at negotiation, contract management and administration, and subcontract supervision. It enables small businesses to learn the procurement process, develop contacts within an agency, establish a track record, and get their "foot in the door" of agencies that would otherwise remain closed to them.

Although NAWBO supports the concept of the SBSA program, viewing it as one of the few effective mechanisms for getting contracts awarded to small business, we have some serious concerns about the program:

- The small business set-aside program, as currently devised, focuses on areas where small businesses are inherently successful and where competition is already most intense for small firms (e.g., services) and does not provide access for small businesses to compete in other procurement areas where competition is limited.
- It provides an impediment and disincentive to otherwise highly entrepreneurial firms that are growing and creating employment and that are purveyors of innovation and/or high techonology both in the product and service categories. The damage to these firms is simple. The high concentration of set-asides in given industry sectors results in entrepreneurial firms being foreclosed from continued participation in those markets (which they have earned through responsive performance) when they exceed the small business size standard. They are, therefore, confronted with a very real disincentive to growth.
- The small business set-aside program, as currently operated, results in an adversarial relationship between SBA-defined large and small businesses. This discourages larger organizations from utilizing small businesses as subcontractors, which serve as important vehicles for small business entry into new markets. This adversarial climate often inhibits close working relationships between larger and smaller organizations, which could provide small businesses with the technical and management assistance that would assist in accelerating growth of new small businesses.

Small Business Innovation Research Program

The Small Business Innovation Development Act of 1982 (Public Law 97-219) was enacted to increase small business R&D participation. In fiscal year 1982, the small business share of the total $19.5 billion spent on Federal R&D procurements was only 4.8 percent—a decline from 6.8 percent in fiscal year 1980 and less than the small business share of other services and products.[22] Under the act, those 12 Federal agencies with extramural R&D obligations in excess of $100 million in fiscal year 1983 are currently required to establish a small business innovation research (SBIR) program. The SBIR program requires that a small percentage of extramural obligations be awarded annually to small businesses (having fewer than 500 employees) using a two-phase award approach.

The small business R&D community has responded very positively to this program. In the first year alone, 785 winning proposals were selected from more than 8,800 submitted by over 4,000 firms.

NAWBO supports this program for the following reasons:

- It has resulted in an increase in competition for Federal R&D procurements.
- The review process is simplified and streamlined. Proposals are written in response to broadly written research topic areas designated by the agency. There are no detailed sets of specifications issued for the agency research requirements.
- The program requires that award be made within 6 months from receipt of proposal.
- Award is made on the basis of the proposal. There are no best and final offers.
- In many cases, firms awarded a contract under SBIR can obtain an advance payment or monthly advance payments to allow an adequate cash flow to implement the project.

The main disadvantage of this program is that there is a hiatus between phase 1 and phase 2 funding. Upon completion of phase 1, the contractor is given up to 30 days to submit a separate proposal for phase 2 funding. The agency then has up to 6 months to award the phase 2 contract. Many small businesses find it difficult to maintain staff and other resources necessary for phase 2 during this hiatus.

Small Business Administration's 8(a) Contract Program

The SBA's 8(a) program for contracting with small businesses owned and managed by socially and economically disadvantaged individuals is in the form of sole source subcontracts awarded by the SBA after negotiation with the procuring agency. Women as a class are not included in the presumptive categorical definition of socially and economically disadvantaged individuals.

The small business eligible for 8(a) status can benefit greatly from the program. In general, these firms are eligible to receive a great deal of technical and managerial support. Additionally:

- Technically eligible firms do not need procurement experience because these is a limited competitive process.
- SBA expedites the procurement process so that awards can be made in a matter of weeks.
- The 8(a) program offers a great deal of support and technical assistance in the following areas:
  - —procurement process training.
  - —management assistance 7(j) and legal, accounting, and financial assistance.
  - —financial assistance for business development, which helps these firms build up deficient areas of business.
  - —technical matters (i.e., technical assistance in engineering, etc.).

NAWBO believes this program would be strengthened if competition among 8(a)-certified firms tracked closely the current competitive procurement process involving both technical and price competition. NAWBO has not recommended that women be given presumptive status in the 8(a) program because we believe that technical and price competition is paramount to learning how to succeed in the procurement system and further because NAWBO believes such an action is politically infeasible.

NAWBO Recommendations

NAWBO's goal was to develop recommendations that are pragmatic, attainable, and manageable in the real business world, objectively measurable, and in keeping with the competitive spirit of free enterprise.

NAWBO proposes the implementation of a two-phase program to help woman-owned businesses

[22] Ibid., pp. 330-31.

gain access to Federal procurements and overcome the barriers they currently face. Phase 1 would last 2 years and would involve actions that we believe would increase the share of Federal procurements going to woman-owned firms. Phase 2 would be implemented only if the proportion of awards to woman-owned businesses had not been significantly increased and was not steadily increasing 2 years after implementation.

Phase 2 would establish a set-aside program for woman-owned businesses and be implemented to supplement actions taken in phase 1. Phase 1 and 2 recommended actions are described below.

Phase 1 Actions

- Revise Federal agency practice to ensure planning on an annual basis for the utilization of woman-owned businesses as prime contractors and subcontractors across all of the product and service industries in which they plan to procure for a given year. A mechanism should be established to ensure review and implementation of these plans.
- Provide financial, managerial, and technical assistance and support to woman-owned small business as follows:
  - —Model programs involving woman-owned small businesses should be established to demonstrate effective approaches for marketing to and contracting with specific agencies (e.g., Department of Defense).
  - —Majority women business owners should be made eligible for Minority Enterprise Small Business Investment Company (MESBIC) funding, per the April 1984 vote of the American Association of the MESBIC's board of directors.
- Establish a "woman-owned small business preference procurement" model that would preserve full and open competition by executing an unrestricted procurement, but would award preference points to woman-owned small businesses.
- Direct all agencies to include at least one bid from a woman-owned small business for all small purchase orders under $25,000.
- Establish mechanisms to ensure that the quantity and quality of woman-owned business participation as subcontractors under OFPP Policy Letter 80–2 are a real and compelling part of source evaluation and scoring by awarding preference points to bidders for utilization of woman-owned businesses. This would result in a positive, self-executing incentive for other than small businesses to build woman-owned business participation into their contract structure. To place all prime contractors on an even footing, the government should specify the level or range of woman-owned business participation that they consider to be responsive on specific procurements. Also, these procurements should include explicit, mandatory contract requirements for prime contractors to provide to woman-owned business subcontractors technology transfer and management training.
- Make interest an allowable cost for government contractors, an action that would be especially helpful to small and entry-level businesses.
- Award procurements of $100,000 or less within 60 days of proposal submissions and other small business set-aside procurements within 90 days of proposal submission.
- Increase the small business share of Federal prime contract dollars from 14.7 percent in 1982 to a level more consistent with the contribution that small businesses make to our economy.
- Increase small business' share of Federal R&D dollars through careful monitoring of the implementation of the Small Business Innovation Development Act of 1982 and the share going to women business owners.
- Apply set-aside programs more evenly across all procurement areas to (1) ensure that all procurement areas are open to small, woman-owned, and minority-owned businesses, and (2) ensure that excellent, high-performing, growing small firms will have an opportunity to obtain a fair proportion of procurements after they exceed technical size standards.
- Hold congressional oversight hearings immediately following the release of the upcoming report of the President's Advisory Committee on Women's Business Ownership. Such hearings should cover the adequacy of existing Federal Government laws and programs and private sector initiatives to meet the broad needs of the woman-owned business community.
- Continue, by congressional mandate, the Interagency Committee on Women's Business Enterprise. This committee should continue to marshal existing resources to provide the best possible programs for women business owners with the Federal departments and agencies.

- Require the President to report annually to the Congress on the status of Federal procurements from woman-owned businesses.
- Establish advisory committees of women business owners for executive agencies, as well as for the Interagency Committee on Women's Business Enterprise, to advise them on effective mechanisms for increasing procurement with woman-owned small businesses.
- Expand bidders lists for all agencies to include greater representation of woman-owned businesses. Woman-owned firms should be retained on these lists during list rotation so that a fair and representative amount of woman-owned businesses remain on the lists at all times.
- Institute education programs on the capabilities of woman-owned businesses for government technical and contracting staff to eliminate misconceptions about woman-owned businesses.
- Relate the performance appraisal of government contracting employees to their success in meeting procurement goals, management assistance, and loan approvals for woman-owned businesses. This can be done, in part, through the award of performance evaluation points.

Phase 2 Actions

A failure of the actions recommended in phase 1 to achieve a steady, significant increase in the share of Federal contract dollars awarded to woman-owned businesses within 2 years of implementation would demonstrate that the barriers facing woman-owned businesses in trying to do business with the Federal Government are too great to overcome with actions short of a set-aside program. NAWBO recommends that if those actions fail, the Federal Government should establish a set-aside program for woman-owned businesses modeled after the current small business set-aside program. This set-aside program should not draw on any of the funds targeted to the small business, SBIR, or 8(a) set-aside programs. Further, the set-aside program for woman-owned businesses should involve both technical and cost competition that duplicates current procurement competition procedures, should offer technical assistance, and should provide incentives for growth, innovation, and job creation.

The Role of Set-Aside Contracting in Promoting the Participation of Minority-Owned Firms in Federal Government Contracting

By Fernando Valenzuela*

On behalf of the Latin American Manufacturers Association (LAMA), its board of directors, and its membership nationwide, it is a pleasure to express our appreciation for your invitation to LAMA to address the United States Commission on Civil Rights on minority business set-asides.

LAMA is a national industrial association representing over 500 Hispanic manufacturing and high-technology firms throughout the United States and Puerto Rico. This membership includes firms involved in precision machining of aerospace and defense components, fabrication of critical aircraft components and assemblies, precision sheet metal fabricators, structural steel fabricators, forging operations, stamping houses, plastics and rubber products, electrical and electronic assembly and manufacturing, ferrous and nonferrous castings, precision welding, nondestructive testing, microfinishing and plating, plastic injection-molded products, etc. LAMA's membership also includes numerous other areas such as engineering, construction, industrial supply, and technical consulting.

Sample products manufactured or designed by our members include:

Precision parts for the WMATA fare collection equipment
Complex aluminum electronic receiver chassis
Motor control centers
Battery chargers
Electronic power supplies
High frequency communications equipment
Hydromechanical transmission housings
Sidewinder missile aircraft attachment brackets
Precision optics for cameras and satellites
Transformers (single- and three-phase ferroresonant and linear transformers)
Waveguides, microwave components
PC boards, cables, and harnesses
Custom-designed enclosures for computers
Heat converter and exchanger (atomic plant applications)
Tank engine oil strainer
Air duct segments for J-79 jet engine
Control panels for pipeline control and wastewater control systems
Titanium forgings for aircraft and missile applications

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Plastic injection-molded automotive and aircraft parts
Cast aluminum components for the medical and aerospace industries
Safety control panels for nuclear power plants
Remanufacturing of diesel radiators
Radar avionics chassis
Digital switching power supplies

Your invitation requested that LAMA present its views on minority business set-asides. This testimony, therefore, will focus on the effects of the Small Business Administration's 8(a) set-aside program. I have elected to present several specific examples of the set-aside program to illustrate the positive impact the program can have on individual companies. The companies described are members of LAMA and are 8(a) certified by SBA. These examples will demonstrate that the 8(a) program is an effective means to assist minority companies to increase their sales, develop as Federal Government prime contractors, and increase the magnitude of their contracts.

Background on the 8(a) Program

SBA's 8(a) program is a special effort designed to promote the participation of minority companies in the multibillion dollar procurement activity of the Federal agencies. The designation "8(a)" is a reference to the section of the Small Business Act under which the program was established by Congress.

Section 8(a) authorizes the Small Business Administration to identify Federal requirements and set them aside for negotiation with 8(a)-certified companies. The contracts are awarded on a negotiated basis. There are currently some 2,600 minority contractors in the 8(a) program. During FY 1984, SBA channeled over $2.6 billion in contracts to 8(a) firms.

The following items are recent projects undertaken by LAMA members that were awarded under the 8(a) program:

Stinger missile trainers (Army)
Shipboard hydraulic lifting devices (Coast Guard)
Critical tank suspension components (Army)
Navigation radar circuit assemblies (Coast Guard)
Navigation buoys (Coast Guard)
Military standard engines 6-HP (Army)
Telephone interconnect system (GSA)
Microprocessor-based physical security systems (FAA)
Multiyear computer-based fleet support planning (Navy)
Shipboard control panels (Coast Guard)
Mission planning segment for the Solar Maximum Repair Mission (NASA)
Systems planning and integration, Space Telescope (NASA)
Software support for fiber-optic guided missiles (Army)
AFTEC office automation (Air Force)

Acquiring an 8(a) Set-Aside Contract

It is important to point out to the Commission that the 8(a) program is not a giveaway or welfare program. Many people are under the impression that the government is forced to pay noncompetitive prices or purchase inferior products as a result of the 8(a) program. The Associated General Contractors has been in the forefront of the effort to characterize the 8(a) program as a welfare program that wastes government monies.

In actuality, the 8(a) program is simply a certificate to secure contracts on a negotiated basis. Once a requirement is identified for the 8(a) program, the next step is the negotiation of acceptable terms and conditions. The procuring agency dictates all aspects of the contractual agreement, including price, quantities, quality assurance, adherence to Federal and military specifications, and delivery schedules. If these terms and conditions cannot be met, an agency is not compelled to contract with the particular 8(a) company.

The 8(a) program provides a means by which a minority-owned company can *negotiate* a contract with a given Federal agency. Nothing is *given* to the 8(a) firms. They will not receive a contract at all unless they can successfully negotiate terms and conditions with the buying agency. The 8(a) firms are treated just like any other firm. If their proposed price is too high, they won't get the contract. If the agency feels their quality control program is unsatisfactory, they will not get the contract. If they cannot deliver in the time frames dictated by the agency, they will not get the contract.

Once a contract is successfully negotiated, the 8(a) firm must perform according to the terms of the contract or the contract will be terminated by the government. In short, 8(a) contracts are awarded based on terms and conditions established by the

buying agency (not by the SBA or 8(a) firm). The government secures a service or product just as it does from any other supplier. There is no giveaway or welfare involved at all. The only advantage an 8(a) firm has is the opportunity to negotiate a requirement that has been set aside for potential award under the 8(a) program.

Examples of 8(a) Program Participants

Wedtech, South Bronx, New York

Wedtech is a high-tech manufacturing company located in one of the most blighted areas of the United States, the South Bronx. When LAMA discovered Wedtech 10 years ago, Wedtech had 8 employees in 1,500 square feet of space and annual sales of less than $200,000. The firm had no prime contracts, and its subcontracts from major aerospace companies averaged around $25,000.

Today, after 5 years in the 8(a) program, Wedtech has almost $40 million in sales, over 300,000 square feet of manufacturing space, and some 700 employees, most of whom are from the ranks of the hard-core unemployables in the South Bronx. The firm is making tank components for the Army and powered causeways for the Navy. Their largest contract to date was for $27 million to manufacture 6-HP engines for the Army.

There is simply no manner in which a small job shop in the South Bronx would have been able to secure prime contracts for highly technical items were it not for the 8(a) program. Wedtech is slated for graduation from the 8(a) program next year. This is one of the most outstanding examples of what can be accomplished by the careful use of negotiated contracts set aside for qualified minority firms.

Martinez Custom Trailers, Albuquerque, New Mexico

This company is involved in the manufacture and design of custom trailers for the livestock, earth-moving, and transportation industries. The company was established in 1972. Prior to certification into the 8(a) program, sales averaged around $800,000 per year. Martinez Custom Trailers had never contracted directly with the Federal Government, and the largest contract the firm had received was $300,000.

In fiscal year 1984, which was MCT's first year in the 8(a) program, sales jumped to $2.2 million, with the largest contract being $2 million (with a 100 percent option). This contract was for the manufacture of military trailers and was awarded under the 8(a) program from Army's Tank and Automotive Command. It marked MTC's first prime contract with the Federal Government.

MCT would probably never have become a prime contractor to the Department of Defense were it not for the 8(a) program. In addition, MCT has experienced increased sales and is now performing work of a much larger magnitude.

New Bedford Panoramex, Santa Fe Springs, California

This company has been in existence for 18 years and is involved in electromechanical assembly and software development for the power generation, aviation, and defense industries. Prior to entry into the 8(a) program, sales averaged $3 million per year with less than 1 percent of its sales as a prime contractor with the Federal Government.

Now that the firm is in the program, sales are projected to reach the $9 million mark, with the majority of the increase in sales coming as a prime contractor to the Federal Government. The largest single 8(a) contract signed by New Bedford Panoramex to date was for $600,000 with a defense agency. Currently, NBP is negotiating a $25 million requirement with the Department of Transportation.

NBP has indicated that the projected $9 million in sales could never have been met without the 8(a) program. The prospects of becoming a significant prime contractor to the government were not high. The 8(a) program has enabled the firm to negotiate its largest single contract, and NBP has increased its work force to 40 employees, with projections of an additional 150 jobs by the end of 1985. This increased work force is expected to come from the labor surplus areas of Los Angeles County.

R&E Electronics, Wilmington, North Carolina

R&E is a telecommunications company established over 10 years ago. The firm has been a participant in the 8(a) program for just over 2 years. Prior to program participation, R&E's sales averaged around $120,000 annually, with the largest contract being only $40,000. R&E had received no government prime contract work.

This picture has changed significantly since entering the 8(a) program. Sales over the last 2 years have

averaged around $3.5 million. The largest single contract to date totaled $3.2 million for the installation and maintenance of a 10,000-line phone system for the Marine Corps. R&E would never have been able to secure a contract to install a 10,000-line phone system without the 8(a) program. Generally, solicitations require previous experience in at least three similar systems just to qualify to bid.

R&E's participation in the 8(a) program has had a major impact on the company. Sales are substantially increased, the size and scope of awards have increased markedly, and R&E is now a prime contractor to the government.

RJO Enterprises, Crofton, Maryland

RJO was established in 1979 with capabilities in information sciences, telecommunications, and computer software design. Prior to 8(a) certification, company sales averaged around $251,000 annually. RJO's largest single contract was for $80,000 to perform subcontract work to a Federal Government prime contractor. RJO did not contract as a prime to the government prior to entering the 8(a) program.

In 1985, RJO's first full year in the program, sales are projected to reach the $5 million level. The largest single 8(a) requirement for RJO to date is for $1.4 million—17.5 times larger than the largest contract prior to 8(a) certification. Here again, as a result of the 8(a) program, sales have increased significantly, the average size of contracts has increased significantly, and RJO has become a prime contractor to the government.

Roselm Industries, South El Monte, California

Roselm has been in business for 18 years manufacturing electronic cables, electronic assemblies, circuit cards, radar components, and other electronic items. Before entering the 8(a) program, the company had never been a prime contractor to the Federal Government. During that time, sales averaged around $250,000, and the largest contract never exceeded $100,000.

Sales since 8(a) certification show a different company entirely. In 1985 sales are estimated at $1.8 million. Roselm's largest single contract is a multiyear, $1.5 million award as a prime supplier to the Coast Guard for radar components. Roselm currently employs 35 skilled and technical workers in an area of high unemployment, with a projected increase to 60 employees by year's end.

By acquiring state-of-the-art equipment through the company's equity capital and other SBA programs, Roselm has increased the capability of the firm's quality assurance and product testing abilities. Having these capabilities inhouse has made Roselm much more competitive in the private sector. Currently, Roselm's clients include Rockwell International, Hughes Aircraft, Litton Industries, and Teledyne.

We again see the positive effects of the 8(a) program. Roselm is now a prime contractor to the government, sales have increased sevenfold, and the size of the firm's contracts has been increased substantially.

Southeast Machine Company, Newport News, Virginia

Southeast Machine Company was established in 1979 and was in business for a year prior to entering the 8(a) program. The company is a precision machining and fabrication house whose principal customer is currently the Department of Defense. In its first year, sales totaled $86,000, with the largest single contract equaling $26,000. This work was as a subcontractor to another defense contractor. SMC did not perform work as a prime contractor to the government prior to 8(a) certification.

During its 4 years in the 8(a) program, SMC has averaged $4 million in sales and has a 1985 projection of $8 million. The company's largest contract to date has been a $9 million, multiyear procurement for the Defense Logistics Agency. Participation in the program has meant increased sales, increase in the size of its individual contracts, and a track record as a government prime supplier.

Arral Industries, Ontario, California

Arral was established in 1968. Arral engineers and manufactures precision metal components, hydraulics, electromechanical assemblies, and related products for the aerospace, aviation, defense, and other commercial industries. For 10 years, sales fluctuated between $300,000 and $500,000 annually. During that 10-year period, Arral never received a prime contract with the Federal Government, functioning mainly as a subcontractor to defense and commercial suppliers. The company's largest single contract was in the $80,000 range.

Entry into the 8(a) program has resulted in a 1983 and 1984 sales average of around $6 million. Arral is currently in the final stages of completing a $9

million, 3½-year defense project for the manufacture of Army's field handling trainer for the Stinger missile. The company currently employs 75 people in Ontario, California (a labor surplus area).

Arral has indicated that its actual sales increase in 1983 and 1984 would have never been accomplished without the 8(a) program. The Arral example demonstrates that the program can provide valuable experience as a direct contractor with the government, in addition to larger, more significant contracts.

Amertex, San Lorenzo and Vieques, Puerto Rico

Amertex was formed in 1978 as a cut-and-sew operation (clothing, canvas products, etc.) supporting mainland U.S. manufacturers. Prior to 8(a) certification, the firm averaged around $1 million in revenues, always as a subcontractor to someone else. The firm's largest single contract never exceeded $250,000.

Certification into the 8(a) program has had a significant impact on company sales. The past 3 years in the 8(a) program have seen sales averaging $11 million, with 1985 projections at the $36 million level. The 1985 figures reflect a recent $49 million, multiyear award from the Defense Logistics Agency to manufacture fragmentation vests. Prior to this award, Amertex's largest 8(a) award was for $3 million to produce duffle bags for the same agency.

Amertex currently provides 486 jobs (semiskilled) in San Lorenzo and on Vieques Island, which is located near Puerto Rico. Unemployment in Puerto Rico is around 24 percent and exceeds 50 percent on the Island of Vieques. Vieques has gained notoriety as a favorite target practice island for U.S. naval battleships. Amertex's Vieques facility employs roughly 175 persons, thereby making a significant contribution to the local economy.

Here again, we see a pattern of the effects of the 8(a) program. As a result of 8(a) program participation, Amertex now has dramatically increased its sales, has developed direct government contracting experience, and has experienced an increase in the magnitude of the individual contracts.

Summary

Through these examples, we hope to have demonstrated the positive aspects of a minority business set-aside program. Certification as a minority 8(a) contractor has resulted in a significantly improved business posture for these companies. In each of the cases presented, we see an increase in overall sales and an increase in the magnitude of the contracts each company has negotiated. In addition, these firms are developing as prime contractors to the Federal Government.

The key is that these firms, and hundreds of other firms like them, have the requisite technical capability to become prime contractors to the Federal Government, but have no effective means to penetrate that market without the 8(a) program.

Hispanic Underrepresentation Within the 8(a) Program Portfolio

I would like to take this opportunity to address an issue of importance to LAMA. Our concern is the significant underrepresentation of Hispanics in SBA's minority business set-aside program.

Historically, Hispanics have been underrepresented in the 8(a) program. For the past decade, Hispanics have represented approximately 20 percent of the portfolio (blacks, approximately 65 percent). Some regional SBA offices are worse than others. In California (Region IX), for instance, where Hispanics constitute around 64 percent of the minority population, Hispanics represent only around 31 percent of the 8(a) portfolio.

For the past decade, Hispanics have received approximately 15 percent of the dollar value of all Federal 8(a) contracts (blacks, approximately 70 percent). The disparity is much worse in specific agencies and administrations, such as HUD, HHS, NASA, and FAA.

The 8(a) program now awards over $2.6 billion annually in contracts to its portfolio members. The shortfall to Hispanics because of their underrepresentation in the 8(a) program is in the hundreds of millions of dollars.

Pursuant to management initiatives by the current SBA administrator, James Sanders, we are beginning to see an improvement in the *ratio* of Hispanic participation in the 8(a) program. For FY 84, for instance, the dollar value of awards to Hispanic 8(a) firms moved up to 27 percent. We are concerned that these gains be consolidated and improved.

LAMA asks that the Commission support legislation mandating the SBA to conduct the 8(a) program in a manner that is more fully representative of Hispanics, Asians, and other minorities that have not shared fully in the 8(a) program. The SBA should

further institute strong management initiatives to that end, including numerical goals and timetables.

Testimony of the National Construction Industry Council

By G. Paul Jones, Jr.

Introduction

Mr. Chairman and members of the Commission, I am G. Paul Jones, Jr., chairman of Macon Prestressed Concrete Inc., located in Macon, Georgia, a construction firm specializing in precast and prestressed concrete products in Georgia, South Carolina, and adjacent States. As such, my firm operates in the capacity of both a supplier of construction materials and as a subcontractor. However, I am appearing today in my capacity as a member of the executive committee of the National Construction Industry Council (NCIC) and for which I served as chairman until March 1 of this year.

NCIC is an organization composed of 26 national trade associations representing all facets of the construction industry, including engineering and design, material supply, equipment manufacturing and distribution, general contracting, sub- and specialty contracting, and financing. Taken together, the members of NCIC represent more than 80,000 construction firms and over 100,000 design professionals throughout the United States. The construction industry is one of the most important contributors to the overall U.S. economic strength. More than 440,000 firms employing over 4.3 million workers with a payroll of $78.5 billion comprise this industry. In 1982 construction receipts totaled more than $310 billion.[1]

I am grateful for the opportunity to testify before the Commission today on a subject that has engendered profound resentment on the part of individual contractors and has continued to be the single most contentious issue to be discussed by members of the industry and the council. The testimony I deliver today will focus on only one aspect of what may be defined as "affirmative action"; that is, minority business subcontracting requirements for Federal and federally assisted construction.

At the outset, I must observe that although the council has developed consensus policies on this subject, industry members continue to disagree as to what specific actions should be taken to remedy the present problems in this area. However, it is clear that members of NCIC are in unanimous agreement that existing programs must be modified and that any continuation of the present status quo will serve only to increase resentment and to further polarize members of the construction community. A more practical consideration in this time of "deficit reductions" at the Federal level would suggest that failure

[1] 1982 Census of Construction Industries (cc82-I-s(p)), U.S. Department of Commerce, Bureau of the Census.

to change existing programs may add *10–20 percent* to the cost of Federal construction contracts.

I would also like to define, for the purposes of my testimony here today, the use of the term "quota." Many euphemisms have been applied to the statutory language developed by Congress over the years for increasing minority business utilization in connection with Federal and Federal-aid work: Objectives, guidelines, goals, quotas are all terms that have been used in this context. It is, perhaps, enlightening to hear what some of the proponents of these legislative proposals have to say on this subject.

Congresswoman Cardiss Collins, in a hearing held in 1983, stated the following in connection with DOT's regulations issued pursuant to section 105(f) of the Surface Transportation Assistance Act of 1982 (STAA 1982):

> As I understand the regulatory language, a goal is a goal and a requirement is a requirement. Minority firms must participate in the rebuilding of America's transportation network. This is a binding term in every Department of Transportation grant agreement. Yet DOT calls this a goal. Perhaps [the witness can explain] other legal and contractual requirements that [DOT] considers to be *mere* goals.[2]

And further:

> Codified early in the final regulations is a provision that reads like a decree. It pronounces that the 10 percent requirement of Section 105(f) "will be achieved if all recipients set and meet goals of at least 10 percent."[3]

A goal, which in my mind is a target to strive towards, would permit the best or good-faith efforts of the contractor to be taken into account if the goal is not reached. To those of us in the construction industry who must adhere to these rules, applied inflexibly and without concern to the hardships created even for those who are arguably to be favored, this is indeed a "decree" and, in practical application, clearly a quota.

Position and Policies of the National Construction Industry Council

Discussion of the problems associated with mandated utilization of minority or disadvantaged business enterprises (DBEs) began in NCIC in 1977, prompted by the provisions contained in the Local Public Works Capital Development Act of 1976[4] and the Public Works Employment Act of 1977.[5]

This latter act required that at least 10 percent of each grant of the Economic Development Administration (EDA) (the administering authority of programs created under the act) be spent with minority firms (either contractors or suppliers). Grantees, usually local communities or States, were responsible for assuring that 10 percent of the grant award would be spent with minority firms. This requirement was then translated into a requirement that prime contractors include assurances that 10 percent of the contract amount would be awarded to minority subcontractors or suppliers. Grantees themselves could contract directly with minority firms as prime contractors to see that this requirement was met.

However, the Secretary of Commerce was granted limited authority to waive the application of these provisions for specific grants, usually where it was shown that insufficient minority firms existed to fulfill the requirement.

The difficulty of locating qualified minority firms, *of reaching an acceptable price for work to be performed by such firms,* and of apportioning work to be performed under a contract, led many construction firms to call for either the termination of such programs or their substantive revision.

As a result, NCIC adopted two position papers on the subject in 1977. In summary, these policies generally opposed the use of preferential treatment for legislatively favored racial classes and, more to the point, the use of quotas to achieve higher disadvantaged business enterprise (DBE) utilization in the construction industry.[6]

Since the adoption of these policies, the council has continued to grapple with this issue while government programs have become more inflexible

[2] *Hearing on DOT Minority Business Enterprise Program and Section 105(f) of the Surface Transportation Assistance Act of 1982,* before a Subcommittee of the Committee on Government Operations, U.S. House of Representatives, 98th Cong., Sept. 12, 1983, p. 210.

[3] Ibid., p. 226.

[4] Title I, Public Works Employment Act of 1976, 42 U.S.C.A. §6701 *et seq.*

[5] Pub. L. No. 95–28, Title I.

[6] The NCIC position papers are available in microfiche from the U.S. Commission on Civil Rights.

and pervasive regarding the use of DBEs. As the Department of Transportation, the Environmental Protection Agency, the Small Business Administration, and other Federal agencies adopt quota requirements, more and more construction firms are drawn into the arena of contention, and the backlash against the perceived unfairness, as well as the significant increase in cost, of such programs has continued to grow.

The Nature of Opposition to Quotas in the Contract Construction Industry

At the risk of oversimplifying, the industry's opposition to the mandated use of quotas with respect to DBE utilization can be divided into two categories: the practical impossibility of achieving a specified DBE quota on any and all individual construction contracts, and the perceived unfairness of preferring certain racial classifications over others in the award of publicly funded construction work.

This first aspect, the impossibility of achieving a mandated quota on any and all construction projects, is a reflection of the problems encountered in an industry that is highly competitive (especially as to price) and composed in the main of small businesses that are family owned and operated. Further, the ease of entry into the industry is promoted by the fact that neither a great level of business sophistication nor large initial capital investments are required. The ease of entry, while promoting competition, also results in a high failure rate for firms. The true obstacles to maintaining a viable firm in the construction industry are lack of relevant expertise, inadequate working capital and cash flow, inability to obtain bonding, and inadequate experience in bidding, obtaining, and managing work.

For the minority or disadvantaged business, these problems are not susceptible to solution by the mandated use of quotas. They are solvable by programs aimed at increasing education in construction disciplines, easing of bonding requirements, expanded apprentice and training programs, more generous loan programs, and capital assistance programs.

Unfortunately, neither the 1977 public works legislation nor the subsequent DOT regulations and other similar programs take any action to eliminate these very real barriers to access to the construction market. Instead, they create new barriers based on race and designed to exclude individuals and firms with no prior history of discriminatory action of their own.

Let me now address more specifically the problem of "impossibility" I mentioned earlier. First, there is the issue of whether qualified DBEs exist in all parts of the country to perform specific contract work. There has been a considerable controversy as to whether such firms, in fact, exist and, if so, in what numbers and what locations. Speaking for the average majority contractor, I would say that there is a real problem in finding a qualified DBE in many instances. Unfortunately, the Federal Government has consistently held to the position that, whether or not such firms can be found, it is the responsibility of the prime contractor to meet the required contract quota. This has led to shams and "front" minority business enterprise (MBE) organizations and brokers, posing as MBEs.

The Comptroller General's report on the Local Public Works Employment Act programs indicates that the problem of locating qualified minority firms is a real one. Almost 50 percent of the time, prime contractors had difficulty finding the requisite DBE firm.[7] The report indicates that about half of the contractors who had problems in locating firms were forced to go outside their normal marketing area.[8] Table 1, taken from that report, provides an insight into some of the reasons why contractors had difficulties.

The absence of qualified firms, when coupled with inflexible mandated quotas, places a severe burden on contractors who do not operate in multi-State markets. Local contractors often have little way of ascertaining, in the short time span set for submitting bids, the existence and qualifications of minority firms in other States. Again, as the Comptroller General's report shows, about 45 percent of the contractors in the sample stated that they normally subcontracted with firms within their State, but were forced to go out of State to locate minority

[7] Comptroller General's Report to Congress, *Minority Firms on Local Public Works Projects—Mixed Results* (CED-79-9, Jan. 16, 1979) (hereafter cited as Comptroller General's Report), pp. 20–23.

[8] Ibid., p. 24.

TABLE 1
Problems Finding Minority Firms

Reasons	Number of times cited: Rural projects	Urban projects	Total projects
Absence of qualified minority firms in local areas	28	57	85
Unable to locate any minority firms	28	44	72
Unable to ascertain if minority firms were qualified	30	41	71
Took too long to find minority firm	27	32	59
Available minority firms lacked particular skill needed	23	34	57
Available minority firms were overbooked	14	17	31

Source: Comptroller General's Report to Congress, *Minority Firms on Local Public Works Projects—Mixed Results* (CED-79-9, Jan. 16, 1979), p. 21.

firms. This would almost certainly lead to higher costs and higher prices to the Federal Government.

In many instances, a few recognized minority firms with the necessary expertise are repeatedly called upon to satisfy the DBE requirements. During the second round of EDA projects, it was learned that one minority supply firm was used to satisfy the DBE requirements for 45 projects in North and South Dakota and that this firm was the only minority firm used on 33 of those 45 projects.[9]

Such statistics clearly indicate that mandated quotas will not serve to further appreciably the creation of DBEs or to bring new firms into the industry, but will provide increased contracting opportunities for the few that are qualified.

Of particular concern to contractors in the highway construction field is section 105(f) of the Surface Transportation Assistance Act of 1982. That provision requires that recipients of Federal-aid highway funds expend "not less than 10 percent" of the amounts authorized to be appropriated under the act with firms "owned and controlled by socially and economically disadvantaged individuals. . . ."[10]

Under the rules promulgated by the Department of Transportation to implement section 105(f), the fact that a State recipient might have a small minority population was not to be considered as a valid enough reason for obtaining a waiver from the act. Indeed, DOT has stated that although some consideration could be given to a State's minority population, "this is probably the least important of the waiver criteria."[11]

Thus, in States where no waiver has been granted and that possess small minority populations, contractors are hard pressed to find qualified DBE firms to meet subcontracting goals mandated by the act. Again, reference is made to the Comptroller General's report. Table 2 provides some guidance as to States with small minority populations in which contractors were forced to locate DBE firms out of State.

Despite the evidence indicating the difficulty in locating sufficient DBE firms in these States, other Federal programs continue to adhere to rigid compliance with DBE contracting requirements. As an example, the DOT's DBE regulations in effect during 1980 to 1982 mandated certain DBE subcontract quotas. Although it was possible for recipi-

[9] Ibid., p. 22.
[10] Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §105(f).
[11] 48 Fed. Reg. No. 40, p. 8421, Feb. 28, 1983.

TABLE 2
Minority Contracting in States with Small Minority Populations

State	Number of projects	Minority firms: Under contract	Minority firms: Out of State	Minority firms: Percent out of State
New Hampshire	68	83	57	69
Wyoming	77	76	39	51
Vermont	109	136	68	50
Kentucky	83	67	31	46
Kansas	106	142	53	37
North Dakota	101	128	41	32

Source: Comptroller General's Report to Congress, *Minority Firms on Local Public Works Projects—Mixed Results* (CED-79-9, Jan. 16, 1979), p. 24.

ents—i.e., States—to request a waiver from the provisions, DOT granted few such requests.

Indeed, two of the top three States listed in table 2 (New Hampshire and Vermont) applied for a waiver and were denied. To my knowledge, at least 21 States applied for such a waiver, and of those 21, 19 were denied. Obviously, where 42 percent of the States in this country request exclusion from a regulation issued by a Federal agency, there are substantial grounds for questioning the efficacy of that regulation.

That such a situation could arise was clearly contemplated by the sponsors of the 1976-77 public works legislation. Senator Brooke (the author of the provision in the Senate), in responding to a question from a colleague on the Senate floor during debate on the bill, stated that public works grantees are not to go out of State to find minority contractors where such firms are not available within the State. The conference report on H.R. 11 stated that the MBE requirement was "dependent on the availability of minority businesses located in the project area."[12]

Senator Durkin of New Hampshire, a State with a small minority population, stated in correspondence to the Comptroller General that EDA's regulations "forced" contractors to seek DBE firms outside of State boundaries, contrary to the intent of the drafters of the legislation:

> The obvious. . .result has been that contractors in the high unemployment local market areas are not getting the contracts to stimulate the local economy. Thus, EDA's actions run directly counter to the primary aim of the Act.[13]

With respect to the EDA projects discussed earlier, the DBE requirements appear to have partially undermined the principal purpose of the entire program. Ostensibly, the Local Public Works Employment Act of 1977 was passed to promote business and employment opportunities in those local areas suffering from higher than average recessionary impacts. It is unclear as to how local business and employment activity is promoted when there is significant reliance on out-of-State firms to meet DBE contract quotas.

Secondly, the inability to locate qualified minority firms has led to the unfortunate consequence of creating DBE firms that exist in name only. Although these firms may, in fact, be owned by minorities, they act in a brokerage capacity or are merely corporate shells that lease construction equipment, utilize project management services, and obtain bonding and loans from majority firms. Although some government studies have shown significant increases in the number of minority-owned firms, there is little attempt to determine the number of these firms that are genuine and the number that are merely shams.

Both EDA and the Office of the Comptroller General conducted investigations into the eligibility of DBE firms in connection with local public works

[12] Congressional Record, Mar. 10, 1977, S. 3910.

[13] Comptroller General's Report, app. II, p. 47.

contracts. The EDA found 449 firms of 1,386 investigated, or 32 percent, were ineligible to meet DBE requirements. The Comptroller General's staff investigated 33 firms and found 12, or 35 percent, to be of questionable eligibility.[14] In addition, several States, such as New York, held their own investigations due to the number of complaints filed regarding eligibility.

The Comptroller General's report states: "the problem of ineligible minority firms was quite extensive." However, the problem still persists despite the evidence amassed during and since that report was issued and despite the repeated testimony of contractor organizations before Congress.

Congresswoman Cardiss Collins stated, during oversight hearings on section 105(f) of the 1982 STAA:

> There was a great potential for abuse of the program by companies who operate as front or puppet companies. Several of the witnesses testified. . .and stated it was a widespread problem. Subcommittee investigation disclosed firms suspected of operating fronts. . .damaging the goals and credibility of the program.[15]

Thirdly, the cost of utilizing DBE firms is higher both to the public and to the contractor. Ultimately, the taxpayer must bear the additional costs of such programs. The report of the Comptroller General of the United States concerning the impact of the Local Public Works Employment Act of 1977 is enlightening in this regard.

That report concludes: "Project construction costs increased when contractors complied with the minority provision. Price quotes of minority firms averaged about 9 percent higher than normal prices and generally increased construction costs." (My experience suggests that the increase in MBE prices can be as much as 20–25 percent higher than normal.)

The report further states: "about 40 percent of the prime contractors on 7,196 projects had problems with the prices quoted by minority firms." The fact that competition was limited to minority firms and that such contracts were negotiated rather than bid were factors that served to increase costs.[16]

As discussed above, the necessity of utilizing out-of-State firms to meet DBE quotas also serves to increase the cost of construction projects. Other reasons exist: Supplies and services can often be purchased at a lower price from established nonminority businesses; DBEs have a higher cost of doing business; nonminority firms are called upon to provide technical assistance to minority firms that lack necessary expertise and to perform administrative functions on behalf of the minority firms; bonding requirements may have to be waived or assumed by the prime contractor; and defaults frequently occur where inexperienced minority firms are required to be used.

A further problem exists with regard to the government's administrative expenses for such programs. During the initial round of local public works projects created by the 1976–77 act, the EDA used about 25 percent of its total administrative funds for monitoring the 10 percent minority requirement. Additional appropriations had to be requested for both the first and second round of the program in order to meet the increased burden occasioned by the 10 percent requirement.[17]

More important than the issue of increased costs by themselves is the problem associated with the perversion of the competitive bidding process. It has been the policy of the Federal Government to award contracts to the lowest bidder in order to acquire the desired product or service at the lowest cost to the taxpayer while not sacrificing quality of the construction product.

Unfortunately, regardless of the increased cost of mandated DBE utilization programs and despite repeated documented evidence, these programs often result in an award going to someone other than the lowest bidder. As a typical example, a project in North Carolina had an increased cost of $21,000 because the low bidders on two prime contracts were declared nonresponsive for not meeting the minimum minority requirement. This represents an increase of 30 percent over the low bid of approximately $70,000.[18]

This again serves to increase the cost to the public, but the detrimental effects extend far beyond mere dollars and cents. An accepted method of procurement is being distorted in an effort to promote questionable affirmative action programs benefiting only a small segment of the industry. Such

[14] Ibid., pp. 25–30.

[15] *Hearings on the DOT Minority Business Enterprise Program and Section 105(f) of the Surface Transportation Assistance Act of 1982,* before a Subcommittee of the Government Operations Committee of the U.S. House of Representatives, 98th Cong.

[16] Comptroller General's Report, pp. 17–20.

[17] Ibid., pp. 16–17.

[18] Ibid., p. 20.

a practice generates tremendous resentment on the part of society not accorded such preferences—especially on the part of contractors who diligently attempt to submit bids at the lowest possible price and do so only to find that different rules apply with regard to legislatively favored classes and that such preference is accorded on the basis of racial categorization.

There has been another, more invidious, result of these quota programs. Long-established, small, family-owned and family-operated businesses are being denied access to the very markets that provide the source of their livelihood. Nonpreferred supply and subcontracting firms are being told that, despite the fact that they submit the lowest price quotes, they will not be given work because they are not members of a legislatively defined racial class.

This result is directly occasioned by attempts to meet contracting requirements for affirmative action type programs, such as that promulgated by DOT. Even though a national objective of 10 percent was established by DOT for subcontracting to DBEs, the effect on individual parts of the country and individual segments of the industry was far more pronounced. A survey of State highway agencies conducted by the American Association of State Highway and Transportation Officials in 1983 found widely disparate impacts within the United States in an attempt to meet the 10 percent requirement.[19]

Let me cite some examples. For the Federal Highway Administration's (FHWA) Region 3 (Pennsylvania, West Virginia, Virginia, Maryland, Delaware, and the District of Columbia), in the category of expenditures for subcontracting on bridges and related structures, 50 percent of the total 1983 subcontracting funds went to minority businesses. If firms owned by women (WBEs) are included, the total comes to 70 percent.[20]

For those same States, in the category of safety, 20 percent of the funds went to MBEs and an additional 30 percent to WBEs or a total reserved market share (in terms of subcontracting dollars spent in 1983) of 50 percent.[21]

Again, for FHWA Region 3, in the category of landscaping, MBEs received 40 percent and WBEs 7 percent.

For FHWA Region 6 (Texas, Oklahoma, New Mexico, Arkansas, and Louisiana), in the category of bridges and structures, the amount reserved for MBEs and WBEs was 37 percent; for safety, 51 percent; for landscaping, 69 percent.

In FHWA Region 5 (Wisconsin, Minnesota, Michigan, Indiana, Illinois, and Ohio), for the category of landscaping, a staggering 91 percent of the total subcontracting funds expended in 1983 were reserved for these favored firms.[22]

There are a number of reasons for this disparity. Primarily, firms engaged in these categories of work do not require large capital investments and the degree of expertise is not as extensive as it would be for other types of work, such as asphalt or concrete paving operations or for operation as a prime contractor. Also, this type of work is more suitable for subcontracting than other operations that would typically be performed by the prime contractor.

However, whatever the reason, it is of little comfort to the nonminority landscaping or guardrail firm that is being denied access to traditional markets because the owner is not of the preferred sex or race. The viability of these firms is being sacrificed to promote programs that are questionable in nature and effect, but appear to be politically expedient.

Legal and Constitutional Questions

There is something inherently wrong with governmental action that seeks to promote the welfare of one segment of our society at the expense of another segment, especially where those who suffer have not been shown to have occasioned any wrong and those who benefit have not been shown to have suffered at the hands of those who are required to bear the cost. Further, the perceived sense of injustice is exacerbated when these programs are based almost entirely on racial classification. What was once viewed by the courts as a "suspect criterion" is now viewed as a legitimate and justifiable method of apportioning public largess.

The local public works programs, the Department of Transportation's subcontracting requirements, the Small Business Administration's 8(a) set-aside program, and other Federal agency programs have spawned a proliferation of lawsuits during the past

[19] The survey is available in microfiche from the U.S. Commission on Civil Rights.
[20] Survey of MBE/WBE Performance and Capability in the Federal Aid Highway Program. Apr. 21, 1983. (Available in microfiche from the U.S. Commission on Civil Rights.)
[21] Ibid.
[22] Ibid.

10 years. Although a definitive answer as to the constitutionality of these laws and regulations has not yet been achieved, it is clear that many Americans believe they are suffering a new form of discrimination.

Although we believe that recent decisions of the Supreme Court (beginning with the *Stotts* case) have produced a more equitable judicial doctrine, it appears that the courts have not moved beyond its application to employment situations. We fail to ascertain any difference in the discriminatory impact of government programs that, on the one hand, are declared to be illegal in the employment area while, on the other hand, are allowed to stand where contracting opportunities are involved.

The SBA's 8(a) set-aside program, DOT's DBE subcontracting rules, and the minority contracting goals contained in the local public works programs all suffer from the same deficiency. They seek to reserve business opportunities for racially defined classes at the expense of nonminorities. They are predicated upon the concept that those racial classes that are preferred are entitled to be compensated at the expense of other groups in our society simply because of membership in a preferred class. There is no required showing of discrimination against any individual or firm before eligibility is conferred; there is no showing of discriminatory action on the part of any nonfavored individual or firm before such individual or firm is denied the opportunity to bid or undertake work.

Further, unlike court-ordered, make-whole remedies that compensate specifically identified victims of illegal discrimination by the award of a defined quantity, be it backpay or seniority or other damages, government DBE contracting preferences are accorded on a continuing, open-ended basis. If a firm meets the racially defined criteria, that firm may continue to avail itself of preferred contracting opportunities without regard to the dollar volume of business obtained or the number of contracts secured. Further, no attempt is made to apportion any of the projects or contracting opportunities reserved for legislatively preferred classes among the members of these preferred classes in relation to any past harm they may have suffered or future harm they might reasonably be expected to encounter.

These programs, beginning with the SBA's 8(a) set-aside initiative in 1968, are not temporary experiments designed to expire once additional market penetration is deemed to have been achieved by those favored under the programs. They constitute permanent and continuing procurement practices reserving a statutorily defined percentage of public contracts for certain favored groups. There is no indication that the sponsors of these acts had any expiration date in mind when they created the programs nor is there any indication that the percentage of contracting opportunities to be reserved would be reduced or modified upon a showing of success.

Indeed, quite the opposite is true. From the outset of SBA's initiative, more and more government agencies have devised their own form of DBE programs. DOT, EPA, the Commerce Department, the Interior Department, the State Department, the Agriculture Department, and others continue to reserve contracting opportunities on the basis of racial criteria.

That racial discrimination is a part of this country's history is an undeniable fact. That it continues to linger is an ugly truth. That minorities of every kind have suffered at the hand of such discrimination, and not merely suffered in a business or economic sense, is incapable of question. But there is another legacy contained in our development. It is a deep and abiding respect for the rights of the individual, and it can be found in the Constitution upon which the legitimacy of all our laws is predicated. The rights and benefits afforded under the Constitution are guaranteed to the individual. They are, by their very nature, personal rights, not group rights.

Under our system of justice, no one is accorded any special treatment or is obliged to suffer any detriment because of ethnic origin, race, or religious preference. Yet, the objective of these set-aside programs is precisely that: to accord a benefit, in the form of an exclusive and protected market, to a class of individuals denominated solely by their racial characteristics. At the same time, these laws and regulations create a bar to others in our society, denying them the opportunity to receive a governmental benefit because they fail to have the preferred racial or ethnic ancestry.

Nowhere in the language creating these programs can be discerned any attempt either to measure the recovery by the extent of the wrong complained of or to distribute that recovery equally and fairly among those comprising the injured class. Equally absent is any attempt to limit participation in these programs to those who have actually suffered the

effects of discrimination or to seek recovery from those firms who have actually occasioned the discriminatory practices in the past. Neither the innocent nor the guilty, the victim or the nonvictim is accorded any different treatment under these programs. Nonminority firms and grantees who have an established history of actively seeking to place contracts and subcontracts with minority firms are afforded no better treatment than firms with a history of discriminatory practices. Good-faith efforts are irrelevant.

Similarly, minority firms that may have long suffered the effects of discrimination are accorded no more preferential treatment than firms newly created that may have never been harmed by such conduct.

The only criterion set forth according entitlement is membership in a legislatively defined racial or ethnic class. The only criterion set forth excluding entitlement is race or ethnic background. The concepts of individual accountability, of individual compensation and reward, and of individual rights are totally abandoned.

We cannot agree with this approach, no matter how temporary, no matter how well intended. The national government, by resurrecting race as a relevant criterion for the disposition of benefits in our society, as opposed to individual merit and ability, sends a clear message to all its citizens: Any ethnic, religious, or racial group that possesses the political power to negotiate a settlement in the legislative branch of government can take all it can as fast as it can for as long as it can.

AFFIRMATIVE ACTION AS A REMEDY FOR DISCRIMINATION IN EMPLOYMENT AND BUSINESS CONTRACTING: STRATEGIES FOR THE FUTURE

What Was Affirmative Action?

By Jonathan S. Leonard*

Affirmative action, mandated by Executive Order 11246 in 1965, is one of the most controversial government interventions in the labor market since abolition. Although much has been said concerning the propriety of affirmative action in theory, little is known about the impact of affirmative action in practice. If affirmative action has not changed the employment patterns of nonwhites and females, then much of the discussion since 1965 of its philosophical merits amounts to shadow boxing. The goal of affirmative action is to increase employment opportunities for females and minorities. Has affirmative action been successful in achieving this goal? In this study, affirmative action will refer to the provisions related to race, color, and sex of Executive Order 11246 as amended by Executive Order 11375.[1] This is distinct from affirmative action required as a remedy by judicial decision, which shall not be discussed here.

The purpose and development of affirmative action cannot be fully understood outside of history, a history that includes most saliently the institution of slavery in the 18th and 19th centuries, and the civil rights movement of the mid-20th century. The genesis in discord and crisis of the first Executive order by President Roosevelt is most instructive. To protest employment discrimination at the beginning of World War II, A. Philip Randolph, president of the Sleeping Car Porters Union, threatened to disrupt the defense effort by a mass demonstration of blacks in Washington, D.C., on July 1, 1941. Less than a week before the planned rally, Executive Order 8802 was issued and the demonstration called off.[2] In the words of the U.S. Commission on Civil Rights the Executive order was prompted by "the threat of a Negro march on Washington, which would have revealed to the world a divided country at a time when national unity was essential. . . ."[3] Accommodation was only reached under dire threat and even then was of a limited nature.

The distance this country has come in terms of the growing import of affirmative action, expanding intervention by the Federal Government, and changing attitudes towards discrimination since 1941 can best be judged by considering the words of Mark Ethridge, first Chairman of the Fair Employment Practice Committee, established to supervise compliance with the Executive order. In the following quote, Ethridge sharply limits the scope of

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[1] 3 C.F.R. §169 (1974).

[2] Goldstein, 1981, p. 10.

[3] USCCR, 1961, p. 10.

antidiscrimination policy in a manner startling to modern eyes:

> Although he defended the granting of civil rights and equal opportunity to Negroes, he also affirmed his personal support of segregation in the South. Stressing that "the committee has taken no position on the question of segregation of industrial workers," he emphasized that "Executive Order 8802 is a war order, and not a social document," that it did not require the elimination of segregation, and that had it done so, he would have considered it "against the general peace and welfare. . .in the Nazi dictatorial pattern rather than in the slower, more painful, but sounder pattern of the democratic process."[4]

Of course, the delicate question of how to remedy swiftly the harm done by discrimination without distorting the democratic process is still with us, as is the question of whether the democratic process can function well outside an integrated society. Democratic society requires a consensus for change, but it depends upon the full participation of its members. The last 40 years have witnessed a slow and at times painful process of confrontation and accommodation, developing a consensus that provides the foundation for a lasting change in attitudes towards discrimination.

Prior to Executive Order 10925, issued March 6, 1961, by President Kennedy, the antidiscrimination program for Federal contractors lacked any real teeth. In a detailed study of the presidential Fair Employment Practice Committees, Norgren and Hill[5] state: "One can only conclude that the twenty years of intermittent activity by presidential committees has had little effect on traditional patterns of Negro employment," and that "It is evident that the non-discrimination clause in government contracts was virtually unenforced by the contracting agencies during the years preceding 1961." Compliance programs, such as Plants for Progress and its predecessors, were voluntary. Their history strikes at least a cautionary note about the effectiveness of programs that have no legal sanctions behind them. The 1961 Executive order was the first to go beyond antidiscrimination and to require contractors to take affirmative action, and the first to establish specific sanctions, including termination of contract and debarment. Coming on the heels of Title VII of the Civil Rights Act of 1964, Executive Order 11246, which made the Secretary of Labor rather than a presidential committee responsible for administering enforcement, was the first to be enforced stringently enough to provoke serious conflict and debate. On October 13, 1967, Executive Order 11375 amended 10246 to expand its coverage to women, although effective regulation against sex discrimination did not reach full stride until after the Equal Employment Act of 1972 was enacted.

The details of the affirmative action obligation began to be elaborated in a twisting history. Detailed regulations, including numerical goals, were introduced in 1969, after the Comptroller General ruled that the affirmative action obligation was too vague to fulfill the requirement that minimum contract standards be made clear to prospective bidders.[6] Numerical goals were first introduced in the manning tables embodied in the Cleveland and Philadelphia plans for construction contractors,[7] and later won the tacit approval of Congress and the courts.

Under Executive Order 11246, Federal contractors agree:

> not to discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin, and to take affirmative action to ensure that applicants are employed and employees are treated during employment without regard to their race, color, religion, sex or national origin.[8]

This language imposes two obligations: first, not to discriminate; second, whether or not there is any evidence of discrimination, to take affirmative action not to discriminate. It is a measure of this Nation's progress that the first obligation is now largely beyond debate. The redundant-sounding second obligation, however, is anything but. It has provoked continual controversy, and its meaning and effect are not well understood. In the heated political arguments over whether and what affirmative action should be, mythic visions have come to overwhelm any clear conception of what affirmative action actually is. To say that this second obligation, as it has been developed in the regulations, has provoked a good deal of debate would be a considerable understatement.[9] In the words of one legal expert:

> The affirmative action obligations imposed by the Contract Compliance Program are separate and distinct from non-discrimination obligations and are not based on proof

[4] Ruchames, 1953, p. 28.
[5] 1964, p. 169, p. 171.
[6] 48 Comp. Gen. 326 (1968).
[7] See Jones.
[8] 3 C.F.R. §169 202(1) (1974).
[9] See also Fiss (1971) and Glazer (1975).

of individual acts of discrimination. At the logical extreme, affirmative action and non-discrimination obligations can be viewed as mutually exclusive and inconsistent. . .in practice, the non-discrimination and affirmative action obligations may be incompatible when, for example, a less qualified, less senior female or black is granted a job preference that disadvantages a male or white solely on the basis of sex or race to achieve an affirmative action commitment.[10]

In the past the affirmative action obligation has been criticized as being vague and open-ended. In 1967 the Director of the OFCC, Edward Sylvester, stated:

> There is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything you have to do to get results. . . .Affirmative action is really designed to get employers to apply the same kind of imagination and ingenuity that they apply to other phases of their operation.[11]

To be vague concerning methods is the ideal decentralized approach, but this is also vague about the critical issue of ends. What is the goal against which results are judged: nondiscrimination or increased minority and female employment? The distinct, practical question of whether the two can be distinguished in an operational sense is, of course, one of the important questions that will concern us here.

Past Studies

The literature on affirmative action can be divided into studies of the regulatory process that find it mortally flawed and studies of impact that find it successful. The process studies by the U.S. Commission on Civil Rights (USCCR), the General Accounting Office (GAO), and the House and Senate Committees on Labor and Public Welfare all conclude that affirmative action has been ineffective and blame weak enforcement and a reluctance to apply sanctions. For example, in its 1975 appraisal of the contract compliance program, the GAO found (p. 30) that: "The almost nonexistence of enforcement actions taken could imply to contractors that the compliance agencies do not intend to enforce the program." That this is not merely politics can be judged from the fact that the Department of Labor has been sued with some measure of success more than once for failure to enforce affirmative action properly.[12] Debarment, the ultimate sanction, has been used only 26 times; debarment of the first nonconstruction contractor did not occur until 1974. The GAO and USCCR have found that other forms of regulatory pressure, such as preaward reviews, delay of contract award, and withholding of progress payments, have not been forcefully and consistently pursued. However, as evidenced by the increased incidence of debarment and backpay awards, enforcement did become more aggressive after 1973.

In light of the unanimity of these process studies in finding the affirmative action regulatory mechanism seriously deficient, it is surprising that the few econometric studies of the impact of affirmative action in its first years,[13] all based on a comparison of EEO–1 forms by contractor status, have generally found significant evidence that it has been effective for black males. These few studies of the initial years of affirmative action (1966–73) are not directly comparable because of different specifications, samples, and periods. They do find, nevertheless, that despite weak enforcement in its early years, and despite the ineffectiveness of compliance reviews, affirmative action has been effective in increasing the black male employment share in the contractor sector, but generally ineffective for other protected groups.[14] Of the four studies, Goldstein and Smith (1976) find the weakest effects. Their results indicate a 0.0004 yearly increase in black males' share of total employment and a decrease in the ratio of black to white males among nonreviewed contractors between 1970 and 1972. Heckman and Wolpin's (1976) results indicate an effect that is an order of magnitude greater, a 0.007 annual increase in black males' share of total employment between 1972 and 1973, comparing contractors and noncontractors. For comparison, Burman (1973) reports roughly a 0.003 annual increase in black males' share of male employment in the late sixties, and Ashenfelter and Heckman's (1976) results indicate a 0.0086 yearly increase in the ratio of black to white males between 1966 and 1970. These past studies are all based on data for a period that largely predates the beginning of substantial enforcement of regulations barring sex discrimination, the start of

[10] Smith, p. 1028.
[11] Report, 1967, p. 73–74.
[12] *See, e.g.,* the case of Legal Aid Society of Alameda County v. Brennan, 608 F.2d 1319 (9th Cir. 1979), *cert. denied,* 100 S.Ct. 3010 (1980).
[13] Burman 1973; Ashenfelter and Heckman 1976; Goldstein and Smith 1976; Heckman and Wolpin 1976.
[14] See Brown for a review.

aggressive enforcement in the mid-seventies, and the major reorganization of the contract compliance agencies into the OFCCP in 1978.

Despite weak enforcement in its early years, these studies generally conclude that affirmative action under the contract compliance program did lead to significant increases in black males' employment share in contractor firms. This econometric finding of a positive result is all the more notable in light of the consistently negative appraisal of the OFCCP's regulatory mechanism by Congress, the courts, the GAO, and the USCCR.

The Impact of Affirmative Action on Employment

Has affirmative action been effective in increasing the employment of minorities and women? Affirmative action under the Executive order applies only to Federal contractors. One method of judging the effectiveness of affirmative action is, then, to compare the growth of minority and female employment at Federal contractor establishments with their employment growths at similar establishments that do not bear the affirmative action obligation. With the cooperation of the U.S. Department of Labor, I performed such a comparison using EEO–1 data on employment demographics reported by 68,690 establishments in 1974 and 1980. This sample includes more than 16 million employees. The results summarized here are reported at length in Leonard (1983 and 1984a).

Table 1[15] compares the mean employment share of demographic groups in 1974 and 1980 across contractor and noncontractor establishments. Between 1974 and 1980, black male and female, and white female employment shares increased significantly faster in contractor establishments than in noncontractor establishments. The other side of this coin is that white males' employment share declined significantly more among contractors. Employment shares have increased for nonblack minorities, but the differences across sectors in table 1 are not always significant.

Affirmative action appears to have similar effects once other variables are controlled for. In other work I have estimated the impact of affirmative action after controlling for establishment size, growth region, industry, and occupational and corporate structure. These additional controls help assure that differences between contractor and noncontractor establishments reflect the impact of affirmative action rather than other unobserved differences.

Table 2[16] shows a consistent pattern across demographic groups of effective affirmative action. Over a 6-year period the employment of members of protected groups grew significantly faster in contractor than in noncontractor establishments. The growth rate is 3.8 percent faster for black males, 7.9 percent for other minority males, 2.8 percent for white females, and 12.3 percent for black females. A summary measure, white male employment, grew 1.2 percent slower in the contractor sector. All of these effects are significant at the 99 percent confidence level or better, and the effects for blacks and for white males are robust across a number of specifications.

The demand shift for black males relative to white males estimated here for contractor status is similar to that previously estimated by Ashenfelter and Heckman (1976) and by Heckman and Wolpin (1976). The growth rate of black male employment over 6 years in the contractor sector is 3.8 percent greater than among noncontractors. Taking the sixth root yields an annual growth rate that is 0.62 percent greater in the contractor sector. For white males, the annual growth rate is 0.2 percent slower among contractors, so contract status appears to shift the demand for black males relative to white males by 0.82 percent per year. For comparison, using a different specification in a sample of integrated establishments for the earlier period 1966–70, Ashenfelter and Heckman report an annual shift corresponding to 0.86 percent per year.

Compliance reviews have played a significant role over and above that of contractor status, advancing black males by 7.9 percent, other minority males by 15.2 percent, and black females by 6.1 percent among reviewed establishments. Compliance reviews have retarded the employment growth of whites. The effect is significantly negative in the case of white females, but small and insignificant in the case of white males—whom one would have expected to bear the brunt of the adjustment. The anomalous result for white females is sensitive to specification. It is also difficult to reconcile with the positive impact of contractor status on white fe-

[15] Reproduced from Leonard 1984a.

[16] Reproduced from Leonard 1984a.

TABLE 1
Proportion of All Employees

Line	Demographic group	Contractor status	1974 Mean	1974 σ	1980 Mean	1980 σ	MeanΔ	Mean%Δ
1	Black	N	.053	.10	.59	.10	.006	28
2	Males	Y	.058	.10	.067	.10	.008	33
3			(6.0)		(9.4)		(6.5)	(3.6)
4	Other	N	.034	.10	.046	.10	.012	52
5	Minority	Y	.035	.08	.048	.09	.013	58
6	Males		(1.6)		(2.1)		(1.2)	(2.1)
7	White	N	.448	.27	.413	.26	- .034	–2
8	Males	Y	.584	.26	.533	.25	- .047	–4
9			(66.7)		(66.5)		(16.4)	(2.0)
10	Black	N	.047	.10	.059	.11	.012	47
11	Females	Y	.030	.07	.045	.08	.015	77
12			(24.0)		(19.2)		(5.7)	(10.8)
13	Other	N	.024	.08	.036	.08	.012	65
14	Minority	Y	.016	.05	.028	.06	.012	77
15	Females		(14.8)		(13.0)		(1.1)	(3.2)
16	White	N	.394	.27	.400	.26	.006	17
17	Females	Y	.276	.23	.288	.23	.012	30
18			(59.7)		(57.8)		(7.8)	(11.9)
19	Total	N	186	286	209	341	23	17
20		Y	271	728	276	720	5	21
21			(21.2)		(16.2)		(10.7)	(3.3)

Note: *T*-tests across means in parentheses, on every third line. In every case, *F*-tests reject equality of variances across contractors and noncontractors, with more than 99% confidence. The last col. is the mean of percentage changes, not the percentage of change in means. *N* = noncontractor in 1974 (27,432 establishments); *Y* = contractor in 1974 (41,258 establishments).
Reproduced from Leonard 1984a.

TABLE 2

The Effect of Contractor and Review Status on Employment Growth by Demographic Group
(N = 68,690)

	Equations									
	White males		Black males		Other males		White females		Black females	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
CONTRACT	−.012	−.032	.038	.056	.079	−.017	.028	.088	.123	.015
	(.003)	(.014)	(.011)	(.048)	(.014)	(.058)	(.006)	(.026)	(.013)	(.055)
REVIEW	−.00075	−.067	.079	−.189	.152	−.309	−.030	− .049	.061	.567
	(.004)	(.023)	(.015)	(.078)	(.018)	(.095)	(.008)	(.042)	(.017)	(.090)
1n GROWTH	.976	.982	1.223	1.117	1.087	.952	1.016	.970	1.190	1.067
	(.003)	(.005)	(.009)	(.018)	(.010)	(.022)	(.005)	(.010)	(.010)	(.021)
1n SIZE	.0018	−.0018	.0019	.0002	.050	.029	−.005	.003	.020	.013
	(.0011)	(.002)	(.0040)	(.007)	(.0040)	(.009)	(.002)	(.0049)	(.004)	(.008)
SINGLE	.028	.029	−.010	−.003	.064	.077	−.077	− .077	−.076	−.066
	(.004)	(.004)	(.013)	(.013)	(.016)	(.016)	(.007)	(.007)	(.015)	(.015)
PWC	−.076	−.066	.093	.087	−.006	−.016	−.029	− .034	.006	.003
	(.007)	(.007)	(.002)	(.022)	(.026)	(.027)	(.012)	(.012)	(.025)	(.025)
CXG	...	−.0009	...	.126	...	.153	...	.042	...	.113
		(.006)		(.021)		(.025)		(.011)		(.024)
CXS	...	.0037	...	−.002	...	.018	...	− .010	...	.018
		(.002)		(.008)		(.010)		(.004)		(.009)
RXG	...	−.043	...	.057	...	.124	...	.107	...	.294
		(.008)		(.027)		(.032)		(.014)		(.031)
RXS	...	.009	...	.038	...	.066	...	.004	...	−.067
		(.003)		(.011)		(.013)		(.006)		(.012)
R^1	.70	.70	.25	.25	.15	.15	.45	.45	.20	.20

Note: Standard errors in parentheses. All equations include 27 industry and 4 region dichotomous variables. CONTRACT is a dichotomous variable set to 1 if the establishment was part of a Federal contractor company in 1974. REVIEW is a dichotomous variable set to 1 if the establishment had a compliance review between 1975 and 1979. SINGLE is a dichotomous variable set to 1 if the establishment was not part of a multiestablishment company. PWC is the proportion of nonclerical white-collar employees in 1974. SIZE is total employment in 1974. GROWTH is total employment growth rate, 1974–80. CXG is the interaction of CONTRACT × 1n GROWTH. CXS is the interaction of CONTRACT × 1n SIZE. RXG is the interaction of REVIEW × 1n GROWTH. RXS is the interaction of REVIEW × 1n SIZE. The dependent variable is the logarithm of the growth rate of employment of the given group.
Reproduced from Leonard 1984a.

males, but may be influenced by a review process that asks for more than last year, rather than more than average, in a time of sharply increasing female labor supply. For black and other minority males, the impact of undergoing a compliance review is roughly twice that of being a contractor. With the exception of white females, compliance reviews have an additional positive impact on protected group employment beyond the contractor effect. Direct pressure does make a difference.

The estimate in equation (3) is that the growth rate of black males' employment increased 3.8 percent more in contractor establishments, not counting the direct effect of reviews: 6.8 percent of all contractor establishments, accounting for 17.4 percent of all contractor employment, were reviewed in subsequent years. In these establishments, the black male growth rate was an additional 7.9 percent faster than in nonreviewed contractors, so 12 percent faster than noncontractors. The total impact of affirmative action among contractors is, then, the weighted average of the annual 0.62 percent shift among nonreviewed contractors and the 1.91 percent shift among reviewed contractors, or 0.84 percent per year. The demand shifts for other minority males, white females, and black females are 1.69 percent, 0.37 percent, and 2.13 percent, respectively. The shift is largest for black females, although the ranking of these effects is sensitive to specification.

Employment opportunities depend critically on growth. Table 2 also indicates that minorities and females experienced significantly greater increases in representation in establishments that were growing and so had many job openings. The elasticity of white male employment growth with respect to total employment growth is 0.976, significantly less than 1. This indicates that members of protected groups dominate the net incoming flows in both contractor and noncontractor establishments. The respective elasticities for black males, other males, white females, and black females are 1.22, 1.09, 1.02, and 1.19, all significantly greater than 1. Particularly in the case of blacks, of whom the quantity supplied has not greatly increased, this suggests the importance of Title VII, which applies to all establishments in the sample, in expanding employment opportunities. Establishments that are not part of multiplant corporations have significantly lower growth rates of employment of members of protected groups. Corporate size is probably of greater consequence than establishment size, with larger corporations showing greater increases in minority and female employment. Establishment size itself has insignificant effects on white and black males, but other males and black females grow significantly faster at larger establishments, while white females grow significantly slower. It is also important to note that the tests here also control for the skill requirements of each establishment. Establishments that are nonclerical white-collar intensive exhibit faster employment growth for both male and female blacks and significantly slower growth for white males.

The efficacy of affirmative action depends critically on employment growth. The even-numbered equations in table 2 include interactions of contractor and review status with establishment size and growth rate. In every case, being a contractor or undergoing a compliance review have significantly greater effects if the establishment is growing. The evidence with respect to interactions of affirmative action with establishment size is mixed. To illustrate, equation (4) indicated that although black male employment grows 5.6 percent faster at contractor establishments than at noncontractor establishments with stable employment, it grows 6.7 percent faster at the mean total employment growth rate of 5.1 percent and 7.4 percent faster if total employment grows by 15 percent. Affirmative action has been far more successful at establishments that are growing and have room to accommodate Federal pressure.

The tests presented here suggest that although generating tremendous public criticism and resistance and although undergoing frequent regulatory reorganization, affirmative action has actually been successful in promoting the employment of minorities and females, though less so in the case of white females. In the contractor sector over a 6-year period, affirmative action has increased the demand relative to white males for black males by 6.5 percent, for nonblack minority males by 11.9 percent, and for white females by 3.5 percent. Among females, it has increased the demand for blacks relative to whites by 11.0 percent. For a program lacking public consensus and vigorous enforcement, this is a surprisingly strong showing. Although the gains of white females are smaller than those of blacks, it is important to keep in mind that the employment of females and minorities has been increasing in both sectors. Indeed, if the OFCCP pressured establishments to hire more females and

minorities relative to their own past records rather than to industry and region averages, the observed pattern is just what we would expect to see during a period when the female labor supply had been growing. Females' share would increase at all establishments because of the supply shift, and contractor establishments would be under little pressure to employ more females than noncontractors. The relatively short history of affirmative action for females may also help explain the differential impact of affirmative action across protected groups.

This section has reviewed significant large-sample evidence with detailed controls at the establishment level. Members of protected groups have enjoyed improved employment opportunities at contractor establishments subject to affirmative action, and compliance reviews appear to have been an effective tool in changing employment patterns. The evidence here is that a process that has been frequently criticized as largely an exercise in paper pushing has actually been of material importance in prompting companies to increase their employment of minorities and females.

Occupational Advance

One of the major affirmative action battlefields lies in the white-collar and craft occupations. It is in these skilled positions that employers are most sensitive to productivity differences and have complained the most about the burden of goals for minority and female employment. It is also in this region of relatively inelastic supply that the potential wage gains to members of protected groups are the greatest.

All four past studies of the impact of affirmative action on occupational advance have found that although affirmative action increases total black male employment among Federal contractors, it does not increase their employment share in the skilled occupations. Burman (1973) found the employment impact of affirmative action to be largest in clerical and operative occupations, and negative, though insignificant, for managers between 1967 and 1970. He also found that affirmative action had an insignificant impact on an index of occupational status. Ashenfelter and Heckman (1976) extended these results, finding that affirmative action led to increases in black males' employment share, but that this was largest and most significant among operatives between 1966 and 1970. At the tops of occupational ladders, black males' share was estimated to fall relative to that of white males in the contractor sector, sometimes significantly. Overall, Ashenfelter and Heckman found no significant impact of contractor status on the relative occupational position of black workers. Goldstein and Smith (1976) found similar results between 1970 and 1972. Heckman and Wolpin (1976) found that black male employment gains were concentrated in blue-collar occupations between 1972 and 1973. They also found that contractors utilized a greater proportion of white males and fewer blacks and females than did noncontractors in the white-collar occupations.

These studies suggest that contractors have been able to fulfill their obligations by hiring into relatively unskilled positions. Before 1974 affirmative action appears to have been more effective in increasing employment than in promoting occupational advancement. Some might argue that such a result is only to be expected, given a short supply of skilled minorities or females. The presumption behind affirmative action, however, is that trainable members of protected groups will be considered for skilled employment. Even in the case of a small fixed supply, in its initial years affirmative action should induce a reshuffling of skilled blacks and women from noncontractor to contractor firms, without any upgrading of individuals necessary. By the late 1970s affirmative action was no longer as ineffective as it may have been in its early years in increasing minority employment in skilled occupations, according to results summarized here from Leonard (1984b). This difference may reflect the increasing supply of highly educated blacks, as well as a more aggressive enforcement program, in particular the consolidation of enforcement activities into the Office of Federal Contract Compliance Programs (OFCCP) in 1978.

The full story of the impact of affirmative action requires an analysis of employment data within disaggregated occupations. To test this, Leonard (1984b) regresses the change in employment share on contractor and review status, establishment size, corporate structure, industry, region, and growth of total employment for the given demographic group, in samples of establishments reporting employment in nine occupations and two trainee positions. The evidence is most striking in the case of black males. In every occupation except laborers and white-collar trainees, black males' share of employment

has increased faster in contractor than in noncontractor establishments, and except for operatives and professionals, these differences are significant. This impact is found in both the proportionate change in black males' share of total employment and the proportionate change in the ratio of black male to white male share.

The marginal impact of a compliance review, conditional on contractor status, is also tested. The relative importance of being a contractor and of being a reviewed contractor is mixed across occupations, but in every case, except blue-collar trainees and clerks, reviewed establishments have increased black males' employment share more than nonreviewed contractors.

The total impact of the contract compliance program, the weighted sum of contractor and review effects, shows some evidence of a twist in demand toward more highly skilled black males. The contract compliance program has not reduced the demand for black males in low skilled occupations, except for laborers. It has raised the demand for black males more in the highly skilled white-collar and craft jobs than in the blue-collar operative, laborer, and service occupations. Although this may help explain why highly skilled black males have been better off than their less skilled brethren, it does not help explain why low skilled black males should be having greater difficulty over the years in finding and holding jobs.

Affirmative action has also helped nonblack minority males, although to a lesser extent. There is evidence of a twist in demand toward Hispanic, Asian, and American Indian males in white-collar occupations, particularly in sales and clerical positions, and away from this group in operative and laborer positions. Compliance reviews have had a strong and significant additional impact in the professional, managerial, and craft occupations. The total impact of the contract compliance program on nonblack minority males is positive in the white-collar, craft, and service occupations, and in training programs. Relative to white males, affirmative action has increased the occupational status of nonblack minority males by 2 percent.

The evidence within occupations suggests that the contract compliance program has had a mixed and often negative impact on white females. For technical, sales, clerical, craft, and trainee workers, contractor status is associated with a significant decline in white females' employment share. Compliance reviews have also often had a negative impact. Although both contracts and reviews produce a significant 1 percent increase in white females' occupational status, this positive impact disappears when changes in white females' occupational status are compared to the relatively greater gains of white males.

In contrast to whites, black females in contractor establishments have increased their employment share in all occupations except technical, craft, and white-collar trainee. Compliance reviews have had a mixed effect across occupations. The positive impact of the contract compliance program is even more marked when the position of black females is compared with that of white females. Overall, black females' index of occupational status has increased 1 percent relative to that of white females under affirmative action.

The conclusion drawn from this detailed analysis of employment by occupation is that, with the exception of white females, affirmative action appears to have contributed to the occupational advance of members of protected groups. In particular, for nonwhite males affirmative action has increased demand relatively more in the more highly skilled occupations. In a useful and important paper, Smith and Welch (1984) show that part of this occupational upgrading may be overstated because of biased reporting on EEO-1 forms, in particular the upward reclassification of minority- or female-intensive occupations. The finding of occupational advance for nonwhite males in Leonard (1984b) is reinforced by evidence from CPS wage equations that affirmative action has narrowed the difference in earnings between the races by raising the occupational level of nonwhite males. These wage equations are reported at greater length in other work.[17] To the extent that contractors may have selectively reclassified upwards black- and female-intensive detailed occupations at a faster rate than did noncontractors, this study and its predecessors will overstate the actual occupational advance due to affirmative action. Of course, pure reclassification would cause black losses in the lower occupations, which is generally not observed.

Affirmative action does not appear to have directly contributed to the economic bifurcation of the

[17] Leonard 1984d.

black community. As Leonard (1984d) shows, minority male wages increase relative to those of white males in cities and industries with a high proportion of employment in Federal contractor establishments subject to affirmative action, although the effect is not always significant. Affirmative action appears to increase the demand for lowly educated minority males as well as for the highly educated.

If minorities and females do not share the skills and interests of white males, then perhaps the best one can expect from an affirmative action program is to increase their employment. But to the extent that minorities and females share the qualifications and interests of white males, an effective affirmative action program should improve their chances of sharing the same occupations too.

Just as no policy works in isolation, so none can be evaluated in isolation. The major finding reviewed in this section is that affirmative action has increased the demand for minorities in skilled jobs in the contractor sector. The relative demand shift has been greater for skilled than unskilled workers. The success of this program in skilled occupations after 1974, where none had been observed before, is probably due in part to the increasing supply of skilled minorities in many fields, as well as to the more aggressive use of sanctions after the early 1970s. The weaker results for white females must be considered in light of the massive increase in female labor supply that has led to increased female employment throughout the economy and that may have obscured the contractor effect. We have also seen minorities and females enjoying the greatest gains at growing establishments, both contractor and noncontractor. The lesson drawn is that affirmative action programs work best when they are vigorously enforced, when they work with other policies that augment the skills of members of protected groups, and when they work with growing employers.

Goals or Quotas?

Have these employment advances been achieved through the use of rigid quotas? The goals and timetables for the employment of minorities and females drawn from Federal contractors under affirmative action stand accused of two mutually inconsistent charges. The first is that "goal" is really just an expedient and polite word for quota. Affirmative action has really imposed inflexible quotas for minority and female employment. The second is that these goals are worth less than the paper they are written on. Affirmative action is a game played for paper stakes and has never been enforced stringently enough to produce significant results.

Under Executive Order 11246, Federal contractors are required to take affirmative action not to discriminate and to develop affirmative action plans (AAPs), including goals and timetables, for good-faith efforts to correct deficiencies in minority and female employment. The aim of this section, which summarizes Leonard (1985b), is to measure good faith, to determine what affirmative action promises are worth. Is negotiation over affirmative action goals an empty charade played with properly penciled forms, or does it, in fact, lead to more jobs for minorities and females in the contractor sector? If the latter is the case, are these goals so strictly adhered to as to constitute quotas? Since the reviews examined here have already been shown to be useful,[18] the question here is not "Are reviews effective?" but rather "Do promises extracted during the review process contribute to the impact of reviews?"

It is not beyond reason to suppose that they do not. Neither the penalties for inflating promises to hasten the departure of Federal inspectors nor the prospects of being apprehended seem great. The ultimate sanction available to the government in the case of affirmative action is debarment, in which a firm is barred from holding Federal contracts. The first debarment of a nonconstruction contractor did not take place until 1974, and in total only 26 firms have ever been debarred. If the Office of Federal Contract Compliance Programs (OFCCP) finds the establishment's affirmative action plan unacceptable, it may issue a show-cause notice as a preliminary step to high sanctions. This step has been taken in only 1 to 4 percent of all reviews.[19] Of these, one-third to one-half involve basic and blatant paperwork deficiencies such as the failure to prepare or update an AAP.[20]

The other major sanction used by the OFCCP is backpay awarded as part of a conciliation agreement. In 1973 and 1974, $54 million was awarded in 91 settlements, averaging $63 per beneficiary.[21] In 1980, in an even more skewed distribution, $9.2

[18] Leonard 1984a.

[19] USCCR, 1975, p. 297.

[20] US GAO, 1975, p. 26.

[21] US GAO, 1975, p. 46.

million was awarded to 4,336 employees in 743 conciliation agreements.[22] These beneficiaries represented less than two-thirds of 1 percent of all protected group employees at just the reviewed establishments. Although these affirmative action sanctions have not been heavily employed, in many cases regulatory sanctions, like weapons of war, are judged most successful just when they are used the least. That does not seem to be the case here. The U.S. Civil Rights Commission, the General Accounting Office, committees of both Houses of Congress, and the courts have all concurred in the judgment that the contract compliance agencies have not made full and effective use of the sanctions at their disposal.

The low penalties if caught are compounded by the low probability of apprehension, although the Department of Defense (DOD), upon whose review this section concentrates, had one of the most vigorous programs. In 1976, DOD is reported to have reviewed 24 percent of its identified contractors, compared to an average for all compliance agencies of 11 percent.[23] In 1977, DOD had a ratio of 42 contractor facilities per staff member, and a total budget of $345 per contractor.[24] It is striking to note that compliance reviews have not typically been targeted directly against the most blatant form of employment discrimination. An establishment's history of employment demographics has typically not played a role in the incidence of compliance reviews, for a reason as procedurally obvious as it is logically obscure: Compliance officers have not generally looked at an establishment's past AAPs or EEO–1 forms in targeting reviews. Heckman and Wolpin (1976) report that reviews are essentially random with respect to the level or growth rates of an establishment's demographics. Leonard (1985a) finds evidence that establishments with more blacks and females are actually more likely to be subsequently reviewed. These two empirical studies agree that affirmative action compliance reviews have not been targeted with greater frequency at establishments with relatively few minorities or females.

In this light, the expected penalties for making promises to the government with little regard for the likelihood of fulfilling those promises do not seem overwhelming. In such circumstances, affirmative action promises may contain little, if any, information about the establishment's future employment. On the other hand, the OFCCP may use more subtle and less easily observed pressures. Firms may care about their reputations, not only with the OFCCP, but also with their own employees and the public, and so strive to set reasonable goals. More important, firms may react to the threat of Title VII litigation, with its substantial legal costs and penalties, hanging over their heads while under affirmative action review.

The employment goals that firms agree to under affirmative action are not vacuous; neither are they adhered to as strictly as quotas. Although affirmative action promises are inflated, they are not hollow. For a sample of establishments that experienced more than one compliance review during the 1970s, Leonard (1985b) compares the goals with the employment actually achieved 1 year later, as in table 3. The mode year for which projections are made is 1976. For an observation in the mode year, then, this table shows actual employment in 1974 and 1975, a projection of employment for 1976 made in 1975, and actual subsequent employment in 1976. The first finding in table 3 is that establishments on average overestimate the growth of total employment. They project 1 percent employment growth 1 year ahead, but employment subsequently falls by 3 percent.

The major finding in table 3 is that neither absolute minority nor female employment increased, but that other minority and female employment shares did increase. This is because the contraction in employment that did occur was almost lily white and predominantly male. Most of the average employment decline of 27 was accounted for by white males, whose employment fell by 21. Put another way, although white males averaged 57–63 percent of initial employment, they accounted for 78 percent of the employment decline. Since females and minorities typically have lower seniority, they are usually found to suffer disproportionately more during a downturn. In this perspective, the finding here that white males accounted for most of the employment decline is itself striking evidence of the impact of affirmative action.

These establishments are projecting swift and substantial increases in black male employment. If the 1-year projections in table 3 are extrapolated for

[22] USCCR, 1982, p. 47.
[23] USCCR, 1977, p. 113.
[24] USCCR, 1977, p. 107.

TABLE 3

Means of Projected and Actual Employment Levels by Demographic Group
(N = 5,240)

	Mode year			
	1974 Lagged 2 years	1975 Lagged 1 year	1976 Projection	1976 Actualization
Black male	54	55	61	54
Minority nonblack male	38	40	42	40
White male	628	623	615	602
Total male	720	718	718	696
Black female	34	35	39	35
Minority nonblack female	20	21	23	22
White female	218	216	222	210
Total female	272	272	284	267
Total	992	990	1,001	963

Note: The first column is the actual level of employment 1 year before the projection was made. The second column is the actual level of employment in the year the projection was formed. The third column is the projection. For the mode observation, this is a 1-year-ahead projection made in 1975 for the level of employment expected to occur in 1976. The fourth column is the level of employment actually realized in the following year.
Reproduced from Leonard 1985b.

10 years, then fully 14 percent of the work force at these plants would be black males.

These projections and actualizations can also be expressed as shares of total employment. Over time, minority and female employment shares are indeed growing, but not nearly as fast as projected. The firms project growth in minority and female employment share far in excess of their own past history and far in excess of what they will actually fulfill. Is there, then, any information at all in their projections, or is the entire procedure an exercise in futility?

The administrative records of completed compliance reviews include data on past and projected employment demographics, indications of deficiencies found in affirmative action plans, and an indicator for preaward compliance reviews in which case one might expect the government's leverage to be greater. These records also indicate successively higher levels of government pressure brought to bear: hours expended by review officers, progress reports required, conciliation process initiated, and, finally, show-cause notice issued. Each of these mileposts in the bargaining process reflects both the establishment's resistance to bureaucratic pressures and, at the same time, increasing levels of bureaucratic pressure itself. If establishment resistance can be controlled for, then these may be taken roughly as inputs into a regulatory production function. By assuming that corporate resistance is controlled for by past growth rates of protected group employment share, and by initial notification of deficiencies, we can then ask what the marginal impact is on factors of regulatory production such as conciliation agreements and show-cause notices. These identifying assumptions are open to question. Caution should be exercised in interpreting the following results, since they may be biased toward finding ineffective enforcement if enforcement has been targeted against the most recalcitrant cases.

For all detailed regulation variables, the results are mixed and often insignificant. One might expect greater growth in protected group employment in the case of preaward compliance reviews—reviews mandated prior to the final award of large Federal contracts—supposedly because the carrot is dangling so close to the nose. On the other hand, few contracts have ultimately been lost in this process,

and the courts have been loath to uphold this type of leverage. Twenty-nine percent of all the reviews studied by Leonard (1985b) are preaward reviews, but only in the case of black females did they make a significant, positive addition to the protected group employment share beyond that expected from a regular review.

One-third of the establishments were required to make interim progress reports. This marginally greater pressure had no significant impact on their subsequent demographics. One hundred and twenty-two establishments, 3 percent of the total, signed conciliation agreements to remedy deficiencies in their AAPs. Perhaps their AAPs looked better, but their immediately subsequent demographics did not.

The ultimate enforcement tool at the Department of Labor's disposal is debarment, but none of the few actual uses of this deterrent shows up in our sample. The strongest pressure observed is a show-cause notice; 24 establishments received such notices offering them the opportunity to show cause why they should not be debarred. On average, they had not significantly altered their demographics a year later. On the whole, there is no compelling evidence here that these detailed components of the enforcement process have a significant impact on the employment of members of protected groups.

The major finding in Leonard (1985b) is that goals set in these costly negotiations do have a measurable and significant correlation with improvements in the employment of minorities and females at reviewed establishments. At the same time, these goals are not being fulfilled with the rigidity one would expect of quotas. Although the projections of future employment of members of protected groups are inflated, the establishments that promise to employ more do actually employ more. The striking finding is that the affirmative action goal is the single best predictor of subsequent employment demographics. It is far better than the establishment's own past history, even controlling for the direct impact of detailed regulatory pressure.

This indicates that although establishments promise more than they deliver, the ones that promise more do deliver more, even conditioning on the past growth rate of employment share. There is significant information in the projection over and above what could have been predicted on the basis of past history. On the other hand, the projection falls far short of perfect information. For example, on average a projected 11 percentage point increase in the growth rate of black male employment share results in an actual increase of 1 percentage point, *ceteris paribus.*

Not only do establishments generally overpromise minority and female employment, they also overpromise white male employment. This reveals something of their strategy in formulating promises. They do not promise direct substitution of minority and female workers for white males; instead, they promise more for all. More accurately, they promise to make room for more minority and female employees by increasing the size of the total employment pie. The first step in bringing these projections down to earth may simply be to ask the establishment whether the projected growth in total employment is reasonable.

We have a policy that appears to be effective in its whole and ineffective in its parts. The paperwork requirements of the AAP, the notification and resolution of AAP deficiencies, and even conciliation agreements and show-cause notices appear to have no general significant impact on subsequent employment demographics. On the other hand, protected group employment share does generally grow more rapidly at reviewed firms, and goals are strongly correlated with this growth. Do our results, then, indicate only that the establishments' projections reflect variations in supply known to them rather than induced variations in demand? Alternatively, can we infer that extracting greater promises will result in greater achievement? The critical evidence is that there is an overall response to pressure. Within labor markets of the same industry and region, reviewed contractors do better than the nonreviewed, as other work shows. As we have reviewed here, within a given SMSA, the establishments that set higher goals achieve greater growth rates of protected group employment. My reading of this evidence is that although much of the nitpicking over paperwork is ineffective, the system of affirmative action goals has played a significant role in improving employment opportunities for members of protected groups.

The Targeting of Compliance Reviews

Affirmative action can be broadly conceived of as pursuing either antidiscrimination or job and earnings redistribution goals. That is to say, it can either pursue equality of opportunity or equality of result.

Given the historical record, progress toward one goal will often entail progress toward the other. In particular, discrimination seems to be a broad enough target that it can be hit even with imperfect aim. The central question this section[25] seeks to answer is: What are the actual goals of affirmative action? The approach taken here is to infer the ends of affirmative action policy from an analysis of the historical record of actual enforcement.

Assertions concerning the ends of affirmative action are surprisingly common, especially when one realizes that only once in the past has the actual pattern of enforcement been analyzed. This path-breaking study of Heckman and Wolpin (1976) examined the incidence of compliance reviews at a sample of 1,185 Chicago-area establishments during 1972. These compliance reviews are the first, the most common, and usually the last step in the enforcement process. Heckman and Wolpin find that the probability of review is not affected by establishment size, minority employment, or change in minority employment. They discover "no evidence of a systematic government policy for reviewing contractor firms." In other words, they find an essentially random enforcement process. This first analysis of targeting studied a relatively small sample in one city during the early 1970s, before the contract compliance program reached full stride. Do these early findings hold true for the Nation as a whole after affirmative action regulations and procedures matured? Just as important, how are such results to be interpreted?

Which establishments does the OFCCP actually choose to review? Can we judge its motives from its targeting policy, and do the goals so revealed conform to those mandated in the Executive order? The OFCCP has had, on paper, formal targeting systems such as the Revised McKersie System or the later EISEN system. These systems generally target in a sensible fashion against discrimination by selecting for review those establishments with a low proportion of minorities or females relative to other establishments in the same area and industry. But interviews with OFCCP officials in Washington and in the field suggest that these formal targeting systems were never really used. Instead of targeting on the basis of an establishment's past demographic record, compliance officers claim they simply reviewed the firms with the most employees and the growing firms. This section shows which types of establishments were actually reviewed between 1974 and 1980, primarily by the Department of Defense. As such, the patterns shown here may not be indicative of current policies or practices of the OFCCP or of past practices of other compliance agencies. In addition, part of the patterns observed here may reflect the requirements for preaward compliance reviews.

The model of affirmative action as an earnings redistribution program has two testable implications. One can, at best, offer weak support for the hypothesis, while the second can provide somewhat stronger support. The first is that no particular pressure should be applied to firms with relatively few minorities or females. This is what we observe in tables 4 and 5.[26] Although this strongly rejects the model of affirmative action as antidiscrimination in employment, it offers weak support for the alternative hypothesis of affirmative action as earnings redistribution because it is also compatible with other models of regulatory behavior. The second implication of the earnings redistribution model is that greater pressure should be brought to bear to shift demand curves where the supply of labor is relatively inelastic. In particular, this implies a higher incidence of compliance reviews at establishments with nonclerical, white-collar-intensive work forces. I find significant evidence that this is what the OFCCP has done.

If one thought of the OFCCP's primary concern as fighting the most blatant forms of prima facie employment discrimination directly in the workplace, one might, then, expect reviews to be concentrated at establishments with a relatively small proportion of females and black males, controlling for size, industry, and region. There is little consistent significant evidence of this in the past. In part, this may be explained by the requirement of preaward compliance reviews. Establishments with the smallest proportion of minorities or females, *ceteris paribus,* are not consistently more likely to be reviewed for compliance with Executive Order 11246. Reviews are significantly more likely to take place, *ceteris paribus,* in nonclerical, white-collar-intensive establishments. Reviews are also more likely to occur at both large and growing establishments, where any costs of white males are likely to be more diffused.

[25] Drawn from Leonard 1985a.

[26] Reproduced from Leonard 1985a.

TABLE 4

Proportion of Defense Contractor Establishments that Were Reviewed from 1975 to 1979, by 1974 Black Male Employment Share
(N = 7,968 Establishments)

Line	Black male employment share, 1974	N	Proportion reviewed
1	.00	1,773	.106
2	.01-.02	1,672	.266
3	.02-.04	1,260	.263
4	.04-.06	761	.254
5	.06-.08	490	.255
6	.08-.10	380	.279
7	.10-.20	911	.301
8	.20-.50	633	.273
9	.50–1.00	72	.083
10	.70–1.00	16	.188

Reproduced from Leonard 1985a.

TABLE 5

Proportion of Defense Contractor Establishments that Were Reviewed from 1975 to 1979, by 1974 Female Employment Share
(N = 7,968 Establishments)

Line	Female employment share	N	Proportion reviewed
1	.00	74	.000
2	.00-.05	1,073	.161
3	.05-.15	2,072	.217
4	.15-.25	1,093	.233
5	.25-.30	397	.252
6	.30-.35	404	.277
7	.35-.40	404	.297
8	.40-.50	707	.270
9	.50-.70	980	.232
10	.70–1.00	764	.283

Reproduced from Leonard 1985a.

How can the lack of a consistent targeting pattern by race or sex be explained? The larger establishments often employ a greater proportion of minorities and females. In interviews, field officers of the OFCCP have stated that they do not generally look at an establishment's past demographic record in targeting reviews. Reviewing large nonclerical, white-collar-intensive establishments with little regard for their past record of minority or female employment is consistent with an affirmative action effort that, in terms of compliance review targeting, is primarily concerned not with attacking the grossest prima facie forms of current employment discrimination, but rather with redistributing jobs and earnings to minorities and women.

Antidiscrimination or Reverse Discrimination?

We have seen that despite poor targeting, affirmative action has helped promote the employment of minorities and women. This raises the most important and the most controversial question: Has this reduced discrimination, or has it gone beyond and induced reverse discrimination against white males? This is also the question on which our evidence is least conclusive. The finding of decreased employment growth for white males is not sufficient to answer the question, since it is consistent with both possibilities.

The integration of the American work force, by race and gender, has been among the most far-reaching and controversial goals of domestic policy in the past two decades. Some have argued that integration can be achieved only at great cost in terms of reduced productivity and profits, that forced equity will entail reduced productivity. Opponents of affirmative action have argued that employers were discriminating on the basis of merit, not on the basis of race or gender. If their contention is correct, then government policies that favor the hiring and promotion of minorities and women should cause a decline in their relative productivity. Equal pay restrictions will compound the inefficiency. The hypothesis inherent in this argument is that the relative marginal productivities of minorities and females have declined as their employment has increased and have not moved toward equality with relative wages.

Using estimates of production functions relating output to inputs for the manufacturing sector, Leonard (1984c) finds that relative minority and female productivity increased between 1966 and 1977, a period coinciding with government antidiscrimination policy to increase employment opportunities for members of these groups. There is no significant evidence here to support the contention that this increase in employment equity has had marked efficiency costs. The relative marginal productivities of minorities and women have increased as they have progressed into the work force, suggesting that discriminatory employment practices have been reduced. Strong policy conclusions based on this particular result should be resisted, since the estimates are not measured with great precision.

If we had observed that relative minority or female productivity fell while relative minority or female wages increased, one might suspect that government pressure under Title VII and Executive Order 11246 (affirmative action) had led to reverse discrimination. I find no such evidence of reverse discrimination or of any significant decline in the relative productivity of minorities or females. Direct tests of the impact of governmental antidiscrimination and affirmative action regulation on productivity find no significant evidence of a productivity decline. These results suggest that antidiscrimination and affirmative action efforts have helped to reduce discrimination without yet inducing significant and substantial reverse discrimination.

Conclusion

Based on my empirical work, and on that of other economists, I believe that the claims that affirmative action has been ineffective have been overstated. There have now been five establishment-level studies that agree in finding that the black male employment share has grown faster in Federal contractor establishments subject to affirmative action than in noncontractor establishments.

The policy of affirmative action has had a short and turbulent history in this country. Of all the social programs that grew during the sixties, it has perhaps enjoyed the least measure of consensus. Its bureaucratic organization and body of regulations have undergone change at frequent intervals since its inception. Although the targeting of enforcement could be improved, and although the impact of affirmative action on other groups is still subject to question, the evidence in this study is that affirmative action and Title VII have been successful in

promoting the integration of blacks into the American workplace.

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Affirmative Action as a Remedy for Discrimination: Strategies for the Future

By Nathan Glazer*

The assignment from the U.S. Commission on Civil Rights asks us to address, as a prelude to our recommendations for the future, such questions as "results of preferential affirmative action" and "results of nonpreferential affirmative action." The questions are valid: Any design for the future must be based on what exists in the present. But the effort to answer them in any responsible fashion would be enormously difficult. We have with us on the panel Finis Welch and Jonathan Leonard, whose work in this area is invaluable, yet even their work may not give us an answer to the question. Dr. Leonard's work, the most recent to appear in print, does distinguish between firms under affirmative action (supervised by the Office of Federal Contract Compliance Programs and with affirmative action plans) from those not in that position, and shows effects of affirmative action in increasing employment of black males and females substantially in this sector; of nonblack minority males less so, but also by a respectable percentage; of white females less. This is as good a measure of "preferential affirmative action" as we can find. I take the position here that preferential affirmative action means goals and timetables, that is, pressures to achieve a certain result numerically in a certain time. Despite the effort of advocates of these policies to assert that no preference is required (and the fact that the law forbids preference in pursuit of goals and timetables), it appears to me that they do tend to preference. Nonpreferential affirmative action I would define as that which stops short of goals and timetables and which involves changes in patterns of advertising for employees, recruiting, review of bars to employment that may have the effect of excluding minorities and women unfairly, and the like. Some of these procedures are required by the Civil Rights Act of 1964, as interpreted by the Supreme Court in *Griggs,* and others are required by the EEOC, or are used by it to judge whether charges of discrimination are valid, and thus also have legal sanction, but they are still different from preferential affirmative action.

Do we have any measures of nonpreferential affirmative action? It does not have the hard character of affirmative action plans and goals and timetables, and it is, therefore, doubtful if we can find a good sample of firms in which this milder form of affirmative action exists. If we take the entire body of employers to compare with contractor firms on the ground that this kind of affirmative action is now near universal because of the desire to avoid charges of discrimination, we, of course, find that in the late 1970s, by the Leonard data, blacks

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did not advance as fast, and white females advanced almost as fast. If we were to take a subsample of firms that were quite committed to nonpreferential affirmative action, we might find they did as well as contractor firms.

I go into this exercise of differentiation because, as we know, the discussion in this area is much bedeviled by a confusion of terms. The argument over affirmative action has, for example, been almost entirely limited to the issue of goals and timetables—"quotas," as the opponents of this kind of affirmative action call it. They have been able to defend themselves from a charge of simple opposition to affirmative action because they do allow the legitimacy of and assert their support for those other measures that open up the job market to a wider range of applicants from all races and both sexes. Our concentration here is on the goals and timetables approach—the statistical effort to determine a "fair" rate of utilization and the requirement to make a good effort to reach that rate within a given period of time.

If one thinks of courses for the future, and if one of them is the abandonment of the goals and timetables that are now required by an Executive order and implementing regulations—and thus, as I understand it, would require no congressional action if they were to be abandoned—we must have some sense not only of what they achieve, but of what other policies that would continue to exist in their absence, achieve. One policy that exists, and would continue to exist, obviously, because it is law under congressional statute, is the law against discrimination in employment. And EEOC, the agency that enforces it, whose budget is substantially larger than that of the OFCCP, which is responsible for affirmative action by government contractors, would also continue to exist. If we were to ask what the future would be like without preferential affirmative action, then we would have to have a sense of what that act and that agency, and the cases brought under it by the Justice Department, achieve. It is my impression they achieve a great deal. If we add to what they achieve the work of State agencies against discrimination or the impact of orders by Governors and mayors—and I have seen no complete survey of them—we would see that, even in the absence of preferential affirmative action, the number of agencies employed in the fight against discrimination, and their resources, would be substantial. Newspapers are filled with news of settlements under the Civil Rights Act (which do involve, very often, "quotas") and of action by State agencies quite independent of Federal requirements.[1]

Perhaps I have narrowed the subject under discussion too much. Opponents of preferential affirmative action would want to move against this policy generally and eliminate it in State and local action as well as in Federal action, in private and nonpublic institutions where it exists voluntarily, as well as in contractor firms now required to have such policies. Nevertheless, I think it makes sense to think of policies in the packets in which they come in reality. A change in Federal affirmative action regulations seems, in view of the attitudes of the present administration, and the relative ease legally of changing them, to be the most likely change. It is most reasonable to think of that change in considering potential effects of a limitation of preferential affirmative action on the prospects of minority groups and women.

There is another potential narrowing of the subject. Since the Civil Rights Commission deals primarily with discrimination, one could ask, as has been suggested by certain statements of the Commission and its Staff Director, what is necessary to overcome the effects of discrimination and does abandonment of preferential affirmative action mean discriminatory effects continue? This has become a question that, to my mind, is so abstract as to have hardly any meaning. When we talk about discrimination today, we really do not have in mind discrimination; we have in mind inferior economic status that is the effect of many causes, among which may be discrimination. Since it is almost impossible to determine, in any case, what part of a difference in income or occupational achievement is owing to discrimination, were we to limit ourselves to what is necessary to overcome discrimination, we would immediately be sunk in those inconclusive and indeterminate efforts to decide what *part* of the gap between black and white and male and female

[1] For example "Georgia Agrees to Hire 243 Blacks, Women," news of a settlement of a Department of Justice suit against Georgia *(Washington Post,* Aug. 9, 1984). The news story notes that this is the second largest settlement (in terms of backpay) obtained by the U.S. Government against a public agency, the first being the settlement of a suit against Fairfax County, Virignia, in 1982; or "Road Contractors Evading Bias Law—44 Barred by Jersey for Failure to Achieve Minority Goals," reporting an action by the State Transportation Department of New Jersey *(New York Times,* Nov. 30, 1984).

income, occupation, and employment is owing to a factor that can be legitimately called discrimination, as against differences in education, experience, interest, commitment, and a variety of other factors—each of which, it can be claimed, is the result of earlier discrimination and, thus, subject to further indeterminate analysis. I do not deny the importance of this discussion in some contexts: We speak of what is just and unjust, and to do so we must make separations and distinctions. But we can limit our task in this case to an easier one: What would happen to income, occupation, and employment of minorities and women in the absence of preferential affirmative action?

As an answer to this question, it is true, we have to have a sense of what part of these differences is now caused by discrimination. But I would return to my earlier skepticism as to our ability to make any such determination. Existing figures simply throw us into confusion if we undertake such an effort. A recent article by Christopher Jencks, for example, using some data developed by Thomas Sowell, points out that some immigrant groups that were believed to be subjected to some or a great deal of discrimination in the past (e.g., Jews, Irish Catholics, Italians) do better economically than groups (e.g., Scandinavians) who it is generally believed faced very little or no discrimination. He points out that Catholics currently do better than Protestants. He points out that if we were to use relative income as a measure of discrimination, we would have to explain why black West Indian women with 9–12 years of education were making 122 percent of the U.S. average in 1969. There are simply too many anomalies in the income gaps and occupational differences among ethnic, racial, and sex groups to be easily explained by a theory of discrimination. The figures do not support any good theory of discrimination as a cause of these differences, even though we know discrimination has been massive and can assume it is still substantial. But if it does not explain the achievement of some discriminated-against groups, how can we use it to explain the nonachievement of other discriminated-against groups?

All this is preliminary to an exercise in considering what the effects of a policy different from preferential affirmative action would be. The exercise requires us to keep in place other elements that determine occupational choice and income. It would be an act of demagogy to assume that if we do away with Federal preferential affirmative action, everything else changes: that the civil rights law is no longer in effect; that the EEOC is no longer funded or operative; that the courts shift 180 degrees in their interpretation of the Constitution and the laws and other Federal regulations; that State and local antidiscrimination commissions, laws, and regulations become inoperative; that all the internal rules and regulations that create a degree of affirmative action within employing agencies, public, private, and voluntary, would become ineffective; that the organizations of minorities and women that now press variably for fairness or preference would fall dumb and powerless. Perhaps a political philosopher can assume all this, or an econometrician. A policy analyst must deal with more realistic alternatives, and that is what I have chosen to do.

As I have already suggested from my accounting—itself not complete—of the forces that keep in place a system of employment and promotion that, on the whole, does not discriminate against minorities or women, not much would change. The fact is the procedures that require fairness have, in large measure, been institutionalized. I would not deny the role of preferential affirmative action in institutionalizing these procedures (along with all the other elements I have listed). But what I would argue is that this institutionalized system would remain more or less in place, whatever the changes in Federal regulations on affirmative action.

I agree with Robert J. Samuelson, who analyzes what the effect of a reduction in strong enforcement would be:

> These pressures [the aggressive use of antidiscrimination laws, including affirmative action] have changed the way labor markets work. Many firms have overhauled personnel policies. Recruitment has been broadened. Tests unrelated to qualifications have been abandoned. Promotions are less informal. When positions become open, they are posted publicly so anyone (not just the boss's favorite) can apply. Formal evaluations have been strengthened so that, when a manager selects one candidate over another (say, a white man over a woman), there are objective criteria.
>
> Equally important, women and blacks increasingly are plugged into the formal information and lobbying networks that remain critical in hiring and promotion decisions.[2]

[2] Robert J. Samuelson, "Affirmative Action's Usefulness Is Passing," *The Washington Post*, July 11, 1984.

I believe that as important in determining the answer to our question as the valuable research of the effect of affirmative action in the late 1970s would be some effort to find out what has happened to the institutionalized procedures that were brought into existence in response to antidiscrimination law and affirmative action procedures in the 1980s. It would be revealing to consider what the effects of 4 years of somewhat slackened enforcement and, more than that, expectation of slackened enforcement have been. The reality of looser enforcement and expectation of looser enforcement has, I assume, not been without effect, but it has been of much less effect than the supporters of strong enforcement believe. I come to this conclusion on the basis of modest experience and, rather more, some settled convictions about how institutions operate. The experience is primarily in the field of higher education, but it is an area in which preferential affirmative action has been very controversial (more controversial, in my experience, than in industry or government generally). If slackened enforcement is to have effect, one would expect it there.

Although I can speak only from very partial experience and knowledge (the study now being conducted for the USCCR by Harold Orlans will tell us more), I have seen no change in the affirmative action procedures instituted in the 1970s. All posts must still be advertised. *The Chronicle of Higher Education* is fatter with advertising than ever as a result. That will not be changed. In my institution, and in many others I know about, a special effort to find minority and female applicants for all posts is still required. That has not changed. Deans and other administrative officers still look more favorably on a proposed female or minority appointment than a white male appointment. That has not changed. The pressure that helps maintain these policies from women faculty, graduate students and undergraduates, and from minority groups has not changed. One hears less about pressures from regional offices of the OFCCP to prepare elaborate affirmative action plans. But once the institutional forces are in place—and some of them exist, it is true, owing to the pressure to create affirmative action plans—the plans themselves hardly matter. The varied forces maintaining the pressure are not reduced by a reduction in the efforts of regional offices.

Admittedly, higher education is a rather special segment. Perhaps more liberal administrators, and more liberal employees than is the norm elsewhere and, in addition, the pressure of liberal students—a force that does not exist in private industry or in public employment—make things different. But in public and private employment, other (and equivalent) pressures come into play; for example, the role of political pressures and competition for the vote in affecting city and State employment policies. One would want to know more about what is happening in this important area: News accounts do not suggest a slackening in those States with large minority populations and liberal traditions. In Federal employment, we know from the case of William Bennett's resistance at the National Endowment for the Humanities that almost all agencies submit affirmative action plans. In business, one expects that the personnel procedures institutionalized during the 1970s have not been abandoned. One has not heard of mass firing of affirmative action officers or mass return to tests that have been declared discriminatory. Institutions do not change that rapidly, and in the private sector, as in the academic and public sector, one must also contend with a body of law, enforced by energetic lawyers whose numbers and expertise in antidiscrimination law have increased apace, to maintain rights once established. I find persuasive, on this point, the advice given to managers and entrepreneurs by neutral sources. Consider, for example, the warnings given in the "Small Business" column of *The Wall Street Journal* on February 4 of this year:

> What's wrong with asking a woman job applicant these questions: Who takes care of your children when you're at work? What if they get sick? How does your husband feel about your taking business trips? What would he say if a male employee went too?
>
> They may seem like reasonable questions. But in fact they could be construed as biased against women and could embroil the employer in charges of discriminating against female job applicants in violation of federal or state laws because male applicants aren't asked such questions.
>
> Employment laws contain many traps for the unwary. More are being created in court decisions. An employer—big or small—can find itself charged with employment discrimination because of its hiring or firing practices. It may be hauled into court for alleged sexual harassment of female employees. (A few cases involve male workers.). . . .
>
> Don't ask if someone has ever been arrested. (Because blacks are arrested more than whites, a federal court has held, such a question can be discriminatory against blacks.)

However, asking about criminal convictions is usually safe. And not hiring a convicted felon can be justified as a business necessity for such reasons as not being able to bond the person.

Restrictive job requirements can get a company in trouble, too. It may be discriminatory to have an education barrier to a position (only high school grads need apply) if it can't be justified as necessary to doing the job. If warehouse workers lug 100-pound loads, requiring an applicant to show such strength is justified. But if workers usually lift only 25-pound loads, then requiring an ability to lift 100 pounds could be ruled discriminatory against women.[3]

Four years after Reagan came to office, employers are advised to be more careful than ever not to trigger charges of discrimination. The basis for this is public law, public agencies, and private laywers; and all these are in place and unchanged. If anything, I would suspect, we have had an expansion in the number of labor lawyers, despite the decline of unions, owing to the new lucrative area of antidiscrimination law. Four more years of Reagan and 4 years of conservative judicial appointees may wear down this structure more in the next 4 years than in the last.

But to show how strong institutional commitments can be, consider the recent case—from an area of affirmative action, university and college admissions, not under consideration here—from Harvard. Former Dean of the Faculty of Arts and Sciences Henry Rosovsky had commented on the rapid increase of Asian students at Harvard and elsewhere. Asian students, as is well known, are represented in institutions of higher education in numbers far greater than expected by their proportion in the population. Asian student representatives protested what they interpreted as a possibility they would be deprived of "minority status"—their term. One may properly be mystified as to what their official recognition as a minority by Harvard gives them—not, I believe, more financial aid, better grades, more tutoring, or anything else. Concretely, it appeared from their protests, the only thing they may get is special effort to recruit Asian students (1982 figures report Harvard to be 4.3 percent Asian—the national percentage Asian is about 1.5 percent). Should such effort be continued? (I will not suggest it is a major effort.) In response to the protest, a dean assured the Asian students (or rather their organizational representatives) that their minority status would continue to be recognized. It is true sillier things may happen on campuses than elsewhere, but when, for example, Asian Indian businessmen can get themselves recognized as a minority deserving special consideration in awarding of contracts, who is to say Harvard is exceptional?

The first point, then, to be made in considering alternatives to preferential affirmative action is that the institutional structure, public and private, that now responds to governmental affirmative action requirements would stay in place and is hardly likely to be dismantled. And a second and related point: The social pressures to maintain preferential affirmative action would also remain in place, and, indeed, one might expect that they would be intensified in response to a loosening of Federal requirements for contractors. Minority organizations, women's rights organizations, and civil rights organizations are numerous and experienced. In universities and colleges, one can be sure student and faculty groups representing minority and women's interests would continue to exert pressure. In businesses, there is less of a tradition of employee organization of this type, but many unions are committed to goals of fairness and would press for them.

The fact is that preferential affirmative action is only partially, and perhaps to a modest extent, responsible for the enormous changes we have seen in the past 20 years in the position of the black minority and of women. In fact, some of these great changes have occurred in the absence of any governmental pressure to preferential affirmative action; for example, the huge increase in the percentage of women entering law and medical schools. I am aware of no governmental pressure in this area, and, indeed, there has also been, I believe, no voluntary affirmative action by law and medical schools designed to recruit larger numbers of women for law and medical schools. This change has occurred entirely as a result of the great change in women's desires as to what occupations and professions they wish to pursue, assisted only marginally by the legal prohibition against discrimination.

This brings me to the main point in considering alternatives to preferential affirmative action. What may we expect in regard to the future of the major group beneficiaries of preferential affirmative action if this policy is abandoned? In the case of women, I would suspect very little change at all. Women have

[3] Sanford L. Jacobs, "Changes in Employment Law Can Trap Unwary Companies," *The Wall Street Journal,* Feb. 4, 1984, p. 25.)

already vastly expanded their occupational and professional horizons. This expansion has been assisted by the fact that where mental tests are involved (e.g., for entry into selective institutions of higher education, into law and medical schools, or entry into the legal and medical professions, and possibly—though here I am not sure—in the case of psychological tests designed to assess suitability for certain professions), women on the whole do as well as men, with minor differences. Preferential affirmative action for women has not been required to overcome gross differences in test achievement, except for physical tests (for fire and police employees and armed forces specialties). The issue has been, rather, one of eliminating formal barriers that could not stand after the Civil Rights Act of 1964 prohibition of sex discrimination. Insofar as preferential affirmative action has sought too vigorously to overcome traditional tastes (e.g., for indoor as against outdoor work, as in the AT&T settlement), it has been expensive and a failure. There are complex issues involved in the rise of women in bureaucratic hierarchies, but they are probably best addressed through litigation under civil rights law rather than through statistical quotas under preferential affirmative action. We are engaged in a revolution of expectations by men and by women; some of us think that that revolution has ignored some differences that are significant and that must be taken account of in assessing suitability for certain roles (e.g., the armed forces, fire and police services). There is simply no basis for preferential affirmative action in making such decisions. Who is to say that women in the armed forces or on a police force should number 40 percent of the personnel (as they do for occupational roles generally), or 20 percent (as is sometimes required for new hires in police and fire departments), or 10 percent, which is their present percentage in the armed forces? These are complex decisions that may be left to a combination of the actual choices women make as to the occupations they wish to follow and administrative decisions as to how many may be accommodated without damage to the mission of the profession or occupation.

Aside from the protection of civil rights law, women are also protected by equal pay provisions. Preferential affirmative action for women has already, in some cases, gone too far (e.g., requirements for some number of women guards in men's prisons). Its abandonment in regard to women would mean no loss in terms of women's desires for equality. Bridgeheads have been established everywhere, and indeed more than bridgeheads, and procedures other than Federal administrative decisions as to how many women should be employed for this or that job by this or that employer are unnecessary and, in some case, harmful to effective functioning. For the armed forces certainly, there are already grave questions.

When we come to racial-ethnic minority groups, the matter is, in some respects, more simple; in other respects, complex. The variable coverage of Asians under preferential affirmative action requirements—here and there being abandoned—is in a word, silly. Without denying the existence of massive discrimination in the past and pockets of discrimination today, preferential affirmative action for Asians makes as little sense as preferential affirmative action for Jews. Asian incomes tend to be above the average, education well above the average; Asians are very well represented in the areas of their occupational choice (e.g., engineering, computer science, architecture). That there are few in the humanities and not many in the social sciences should bother us as little as the fact that there are few Jews teaching forestry or agriculture: It is their choice and it is no business of government to interfere. If government does interfere, we can be sure that various Asian groups will engage in a struggle for advantage. Why shouldn't they? They will try to argue they are as deprived as blacks and are as worthy for set-asides in government contracting. Asian Americans are not discriminated against today in any way that requires affirmative action. If one or another group (Korean, Filipino, Cambodian, Laotian) is worse off than others, we can ascribe that, quite properly, to the immigration situation, in which people with inadequate language skills or inadequate or inappropriate education or different cultural orientation must make their way in a different society. Many need assistance with language, with education, with adaptation to a new culture. I do not see any need for preferential affirmative action.

Hispanic Americans raise a mixed picture. Puerto Ricans are worst off; Cubans are doing fairly well; Mexican Americans themselves present a mixed picture. There are issues of language, issues of education, issues of degree of commitment to making one's way in a new country, different attitudes as

to the permanence of one's stay and what that calls for in commitment to education and occupation.

One of the chief weaknesses of preferential affirmative action is the amalgam it has created of Hispanic Americans. Cubans don't need it, most Latin Americans are happy to make their way as other immigrants have, and persons of Spanish descent are included only by accident. One could make a better argument for preferential affirmative action if it were limited to Mexican Americans and Puerto Ricans, as putative victims of American imperialism and subjects of discrimination. But I am at a loss as to how preferential affirmative action might operate for Mexican Americans, in view of the large and indeterminate element that consists of illegal immigrants and is not fully counted, and the divisions one must make between very long-settled groups, some dating to the 17th century, and recent immigrants, who must undergo, as all immigrants do, the transition to a new language, a new educational system, and different occupations and occupational demands. I cannot imagine a suitable base on which to compute the statistical measure that preferential affirmative action aspires to. There is no reason why laws against discrimination should not offer sufficient protection against discrimination for Mexican Americans. I would argue similarly for Puerto Ricans.

Blacks are the best claimants to preferential affirmative action: They have suffered the most from discrimination and may be still presumed to be more victimized by discrimination than any other group. They show—along with Puerto Ricans—the most substantial gap in income when compared with other Americans. And the very large differences in test scores used for admission to institutions of higher education and eligibility for various occupations points to a very serious problem: We must expect that black participation in key professions such as law, medicine, and higher education, which tend to be test based in various degrees, and in teaching and the civil services, which also use tests that rule out disproportionate numbers of blacks, will show a serious "underutilization," to use the language of preferential affirmative action, as long as such policies are not in effect.

There is no question that measures of preferential affirmative action have substantially increased the numbers of black doctors, lawyers, professors, teachers, etc., above what they would have been in recent years had race-blind procedures been in effect.

For the black group in particular, the consequences of a departure from preferential affirmative action could be quite serious, despite all the qualifications I have given above. Undoubtedly, these policies have increased the representation of blacks in selective occupations, in skilled jobs, in executive positions. They have also had negative consequences that critics of these policies have pointed to, among them Thomas Sowell, in encouraging a view of blacks as less competent—a view held not only by others, but by many blacks—and by reducing incentives to high performance. One can assume such effects, theoretically, but I know of little empirical research that gives direct support to such effects. Nor do I know by what metric we could balance gains against losses, since they are of such different types.

I could well see the virtues of a policy that contracts the reach of preferential affirmative action, first for the groups that do best—Asian Americans and women—then for groups of Hispanic Americans, restricting it to the groups that need it most. I would urge that even for such groups a time limit be set on how long such policies operate. We are well aware that time limits can be extended almost indefinitely (as in the case of the Voting Rights Act and in the case of preferential affirmative action in India). Nevertheless, the idea that preferential affirmative action is a policy for a limited time is a reasonable one to put into the public arena. It would protect blacks from the most radical effects of cold-turkey abandonment, and yet signal to all that we expect this to be a society in which a strict enforcement of fairness and nondiscrimination will satisfy all groups. The benefits of preferential affirmative action, even for the black group, are sufficiently ambiguous—particularly when we take into account that it is not at all effective in reaching the most disadvantaged and problem-ridden strata of that population—that such a policy could be justified, even if it is utopian to expect that it will attain wide acceptance. Fears of what it might produce could be moderated if it were combined with vigorous attention to the elements in the education of blacks that lead to those test scores of all types that are at present a substantial barrier to black achievement in the absence of preferential affirmative action. One suspects that in the present climate the hope of coupling a withdrawal from preferential

affirmative action with such a program is also utopian.

Affirmative Action in Employment: An Overview and Assessment of Effects

By Finis Welch*

Title VII of the 1964 Civil Rights Act forbade discrimination in terms and conditions of employment. The act also established EEOC (the Equal Employment Opportunity Commission) to monitor compliance. Affirmative action was first given official status in 1965 by Executive Order 11246, where Federal contractors were required to comply with the 1964 act and to take *affirmative action* to eliminate continuing effects of past discrimination. The Office of Federal Contract Compliance (OFCC) was created to monitor contractor responses to this order.

In 1967 Executive Order 11246 was amended (Executive Order 11375) to include women in protected groups. There was a requirement in 1968 that Federal contractors present written affirmative action plans to OFCC (later OFCCP when the separate agency offices were combined into a single program entity). In 1973 the 1964 act was amended to extend employer coverage to educational institutions and governments. The 1972 amendment (the Equal Employment Opportunity Act) also gave EEOC the right to sue in plaintiff's behalf.

My assignment is to discuss affirmative action strategies for the future in areas of employment and contracts. I know very little about contract set-aside programs, so I confine my comments to the employment programs and to changes in wage and employment patterns.

The wage comparisons are restricted to contrasts of black men and white men from the 1960, 1970, and 1980 U.S. censuses. Workers are divided into groups on the basis of their age and education. The patterns of change are clear. Overall, there is sharp improvement, but some groups have done much better than others. I personally think the patterns we see are consistent with what we would or should have expected from independent studies of the nature of litigation and employment responses of Federal contractors.

The main conclusion is that employers who were most vulnerable to litigation and contract sanctions moved strongly to increase the representation of protected workers among their employees. Later, as programs matured and as responsibilities of employers were clarified, the emphasis apparently shifted to promotion or career progression. As a rough rule of

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I am indebted to James P. Smith for his thoughts and comments and to Eanswythe Leicester who compiled the census data.

thumb, the emphasis seems to have been that of moving protected workers to firms and job classifications where they have traditionally been least represented. Since representation is least at higher rungs of organizational ladders, these positions have been emphasized. One consequence for blacks is that there has been a strong proskill bias in effect. Through time, earnings of highly educated blacks have moved sharply toward earnings of similarly aged and educated whites.

The other side of the issue is that minorities and women have traditionally been overrepresented at low-skill, low-pay rungs of organizational ladders. I will argue that, as programs have matured, young less educated blacks have not enjoyed the same degree of success as other groups. This, I think, is partially a result of program emphasis and is something that ought to be changed.

Enforcement

Beginning in 1966, private sector firms with more than 100 workers and Federal contractors with contracts exceeding $50,000 and 50 or more employees were required to report annually on their employment in each of nine occupational categories. The forms containing this information are called EEO–1 forms, and summaries from them are the basis for a large part of my discussion. Totals from EEO–1 forms suggest that around 50 percent of all employment, outside governments and educational institutions, is in firms reporting to EEOC. Three-fourths of reported employment is in firms that identify themselves as Federal contractors.

To set the stage for inference of effect, I have traced the evolution of EEOC and OFCCP budgets and caseloads, together with charges filed and litigation activity. Table 1 gives the budget information and filings under Title VII in Federal courts. The impression is of a combined program that developed slowly until 1970 and then matured rapidly.

Perhaps the most striking numbers in table 1 are those describing cases filed in Federal courts under Title VII. Until 1970 separate statistics were not maintained for Title VII filings, and in 1970 only 340 cases were filed. This number grew tenfold in 5 years and doubled again by 1982. There is some evidence to suggest that, during the 1970s, growth in Title VII litigation accounted for all growth in civil proceedings in Federal courts.

Table 2 describes actionable charges filed with EEOC showing, as did the figures in table 1, that major growth occurred between 1970 and 1975.

It would be a mistake to discount the period prior to 1970. There were too many signals to firms that the new legislation had the potential of affecting the ways they function. The EEO–1 forms gave regulatory bodies the potential of contrasting utilization of minorities and women between firms in the same industry and area. Employees were filing thousands of complaints with EEOC and filings were increasing each year. Beginning in 1968, Federal contractors had to submit affirmative action plans with goals and timetables. Even so, the early years must have involved a lot of confusion about the kinds of behavior that would be penalized.

Clarification, no doubt, awaited the 1970s when the courts would have opportunities to present interpretations of existing statutes.

Patterns of Employment Change

I assume that the firms most likely to have responded to affirmative action pressures are those that report to EEOC. Questions of discrimination against protected groups either involve overt acts or they involve patterns of practice. Overt actions are easily identified, but patterns of practice can be subtle. Detection ordinarily requires that firms have enough employees to permit statistical studies so that observed differences between groups can be contrasted with differences that might occur by chance when employers ignore information of race, sex, and ethnicity altogether.

As an example, assume we want to know whether firms exhibit gender preference in selecting employees. Suppose we are considering a single job category and, in the relevant labor market, half of those in the category are women. We are told that three-quarters of firm *A's* employees in this job are men. Is there evidence that *A* selects its employees to avoid women? If *A* had only four employees and selected them randomly, the chance that three or all four would be of the same sex is five in eight. In a sex-blind environment, an exactly balanced force of two men and two women is less likely than an imbalanced one.

Now suppose *A* has 20 employees in this job. In this case if *A* were sex blind, the chance that the minority sex would have no more than 5 people in it is about 4 in 100. If *A* had 100 employees in the job and three-quarters were men, the chance for such an

TABLE 1

Selected Statistics for EEOC, Cases filed in Federal Courts, and Selected Statistics for OFCC

A.

Year	EEOC budget ($1,000s)	EEOC resolved cases (1,000s)	Cases filed in Federal courts under Title VII
1966	3,250	6.4	N/A
1970	13,250	8.5	340
1975	55,080	62.3	3,930
1979	111,420	81.7	5,480
1981	141,200	61.8	6,250
1982	144,739	57.2	7,689

B.

Year	OFCC budget ($1,000s)	OFCC positions funded (1,000s)
1970	570	34
1975	4,500	201
1978	7,190	216
1979*	43,214	1,021
1981*	48,189	1,232
1982*	43,150	979

N/A = not available.

* OFCC data refer to central offices only. Beginning in 1979, figures reflect consolidation of 11 agency offices with OFCC to form OFCCP.

Sources: EEOC budgets are from U.S. Executive Office of the President, *The Budget of the United States Government*, Washington, D.C.: Office of Management and Budget, various years. Title VII cases filed: *Annual Report of the Director*, EEOC, various years. OFCC data are unpublished data from the U.S. Department of Labor.

TABLE 2

EEOC Actionable Charges

Year	Race	Sex
1965	0	0
1966	3,254	2,053
1970	11,806	3,572
1972	27,468	10,436
1975	33,124	20,205
1981	44,085	30,925

Source: Burnstein (1979), derived from EEOC *Annual Reports*.

TABLE 3
Percentages of White Men Employed in EEO-1 Reporting Firms*

	1966	1970	1974	1978	1980
All EEO-1	52.7	53.5	52.4	49.3	48.5
Federal contractors	N/A	39.2	38.9	37.4	36.2
Noncontractors	N/A	14.3	13.6	11.9	12.2

N/A = not available.
* Derived as EEO-1 employment divided by *Current Population Survey* employment outside governments and educational institutions.

extreme mix under neutral selection is trivial. We could confidently say that a three-fourths to one-fourth imbalance is "proof" of nonrandom selection with 100 employees; with 20, we are less certain; and with 4 we could not distinguish a strong bias from neutral selection.

Patterns of practices are inherently statistical questions and elimination of chance, as an alternative explanation of what is, requires large numbers. Since only larger firms (100 or more employees) are required to report to EEOC, I rely on totals from EEO–1 reports to index the size of the affected population.

As a benchmark, I have calculated numbers of white men in firms reporting to EEOC as a percentage of total employment in private industry. The percentages are given in table 3 for selected years. Over the full period, 1966 to 1980, about one-half of employment was in firms reporting to EEOC and three-quarters of this employment was in Federal contractors. Note the declining fractions for white men after 1970. Part of this decline is the result of substitution that increased the representation of protected workers, but that is not the whole story. Patterns of employment growth during the 1970s show that the greatest increases were in industries where the smallest fractions of employees are in firms reporting to EEOC.

In the tables that follow, I provide indexes of representation for three protected groups: black men, black women, and white women. In each case, reference is to one of these groups. Employers are specified as either all EEO–1 reporting firms, Federal contractors, or noncontractors. Job classifications include all employees, officials and managers, or professional and technical workers. The representation statistic is the number of protected workers in the job classification that work for the designated firms as a proportion of all protected workers in that classification divided by the corresponding proportion for white men. The index is normalized so a value of 100 means that the firms described employ the same fraction of protected-group workers as of white men. An index value of 75 implies that only three-fourths as many protected workers are employed as would be predicted on the basis of the employment of white men.

Firms reporting to EEOC are larger than others. Reporting firms are not distributed among industries in the same proportions as other firms, nor do they have the same mix of occupations. It is, therefore, not surprising that the measures of representation usually differ from the 100 norm. The representation statistics are not particularly useful for determining whether firms or groups of firms intentionally opt for or against protected workers because of their minority status or whether the imbalance exists for other reasons. The value of the representation statistics is that it gives us a simple way of observing change, i.e., the numbers themselves are less interesting than the trends in them.

The first representation statistics are in table 4. In 1966, 48.4 percent of the black men in private industry worked for EEO–1 reporting firms. That number is 91.2 percent of the corresponding share for white men (52.7 percent). Table 4 refers to total employment in firms reporting to EEOC and, in 1966, employment shares of protected workers in these firms were 8 to 10 percent below their employment of white men. Note, however, the remarkable realignment between 1966 and 1970 for black men and women. In 4 years the firms reporting to EEOC switched from having an underrepresenta-

tion of blacks to a disproportionately large representation.

For black men, the trend continued until 1974 and then apparently stabilized, with EEOC reporting firms employing a share that exceeds the share for white men by 25 percent. For black women, the growth is greater and has persisted. In 1980 EEO–1 reporting firms employed 48.5 percent of white men in private industry. These same firms employed 74.9 percent of the black women. Contrast this to the 1966 numbers of 52.7 percent for white men and 48.7 percent for black women.

The pattern for white women is qualitatively similar to that of the other groups but the changes are an order of magnitude smaller.

In 15 years the employment picture shifted from one where protected groups were less likely to work for firms reporting to EEOC, to one where blacks are more likely and white women are about as likely as white men to work in these firms.

Although we cannot distinguish between Federal contractors and others in the EEO–1 data in 1966, table 5 provides this contrast for the later years. In addition to total employees, numbers are shown for the top two of the nine occupations contained in EEO–1 forms. Using 1970 as the benchmark, the first thing to observe is that protected workers were much more likely than white men to work for noncontractors. This contrast is sharper for women than for black men and is probably an artifact of occupational and industrial segregation.[1] The second thing to observe is that the representation statistics do not change much between 1970 and 1980 for noncontractors when all employees are considered. And, for the top two occupational groups, the patterns of change are erratic—and perhaps show a slight upward trend. The dominant changes are for Federal contractors. Among all employees, representation increased between 1970 and 1980 by 18 percentage points for black men, by 46 points for black women, and by 10 points for white women. The numbers for officials and managers and for professional and technical workers are more impressive.

The all employees category necessarily refers to hiring, and the data show that Federal contractors have recruited an increasing share of protected workers. These data also show that the bulk of the increase was accomplished by 1974 for black men, but continued throughout the period for women.

In the wage comparison that follows, I concentrate on black men. Although I recognize that the story for women (especially minority women) may be more striking, and is probably different, there are so many complications in wage contrasts of men and women arising from questions of interruptions in the work career that I have taken the easier route.

It would be nice for interpreting wage comparisons if we could identify representation separately for Federal contractors and for others reporting to EEOC in 1966. Unfortunately, my data do not permit this calculation. Nonetheless, I assume that the 1966–70 period was the one during which the greatest growth occurred. Consider the evidence from tables 4 and 5. There are four component periods between 1966 and 1980 where changes in representation are observed. These include 1966 to 1970, 1970 to 1974, 1974 to 1978, and 1978 to 1980. In only the last three are differences between contractors and others known. In table 6 I contrast changes in representation of black men for all EEOC reporting firms with changes where the firms are distinguished by contractor status.

Notice after 1970 that changes for Federal contractors are slightly larger, but are otherwise similar to changes among all EEO–1 reports. Recall, in any case, that Federal contractors account for about three-fourths of all EEO–1 employment. For the EEO–1 totals, representation of black men grew more between 1966 and 1970 than it did for any other period or combination of periods. Is it not reasonable to assume that most of this growth resulted from hiring by Federal contractors?

Patterns of Wage Change

In this section, I describe earnings of black men as a percentage of the earnings of white men. Most comparisons are based on age or years since leaving school and on level of education. Five schooling levels are distinguished to identify those who completed 8 years of schooling, 9 to 11 years, 12 years (high school graduates), 13–15 years (1 to 3 years of college), and 16 or more years (college graduates).

[1] I do not intend that segregation be viewed as discrimination. There is a long list of alternative explanations. Notice also that job categories like officials and managers or professional and technical are aggregates of many specific job titles. Occupational segregation, coupled with different occupational mixes between contractors and others, will result in differences in representation of protected groups among these groups of employers.

TABLE 4

Representation of Protected Groups in Firms Reporting to EEOC

	1966	1970	1974	1978	1980
Black men	91.8	112.5	123.1	128.4	126.4
Black women	91.5	118.7	141.2	144.8	154.4
White women	90.1	93.4	95.8	97.6	96.7

Numbers are percentages of protected workers in EEO-1 reporting firms divided by the corresponding percentages for white men. Ratios are multipled by 100.

TABLE 5

Representation of Protected Workers in Firms Reporting to EEOC by Contractor Status

	1970	1974	1978	1980
A. All employees				
Federal contractors				
Black men	105.6	118.3	125.7	123.5
Black women	88.2	112.1	121.9	134.5
White women	71.6	74.2	78.6	81.5
Noncontractors				
Black men	130.8	132.4	137.0	137.7
Black women	202.1	224.3	216.0	218.0
White women	154.5	157.4	157.1	142.6
B. Officials and managers				
Federal contractors				
Black men	72.4	100.8	101.8	106.0
Black women	76.8	113.4	155.9	136.9
White women	52.6	57.0	64.1	62.8
Noncontractors				
Black men	100.0	112.9	99.0	109.4
Black women	180.2	227.6	248.5	209.4
White women	139.6	126.7	123.8	105.7
C. Professional and technical workers				
Federal contractors				
Black men	77.0	131.5	113.9	94.6
Black women	35.8	48.2	68.8	86.2
White women	42.9	43.9	52.8	57.8
Noncontractors				
Black men	108.6	167.2	133.3	113.2
Black women	184.3	252.9	274.3	235.7
White women	236.4	278.2	281.0	207.8

TABLE 6
Changing Representation of Black Men

	Between			
	1966 & 1970	**1970 & 1974**	**1974 & 1978**	**1978 & 1980**
All EEO-1	20.7	10.6	5.3	–2.0
Federal contractors	—	12.7	7.4	–2.2
Noncontractors	—	1.6	4.6	0.7

TABLE 7
Earnings of Black Men as a Percentage of Earnings of White Men by Years Since Leaving School, in 1960, 1970, and 1980

Years since	**Annual earnings**			**Weekly earnings**		
leaving school	**1960**	**1970**	**1980**	**1960**	**1970**	**1980**
1–5	58.4	70.5	76.2	61.1	74.6	80.8
6–10	54.9	65.1	71.3	58.8	68.1	75.0
11–15	54.8	63.1	69.2	58.6	65.2	72.4
16–20	54.7	60.7	67.1	58.4	62.9	70.0
21–25	55.0	59.8	65.4	58.3	62.2	67.8
26–30	53.4	58.4	64.5	56.8	60.7	67.1
31–35	53.3	57.8	65.0	56.1	60.1	66.7
36–40	54.0	58.7	66.6	57.2	60.5	68.5
All	55.3	62.7	70.9	58.6	64.9	73.5

Source: Individual records of wage and salaried employees from public use file of the 1960, 1970, and 1980 *U.S. Censuses of Population and Housing.*

The data are from the 1960, 1970, and 1980 U.S. censuses. These surveys are taken in April of the decennial census years and include information about individuals' age, education, and, for those who are employed by others, wages and salaries during the preceding calendar year (1959, 1969, or 1979). Numbers of weeks worked during the preceding year are also recorded and, in most cases, I use average weekly earnings (earnings last year divided by weeks worked last year) for the comparisons.

The censuses do not tell us when people left school and began their work career. The convention I use is to estimate time since leaving school (and beginning work) on the basis of age and education. For example, for those who did not complete high school, I assume the work career began at age 17. Those designated as in their first 5 years since leaving school are those who were 17 to 21 years old when surveyed, provided that they did not graduate from high school. For high school graduates, work is assumed to begin at age 18. For those who attended but did not graduate from college, work is assumed to begin at age 20 and at age 22 for college graduates. Thus, a 40-year-old college graduate is assumed to be in the 18th year out of school.

Table 7 gives earnings comparisons (by years since leaving school) from the three censuses.

The first thing to observe is that earnings ratios are higher when average weekly wages are compared than they are when comparisons are based on annual earnings. This reflects the fact that black men work fewer weeks per year on average than white

men. The data for annual earnings are presented to make this point. The weekly earnings data are more closely related to wage rates, and I confine my comments to them.

Perhaps the most impressive numbers in table 7 are those in the final row when averages are taken over all age groups. Between 1960 and 1980 weekly wages of black men rose from 58.6 percent of the earnings of white men to 73.5 percent. More than one-third of the black-white wage gap was closed during these 20 years. Part of this change has occurred because schooling levels of blacks and whites are converging, but the largest part of the change has been that earnings of blacks are increasing relative to whites at the same schooling levels.

Earnings growth for blacks with the same schooling as whites could occur because the schools attended are increasingly similar in quality.[2] But the growth may also be attributable to improving job market opportunity for blacks.

If we choose a column in table 7 and look down the rows, we see that the wage ratio is higher for younger than for older men. This partly reflects a narrowing black-white educational differential,[3] but it may also reflect superior job market opportunities for younger blacks.

It is often asserted that this phenomenon of higher relative wages for young black men is an artifact of slower career progression. According to this argument, blacks and whites are most similar in realized earnings when they first enter the job market. As the career unfolds, blacks are disproportionately shunted into dead end jobs and whites are promoted into higher paying jobs. The obvious prediction is that relative wages of blacks fall as they age.

This view, which is called the dual or secondary market hypothesis, fails to explain why the wage profiles are higher in recent years than in 1960. Moreover, it simply misrepresents the data. Career progressions can be traced in table 7 by reading on the diagonal.

For example, those who were 1–5 years out of school in 1960 were 11–15 years out in 1970, and 21–25 years out in 1980. Starting with a relative wage of 61.1 percent in 1960, this cohort's wage increased to 65.2 percent in 1970 and to 67.8 percent in 1980. If you examine all such cohort comparisons in table 7, you will see that there are a total of 12 changes to observe. Eleven of the 12 show rising relative wages for blacks as the career expands. The single exception is for those 1–5 years out in 1970 (and 11–15 years out in 1980) for whom the wage ratio falls from 74.6 to 72.4 percent.

In table 7, if we contrast 1960 and 1980 wage ratios, we see that the largest gain occurred among the youngest groups. For example, relative wages for those 1–5 years out of school increased from 61.1 to 80.8 percent or 19.7 percentage points. For the oldest group, relative wages increased from 57.2 to 68.5 percent (11.3 percentage points). As I will show, this pattern of greater growth for the younger groups only shows more rapid growth in school completion in the recent period. Once changing educational levels are taken into account, a pattern of advance emerges that is fairly uniform across the age groups.

Notice that when the 1960 to 1980 changes are broken into two phases, 1960 to 1970 and 1970 to 1980, the greatest growth occurred for younger workers during the 1960s and occurred for older workers during the 1970s. This contrast withstands adjustments for changing levels of education. I interpret it as suggesting that the impetus of affirmative action in the 1960s was on hiring, but moved to promotion during the 1970s.

Because most newly hired workers are young (relative to the general work force), an emphasis on hiring creates a youth bias in wage change. An emphasis on promotion has no obvious youth bias.

In table 8 I report wage ratios as of 1980 by time out of school and level of education. These ratios are generally higher than the ones reported in the earlier table, where black-white differences in schooling were combined with comparisons like those shown here. One especially noteworthy feature of table 8 is that, at higher levels of schooling, younger black workers fare decidedly better in comparison to whites than is true for older workers. The reverse

[2] For example, in 1960 black college graduates who were in their first 5 years out of school earned 72 percent as much as whites. In 1980 black college graduates in their first 5 years out of school earned 92 percent as much as whites. These comparisons are of college graduates, 22 to 26 years old in 1960 and 1980. In the 20 years between 1960 and 1980, blacks who are college graduates were drawn increasingly from the same schools as whites. Twenty years earlier, recent black college graduates were much more likely to have graduated from traditionally all-black colleges and the training received during college may have been less comparable than in 1980.

[3] Average school completion levels of young black men are more similar to the educational levels of white men than is true for comparisons of older black men and white men.

pattern appears for those with only 8 years of schooling, i.e., those who did not attend high school. Another pattern of interest is that, among the youngest workers, relative wages of blacks increase as levels of schooling rise. This is an important departure from the familiar patterns of earlier times where earnings ratios for blacks declined as schooling increased. The familiar pattern—about which perhaps too much has been written—is exhibited for older workers in 1980.

There is a tradition in the economics literature of treating schooling as an investment in which students forego opportunities for current income and invest (via staying in school) in higher income for the future. A common practice in this tradition has been to compute rates of return to investments in schooling, just as rates of return are computed for alternative investments. A simple rule for comparing investments for two groups like blacks and whites involves observing whether income rises proportionately more for one of the groups as schooling increases. If it does, the rate of return is higher for that group. Using this rule for table 8 we see that, for workers who have been out of school more than 20 years, i.e., those who left school before 1960, rates of return to schooling were lower for blacks than for whites. The opposite is true for more recent graduates. Investments in schooling are more lucrative today for blacks than for whites.

Table 9 shows earnings growth between 1960 and 1980. The numbers in this table are the differences between the numbers shown in table 8 and a similar one (not shown) for 1960. When workers are grouped by age and education, we find in every case that wages of blacks were higher, relative to whites, in 1980 than in 1960.

The largest gains occur for the most educated. The smallest gains are found for the youngest, least educated. When these changes are divided into those occurring during the 1960s and those during the 1970s, an interesting pattern emerges. First, during the 1960s, the largest gain occurs among the youngest group at every level of education. Moreover, the change is greatest at the highest levels of schooling.

During the 1970s, relative wages of the youngest blacks fell at all levels of schooling except for college graduates.

I have tried to summarize the most salient features of these changes in tables 10 and 11. Table 10 provides changes, averaged over schooling levels, for the groups designated by time since leaving school. Table 11 provides changes, averaged over time out of school, by level of schooling. Between 1960 and 1970, the largest increases in relative wages are found in the youngest groups. This pattern reversed between 1970 and 1980. Relative wages actually fell for those out of school 5 years or less and, for older workers, gains generally increase as age increases. When the periods are combined (in the third column of table 10), there is no apparent pattern between time out of school and improvement in the relative wage of black men.

In table 11 we see a definite pattern of greater increases in the black-white wage ratio being associated with higher levels of schooling. There is no apparent pattern for changes during the 1970s. In the later period, the greatest change occurred for college graduates, and the second largest for those who did not attend high school. Of course (column three), the combined changes for the two decades show much larger gains for the most educated.

Summary

Title VII of the 1964 Civil Rights Act took effect on July 2, 1965. This act proscribed discrimination based on race, sex, religion, or ethnicity in terms and conditions of employment. Remedy was available through the Federal courts. The same year, Executive Order 11246 required that Federal contractors comply with Title VII and take affirmative action to eliminate continuing effects of past discrimination.

Beginning in 1966, larger firms in private industry were required to file EEO–1 reports annually with EEOC, the agency established to monitor Title VII compliance. And, beginning in 1968, Federal contractors were required to file affirmative action reports with goals and timetables with OFCC, the agency established to monitor Executive Order 11246 compliance.

As measured by budgets and caseloads, the two agencies developed slowly until 1970 and then increased by a multiple of 8 to 10 in 5 years. Litigation in Federal courts appears to have paralleled this increase. Part of the growth during this period is attributable to the 1972 Equal Employment Opportunity Act which extended Title VII coverage to governments and educational institutions and gave EEOC the right to sue in plaintiffs' behalf. Growth continued after 1975 but at a more modest rate.

How has all of this affected the groups targeted for protection? The most obvious change is that, in

TABLE 8

Earnings Per Week of Black Men as a Percentage of Earnings of White Men by Education and Years Since Leaving School, 1980

Years since leaving school	Years of school completed				
	8	9–11	12	13–15	16 or more
1–5	72.7	85.5	81.0	91.3	91.6
6–10	75.4	75.5	78.1	84.1	87.7
11–15	79.3	78.6	78.9	80.6	86.3
16–20	74.9	76.8	77.7	79.0	75.9
21–25	76.1	75.2	75.4	77.0	73.2
26–30	81.5	74.6	76.5	75.1	73.4
31–35	80.2	75.7	76.0	77.2	66.9
36–40	77.7	77.1	75.6	74.4	71.7

TABLE 9

Growth in Earnings Per Week of Black Men Relative to Earnings of White Men Between 1960 and 1980, by Education and Years Since Leaving School

Years since leaving school	Years of school completed				
	8	9–11	12	13–15	16 or more
1–5	2.0a	9.0	10.8	16.2	19.9
6–10	1.6a	9.7	7.5	13.1	15.2
11–15	4.5a	12.3	12.1	14.6	17.8
16–20	6.1a	6.6	10.6	12.9	12.8
21–25	2.6a	5.9	7.7	14.0	19.1
26–30	9.2	9.5	10.3	10.2	13.9
31–35	9.7	8.9	11.1	21.1	14.0
36–40	7.6	11.9	15.0	19.1	16.6

Numbers in this table are 1980–1960 differences in earnings per week of black men as a percentage of earnings of white men.
a = Not statistically different from zero.

comparison to white men, members of protected groups are much more likely today to work for firms reporting to EEOC, especially Federal contractors, than they were when the legislation took effect. The fraction of black men in private industry who worked for EEO-1 reporting firms increased from 48.4 percent in 1966 to 60.2 percent in 1970 and 64.5 percent in 1974. Fractions of black men employed in EEO-1 reporting firms fell slightly after 1974 to 61.5 percent in 1980.

The response is even greater for black women, with employment shares in EEO-1 reporting firms growing from 48.2 percent in 1966 to 63.5 percent in 1970, to 74.0 percent in 1974, and to 74.9 percent in 1980.

For white women, the story is a little different. There was an initial response where the fraction in reporting firms rose from 47.5 to 50.2 percent between 1966 and 1970. But then the number dropped to 46.9 percent by 1980.

Although the pattern is mixed for white women, there is no ambiguity for blacks. Employment moved toward the firms that are most closely monitored. Oddly, the bulk of the change had occurred by 1970. After 1974, when litigation and monitoring were apparently reaching their full

TABLE 10

Average Growth in Relative Earnings of Black Men by Years Since Leaving School (All Educational Levels)

Years since leaving school	1960 to 1970	1970 to 1980	1960 to 1980
1–5	15.4	–2.9	12.5
6–10	8.2	1.9	10.1
11–15	8.1	5.0	13.1
16–20	5.6	4.5	10.1
21–25	5.9	2.9	8.8
26–30	3.5	6.7	10.2
31–35	3.9	8.0	11.9
36–40	6.9	6.3	13.2

Numbers are averages of changes within educational levels weighted by the (age specific) distributions of school completion for black men in 1980.

TABLE 11

Average Growth in Relative Earnings of Black Men by Years of School Completed (All Ages)

Years of school completed	1960 to 1970	1970 to 1980	1960 to 1980
8	2.0	4.3	6.3
9–11	5.7	3.5	9.2
12	7.3	2.8	10.1
13–15	12.0	2.4	14.4
16 or more	10.8	5.7	16.5

Numbers are averages of changes within age group weighted by the (education specific) age distributions of black men in 1980.

force, there was a slight shift of employment away from covered firms.

It is impossible to determine from the kinds of data that are available to me whether the movement of minority workers to monitored firms has resulted in more favorable treatment. Ideally, we would use longitudinal data that describe career development of individuals. If we could match employees with firms, we could then contrast starting positions and subsequent progress of employees, say, of Federal contractors with employees of nonreporting firms. That is a task for another day.

What I do instead is compare earnings of black men to similarly aged and educated white men at three points in time: 1960, 1970, and 1980.

It would be naive to argue that all of the observed wage gains for black men have resulted from affirmative action. I do believe, however, that the patterns of changing relative wages are suggestive of program effects.

The clearest pattern over the two decades is the proschooling bias in wage growth. When earnings of black men are expressed as a percentage of earnings of white men, we find a 1960 to 1980 increase of 16.5 percentage points for college graduates, of 14.4 points for those who attended but did not graduate from college, of 10.1 points for high school graduates, of 9.2 points for high school dropouts, and of 6.3 points for those who did not attend high school. In 1960 schooling was a less remunerative invest-

ment for blacks than for whites. By 1980 the opposite was true.

I personally think enforcement of affirmative action statutes is inherently more favorable to the most skilled protected workers. The presumption on which affirmative action is based is that, were it not for discrimination, protected workers and white men would be more similar in labor market success than they are. This presumption emphasizes scrutiny where differences between white men and others are greatest and where the differences are to the advantage of white men. In 1966, among firms reporting to EEOC, 25.4 percent of the white male employees were in jobs categorized as officials and managers or as professional and technical; 3 percent of the black men worked in these top rung jobs. In contrast, 14.3 percent of the white men in the firms were laborers or service workers as opposed to 47.8 percent of black men. Given this disparity, it would be surprising if much pressure was placed on reporting firms to hire black laborers. Instead, one expects pressure for hiring and promotion into professional and managerial ranks.

The representational statistics suggest that early EEO emphasis was on hiring. And, since newly hired workers are younger on the average than others, it is not surprising that relative wage growth was largest for the youngest black men in the early phases.

A reasonable interpretation of the data presented is that the affirmative action impetus breaks into two phases. In the first, say, before the early 1970s, there was little litigation. Later, as levels of litigation rose, there was an expanded range of employment practices opened to question. In addition to hiring, they most often addressed pay and promotion. The evening across age groups that occurred during the 1970s presumably reflects the broader coverage.

Conclusion

On the whole, the apparent bias in affirmative action programs is probably desirable. For those concerned with broadly based equality, a proskill bias may appear anomalous because, in comparison to other members of minority groups, the most highly skilled will fare best in any case. Yet, in evaluating programs, incentives should be considered. An objective of an employment program like affirmative action is not only to eliminate income and employment differentials, but to provide a sustainable basis for maintenance of a reduced differential. The skill differential between blacks and whites that is partially reflected in differential levels of school completion is a major source of the income differential. A proskill bias in affirmative action has the desirable effect of creating incentives for eliminating the skill differential.

A secondary question is whether the skill bias has been overdone and whether the strong affirmative action effect witnessed in the early years of the program has lost some of its steam. Although I think there is evidence of a declining effect, as demonstrated in the representation statistics, I also think it was inevitable.

The firms most vulnerable to pressure are logically those that would have been reviewed first. The evidence is that responses were dramatic. Secondly, after the early successes, the large-scale Federal contractors simply have not had the kind of employment growth that would sustain major shifts in employment patterns. Recall that fractions of white men in private industry who work for Federal contractors have fallen since 1970. Part of this decline is undoubtedly a result of emphasis on hiring protected workers, but it remains true that the industries where total employment grew most rapidly during the 1970s are those where the smallest fractions of all employees work for firms reporting to EEOC.

On the issue of skill bias, I do think administration of affirmative action, especially through courtroom tests, has gone too far. One would like to think that an affirmative employment program would encourage risk taking by employers; that actions which create expanded opportunities for protected workers would be subsidized rather than taxed. Yet, tests of employment practices tend to be step-by-step comparisons where minority success rates are contrasted with success rates of white male reference groups. Any overrepresentation of minorities among the unsuccessful tends to be viewed as discriminatory.

Consider, for example, an employer who decides to increase the representation of black workers. Assume that minority representation in the relevant labor pool is 20 percent and that the firm considers hiring at a rate of 25 percent. One assumes that the departure from the norm would be associated with hiring some blacks who would otherwise be viewed as marginal. If I correctly understand current interpretation of law, it is that if the firm elects to hire blacks at a rate of 25 percent, then at least 25 percent of those promoted must be black and no more than

25 percent of those involuntarily terminated can be black. If the firm elects to hire some who otherwise would be viewed as marginal on the chance that some of them will succeed, it risks being judged as discriminatory in subsequent promotion and termination decisions.

To avoid sanctions in subsequent litigation, a prudent employer response may tend to be conservative in restricting hiring to those who, on first review, appear to have the greatest chance of subsequent success. I have not reviewed the fine details of court proceedings, but I would not be surprised if we were to find that many of the firms hit hardest in litigation involving charges of discrimination in pay, promotion, and termination are the ones that responded most affirmatively in hiring in the late 1960s and early 1970s. I presume that a large part of the proskill bias that we find in affirmative action programs has resulted from the implicit tax on the assumption of risk. Is it surprising that, during the 1970s, the only case where we find relative earnings of young blacks continuing to rise is for college graduates? Relative earnings of young blacks with less schooling fell during the 1970s and eroded part of the gains realized during the 1960s.

As I see it, there are two major weaknesses in modern affirmative action enforcement. One, just described, is that employment processes are examined step by step in fine detail without a broader perspective concerning the way a firm's behavior differs from its own past or from that of comparable firms. The other is that small-scale employers cannot be effectively monitored, and they account for a growing fraction of total employment.

It would seem reasonable that an affirmative action program directed toward eliminating historical deficiencies in the labor market successes of minorities and women would be an integrated system of carrots and sticks. The sticks in current programs are obvious, but they cannot reach smaller employers. Where are the carrots?

Affirmative Action: Evaluation of the Past and Strategies for a Better Future

By Larry M. Lavinsky*

Counting from President Kennedy's Executive Order No. 10925,[1] issued in March 1961, government-required affirmative action has been with us for almost a quarter of a century. During much of that time, preferential affirmative action by government contractors has been the result, if not the aim, of a regulatory system that mandates the establishment of goals and timetables wedded to the concept of proportionality. In this system, quantitative results have become the hallmark of compliance, however insubstantial in terms of real progress and however destructive of equal opportunity.

The system was supposed to be temporary. But no one, least of all the advocates of preferential affirmative action, would be bold enough to suggest when it will have accomplished its objectives. Under the circumstances, an affirmative action consultation such as this Commission has scheduled is most appropriate.

It is the thesis of this paper that the preferential approach has, for a variety of reasons, been counterproductive; that successful affirmative action requires a qualitative, as well as a quantitative, dimension; and that affirmative action efforts must begin in the primary and secondary schools if there is to be any substantial increase in the pool of qualified minority applicants, particularly for higher level positions.

The experience and models for effective, nonpreferential affirmative action are available. Although it would require more effort and dedication than the present system, the needed commitment is far more likely to be forthcoming for an approach perceived as both effective and fair. The alternative is continued controversy, polarization, and politicization of a cause that should transcend politics. It would be tragic if affirmative action—a product of this nation's highest aspirations for social justice—were to become simply another entitlement program.

The Executive Orders

Executive Order No. 10925 and Executive Order No. 11246[2] (issued by President Johnson in September 1965) incorporated the concept of nondiscrimination in its purest sense. In addition, they required government contractors to reach out and recruit

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[1] 3 C.F.R. 448 (1959–63 Comp.).

[2] 3 C.F.R. 339 (1964–65 Comp.), *reprinted in* 42 U.S.C. §2000e at 19.

qualified minorities who had in the past been barred by discrimination and, once employed, to treat them in a nondiscriminatory manner.

Thus, the preamble to Executive Order No. 10925 declared: "It is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons."[3] The latter required contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."[4]

By the late 1960s, however, affirmative action, as embodied in the "Philadelphia Plan,"[5] and other programs, had taken the form of numerical goals for minority employment in the construction trades and elsewhere. In May 1968 the Office of Federal Contract Compliance[6] instituted the concepts of "utilization analysis" and "goals and timetables" in its first regulations setting forth the affirmative action obligations of nonconstruction contractors.[7]

With the issuance of Revised Order No. 4,[8] these concepts were substantially expanded and the transformation of government-mandated affirmative action into a vehicle for preferential and quota-oriented hiring was complete. Despite pronouncements by OFCCP and other governmental agencies that only good-faith efforts were required, the insistence on proportionality, to be achieved through numerical goals and timetables, had diluted the pledge of nondiscrimination to lipservice devoid of substance.

In an article entitled "The Road To Racial Quotas,"[9] Laurence H. Silberman, who served as Under Secretary of Labor from 1970 to 1973, described the "beneficent" effects of the new approach by candidly admitting that "[o]ur use of numerical standards in pursuit of equal opportunity has led ineluctably to the very quotas, guaranteeing equal results, that we initially wished to avoid."[10] On the subject of utilization analysis, Mr. Silberman observed:

> Initially the hiring goals of the Philadelphia Plan were significantly below the minority representation in the labor market. That was because black representation in skilled construction trades was so low that any goal represented significant progress. But the plan's numbers had no real conceptual base, and so eventually all plans and orders were directed towards proportionate minority representation in a given labor market. Indeed, the very word "underutilization" necessarily implied that objective.[11]

Mr. Silberman described the reaction of employers to numerical goals and timetables in the following terms:

> In practice, employers anxious to avoid inquiry from government officials concerned only with results (rather than merely with efforts) often earmarked jobs for minorities without regard to qualifications. . . .
>
> In hindsight, one can see this was predictable. We wished to create a generalized, firm, but gentle pressure to balance the residue of discrimination. Unfortunately, the pressure numerical standards generate cannot be generalized or gentle; it inevitably causes injustice.[12]

The Reagan administration, despite a very different philosophy, has not wrought any fundamental change. Thus, a recent account described the mood at the Department of Labor and the Equal Employment Opportunity Commission as "cautious" and "equivocal," with "White House appointees expressing the Administration's position but career bureaucrats continuing their traditional approach to enforcing civil rights laws."[13]

This account gave the following synopsis of developments at OFCCP during the administration's first 4 years and a suggestion as to what might happen in the next 4 years:

> The Labor Department's Office of Federal Contract Compliance Programs changed some internal procedures and began a tentative move toward negotiating voluntary agreements with major corporations. But the agency continued to waffle over its biggest task—issuing revised affirmative action regulations setting out requirements for federal contractors. Some observers are suggesting that

[3] 3 C.F.R. 448 (1959–63 Comp.).

[4] Exec. Order No. 11246, §202(1), 3 C.F.R. 339 (1964–65 Comp.), *reprinted in* 42 U.S.C. §2000e at 19.

[5] As finally ordered by the U.S. Department of Labor in 1969, the Philadelphia Plan required all Federal construction contractors in the Philadelphia area to "establish specific goals for utilization of available minority manpower in six trades." *See* Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 164 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

[6] Now called the Office of Federal Contract Compliance Programs (OFCCP).

[7] 33 Fed. Reg. 7804 (1968).

[8] 36 Fed. Reg. 23,152 (1971). Revised Order No. 4 is now codified at 41 C.F.R. §60-2.1.

[9] Silberman, "The Road to Racial Quotas," *Wall Street Journal,* Aug. 11, 1977, p. 14, col. 4.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] "Policy Changes, Aggressive Enforcement, Will Mark Next Term At EEOC, Thomas Says," *Daily Labor Report,* no. 221, Nov. 15, 1984, p. A-6.

the four-year-effort at changing the regulations may be junked entirely during the President's second term.[14]

Role of the Courts

In his article, Mr. Silberman suggests that the judiciary, as much as the executive branch, has played an important role in stimulating preferential affirmative action:

> To be sure, we were not solely responsible. Federal courts already had begun to fashion orders in employment discrimination cases which went beyond relief for those specifically discriminated against. The orders required employers found guilty of discrimination to hire in accordance with a set ratio of whites to blacks, whether or not new black applicants had suffered discrimination. Thus was introduced a group rights concept antithetical to traditional American notions of individual merit and responsibility.
>
> It was on that developing legal authority that the Philadelphia Plan was defended when challenged. . . .[15]

DeFunis v. *Odegaard* (1974)[16] was the first affirmative action case to come before the United States Supreme Court. It involved a constitutional challenge, based on the equal protection clause of the 14th amendment, to a minority admissions program adopted by the University of Washington Law School, a State professional school. The Court dismissed the case as moot, because Marco DeFunis, who had been admitted to the school under court order, was on the eve of graduating.

Nevertheless, the dissenting opinion of Justice William O. Douglas, who would have upheld the challenge, is worthy of note. Justice Douglas, who for three decades had championed the cause of social justice, declared:

> A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. . . .So far as race is concerned, any state-sponsored preference to one race over another. . .is in my view "invidious" and violative of the Equal Protection Clause.[17]

Justice Douglas warned:

> If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordion-like quality. . . .[18]

This simple, yet eloquent, warning went unheeded, as a bitterly divided Court, in varying degrees, sanctioned preferential affirmative action in cases involving programs designed to increase minority representation in professional schools, private employment, and the selection of contractors for construction projects funded by the Federal Government.

In *Regents of the University of California* v. *Bakke* (1978),[19] the Court considered a challenge to a special admissions program at the University of California at Davis Medical School, under which 16 out of the 100 places in each entering class were reserved exclusively for minority applicants. Four Justices (Stevens, Burger, Stewart, and Rehnquist) considered the program a clear violation of Title VI of the Civil Rights Act of 1964,[20] which prohibits the exclusion of any person on the basis of race from an educational program receiving Federal funding. Four other Justices (Brennan, White, Marshall, and Blackmun) would have upheld the Davis program, despite the absence of any showing that the medical school had ever discriminated against minority applicants, because it sought to remedy the effects of past "societal" discrimination.[21]

The *Bakke* decision was thus crafted by a single jurist, Justice Powell. He provided the decisive fifth vote for two separate majorities: one declaring the Davis program unlawful and directing that Mr. Bakke be admitted; the other holding that a university may lawfully consider race as "one element—to be weighed fairly against other elements—in the selection process,"[22] in order to achieve a diverse student body.

Two aspects of Justice Powell's opinion are of particular significance. The first is his rejection of past "societal" discrimination as a basis for preferential affirmative action.[23] The second is his dilution, in the name of academic freedom, of the "strict scrutiny" standard for determining the constitutionality of racial classifications.[24] The latter position is difficult to reconcile with Justice Powell's simulta-

[14] Ibid., pp. A-6—A-7.
[15] Silberman, "The Road to Racial Quotas."
[16] 416 U.S. 312 (1974).
[17] *Id.* at 337, 343–44.
[18] *Id.* at 337, 343.
[19] 438 U.S. 265 (1978).
[20] 42 U.S.C. §2000d *et seq.*
[21] 438 U.S. at 366.
[22] *Id.* at 318.
[23] *Id.* at 307–10.
[24] *Id.* at 311–15.

neous rejection of a lesser standard of scrutiny for "benign" racial classifications:

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.
>
> Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign". . . .It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. [emphasis in original][25]

United Steelworkers of America v. *Weber* (1979)[26] involved an on-the-job training program in which unskilled workers were trained for skilled craft jobs. Fifty percent of all openings in the program were reserved for minority employees, who were 39 percent of the work force in the surrounding area, but only 2 percent of the skilled craft workers at the plant. The program was challenged under Title VII of the Civil Rights Act of 1964,[27] which prohibits racial discrimination "against any individual" in employment. Justice Brennan, writing for a 5–2 majority,[28] upheld the program. Stressing the narrowness of the Court's inquiry, he stated that Title VII left to private employers an "area of discretion. . .voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[29] He also observed that, since the program did not involve state action, the equal protection clause of the 14th amendment was not at issue.[30]

Justice Brennan did not "define in detail the line of demarcation between permissible and impermissible affirmative action plans,"[31] nor did he define the term "[t]raditionally segregated job categories."[32] He did, however, note that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."[33] He also concluded that the program did not "unnecessarily trammel the interests of white employees."[34] On the contrary, it afforded both white and black employees training opportunities not previously available.

The decision is troubling for a number of reasons, not the least of which is the questionable use of the term "voluntary" to describe the training program. The issue of voluntariness seems to have been of particular significance to Justice Brennan, in view of his literal reading of section 703(j) of Title VII,[35] which provides that nothing contained in the statute "shall be interpreted to require any employer. . .to grant preferential treatment. . .to any group because of a racial imbalance in the employer's workforce." His rejection of the applicability of this section turned on its use of the word "require" rather than "permit."[36]

One is left to wonder how Justice Brennan ignored the observation of the Court of Appeals for the Fifth Circuit that the district court had found the program at issue "reflected less a desire on. . .[the employer's] part to train black workers than a self

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[25] *Id.* at 289–90, 294–95 (Powell, J.). Notwithstanding Justice Powell's admonition, the Court of Appeals for the Sixth Circuit, which also purports to examine racial classifications under the "strict scrutiny" standard, has stated:

> [A] case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain. . . .

Detroit Police Officers v. Young, 608 F.2d 671, 697 (6th Cir. 1979), *cert. denied,* 452 U.S. 938 (1981).

[26] 443 U.S. 193 (1979).

[27] 42 U.S.C. §2000e *et seq.*

[28] Stewart, White, Marshall, and Blackmun, J.J, joined in Justice Brennan's opinion. Blackmun, J., also filed a separate concurring opinion. Rehnquist, J., filed a dissenting opinion in which Burger, C.J., joined. Burger, C.J., also filed a separate dissenting opinion.

[29] 443 U.S. at 209 (footnote omitted).

[30] *Id.* at 200.

[31] *Id.* at 208.

[32] Justice Blackmun, in his concurring opinion, suggested that a job category is traditionally segregated:

> when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who held jobs within the category.

Id. at 212 (Blackmun, J., concurring) (footnote omitted).

[33] *Id.* at 198 n.1.

[34] *Id.* at 208.

[35] 29 U.S.C. §2000e–2(j).

[36] *See* 443 U.S. at 205 ("Had Congress meant to prohibit all race-conscious affirmative action, as respondent urges, it easily could have. . .by providing that Title VII would not require or *permit* racially preferential integration efforts") (emphasis in original).

interest in satisfying OFCC in order to retain lucrative government contracts."[37]

Fullilove v. *Klutznick* (1980)[38] involved a constitutional challenge to a provision of the 1977 Public Works Employment Act,[39] which required that, in the absence of an administrative waiver, at least 10 percent of any Federal grant for local public works projects "shall be expended for minority business enterprises."[40] The act defined minorities as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."[41]

Prior to enactment of this provision, minority contractors, who constituted 4 percent of those eligible, received less than 1 percent of the work.[42] The Court upheld the legislation by a 6–3 majority.[43] All of the Justices forming the majority concluded that Congress enacted the set-aside provision to remedy the effects of past racial discrimination. Unable to agree on a single legal approach, however, they wrote three separate opinions.[44]

What is particularly troubling about the *Fullilove* decision is the perfunctory and uncritical manner in which Congress passed, and the Court sustained, what Justice Stevens described as the Nation's first "broad legislative classification for entitlement to benefits based solely on racial characteristics. . . ."[45]

In each of these cases, deep divisions within the Court prevented it from articulating standards to guide future conduct in this highly sensitive and controversial area. As the United States Court of Appeals for the Third Circuit recently noted, with appropriate understatement:

> The absence of an Opinion of the Court in either *Bakke* or *Fullilove* and the concomitant failure of the Court to articulate an analytic framework supporting the judgments makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable.[46]

In *Firefighters Local Union No. 1784* v. *Stotts* (1984),[47] the Court recently struck down a district court order overriding a bona fide seniority plan in the context of layoffs. The order had sought to preserve the jobs of less senior minority employees hired pursuant to long term hiring goals contained in a consent decree. The decree was part of a settlement of a lawsuit charging the Memphis Fire Department with a pattern and practice of racial discrimination. The decree, however, did not address the question of layoffs and did not award minority workers competitive seniority.

In his majority opinion, Justice White stated:

> Title VII precludes a district court from displacing a nonminority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination. . . .[48]

Justice White, however, expressly reserved the question whether the Memphis Fire Department could itself have afforded minority employees the protection against layoffs that the district court had sought to mandate.[49]

The *Stotts* decision is the latest example of the Court's protective stance toward seniority rights threatened by judicial intrusion.[50] Nevertheless, until the Court is prepared to address the issue it avoided in *Stotts,* the abrogation of seniority rights through "voluntary" affirmative action is likely to continue.[51]

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[37] 563 F.2d 216, 226 (5th Cir. 1977).

[38] 448 U.S. 448 (1980).

[39] 42 U.S.C. §§6701–6710.

[40] 42 U.S.C. §6705(f)(2).

[41] *Id.*

[42] 448 U.S. at 511, 513 (Powell, J., concurring).

[43] Burger, C.J., and White, Powell, Marshall, Brennan, and Blackmun, J.J., voted to uphold the legislation. Stewart, Rehnquist, and Stevens, J.J., dissented.

[44] Burger, C.J., filed an opinion in which White and Powell, J.J., joined. Powell, J., also filed a separate concurring opinion. Marshall, J., filed a concurring opinion in which Brennan and Blackmun, J.J., joined.

[45] 448 U.S. at 549 (Stevens, J., dissenting). Equally troubling are the racial definitions required for enforcement, but understandably omitted from the act. An article in the *New York Times* discussing the challenged provision suggested that "[s]o far. . .enforcement has been fraught with nagging problems, not the least of which is the determination of who, precisely, is a member of a minority group." *New York Times,* Nov. 13, 1977, p. A1, col. 1, p. 66, col. 2. Walter G. Farr, Jr., the General Counsel of the Economic Development Administration, the branch of the Commerce Department in charge of the public works program, was quoted as saying "[w]hatever a person is considered by his community, that's what we're basing our judgment on." Ibid.

[46] Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 901 (3d Cir. 1984), *cert. denied,* 53 U.S.L.W. 3483 (1985) (footnote omitted).

[47] 104 S.Ct. 2576 (1984).

[48] *Id.* at 2587 n.9.

[49] *Id.* at 2590.

[50] *See also,* Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

[51] *See,* Wygant v. Jackson Bd. of Educ., 36 Fair Empl. Prac. Cas. 153 (6th Cir. 1984); Britton v. South Bend Community School

Of potentially greater significance than the *Stotts* holding is a recent decision by the United States Court of Appeals for the Seventh Circuit. In *Janowiak* v. *City of South Bend,*[52] the court held that a voluntary affirmative action plan undertaken by a public employer does not pass muster under either Title VII or the equal protection clause of the 14th amendment if it is based solely on "a statistical disparity between the percentage of minorities employed and the percentage of minorities within the community. . . ."[53] According to the court, additional evidence of past discrimination must exist in order for an affirmative action plan to be valid.[54]

This decision challenges—in the context of public employment—the fundamental premise on which most preferential affirmative action is based, namely, that lack of proportionality is the functional equivalent of past discrimination.[55] The challenge could be of fundamental significance. However, the Supreme Court's recent refusal to review the decision in an analogous case[56] suggests that it is not yet ready to resolve this issue.

Preferential Affirmative Action

The Term Defined

Definitions are not the least controversial issue in this highly controversial area. Words such as "quota," "preference," "qualified," and "benign" are given different meanings, depending upon the viewpoint of the spokesperson. Indeed, preferential affirmative action includes a spectrum of approaches, some of which are more likely than others to disregard the merit principle, however that phrase is defined. For example, a fixed racial set-aside limiting certain places in a program to minority-group members, such as the minority admissions program struck down in *Bakke,* is more clearly disruptive of equal opportunity for nonminority applicants than the "plus" for race approved by Justice Powell.

In this paper, preferential affirmative action refers to any approach through which an individual is given a job or educational or other opportunity that would not have been forthcoming but for his or her race. Special efforts to recruit qualified minority-group members would not fall within this definition. Similarly, a good-faith change in hiring or admissions criteria for all applicants, such as a greater emphasis on interviewing and less on a written examination, or the introduction of training and support programs for employees would not be "preferential," even if they are of particular assistance to minority applicants or employees. Nor would special consideration on the basis of disadvantage come within the definition if such consideration were accorded to all disadvantaged individuals, without regard to race.

Corp., 35 Fair Empl. Prac. Cas. 1527 (N.D. Ind. 1984). *See also,* Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Service, 35 Fair Empl. Prac. Cas. 24 (D. N.J. 1984).

[52] 36 Fair Empl. Prac. Cas. 737 (7th Cir. 1984).

[53] *Id.* at 741.

[54] This ruling was particularly appropriate in *Janowiak,* since a minority recruiting task force had there found that the employer's hiring standards were reasonable and nondiscriminatory. 36 Fair Empl. Prac. Cas. at 738, 743.

[55] Other courts have upheld affirmative action plans undertaken by public employers based solely on statistical disparities. For example, in Johnson v. Santa Clara County Transp. Agency, 36 Fair Empl. Prac. Cas. 725 (9th Cir. 1984), the court upheld an affirmative action plan by a public employer designed "to eliminate a manifest male-female imbalance." *Id.* at 730. The *Johnson* court cited statistics showing that the employer had few women in skilled positions and concluded that: "[i]n order to demonstrate that its plan is remedial, an employer need not show its own history of purposeful discrimination. It is sufficient for the employer to show a conspicuous imbalance in its work force." *Id.* at 730 (footnote and citation omitted). *See also,* Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), *cert. denied.,* 104 S.Ct 703 (1984); Kirkland v. New York State Dep't of Correctional Serv., 711 F.2d 1117 (2d Cir. 1983), *cert. denied,* 104 S.Ct. 997 (1984); United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980).

[56] Bushey v. New York State Civil Service Comm'n, 733 F.2d 220 (2d Cir. 1984), *cert. denied,* 53 U.S.L.W. 3477 (1985). In *Bushey,* the Court of Apeals for the Second Circuit upheld an affirmative action plan that had the effect of raising test scores of minority candidates for the position of "Correction Captain," to the detriment of nonminority candidates. The plan had been designed to eliminate the examination's perceived adverse impact on minorities. The Second Circuit held that "'a *prima facie* case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for a voluntary compromise containing race-conscious remedies'." 733 F.2d at 227, *quoting Kirkland,* note 55 above, 711 F.2d at 1130.

The Supreme Court denied *certiorari,* with three Justices dissenting. In his dissenting opinion, Justice Rehnquist, joined by Chief Justice Burger and Justice White, noted that the Second Circuit had decided the case solely under Title VII and that the constitutional question under the equal protection clause of the 14th amendment, "left open in *Weber,*" had not been pressed on appeal. 53 U.S.L.W. at 3477, 3478. Addressing this issue, he wrote that:

> the interests of innocent third parties. . .will not be sufficiently protected if agencies charged with discrimination may simply cave in to the allegations without even considering justifications for, or attempting to justify, their original employment decisions, particularly where the allegations are based only upon disparate impact.

Id. at 3478.

Results of Preferential Affirmative Action

Advocates of preferential affirmative action consider numerical standards essential to progress for minorities. For example, a recent report of the Citizens Commission on Civil Rights[57] attributes much of the progress in the occupational status of minorities (as well as women) to government-required goals and timetables and court-ordered or approved ratio hiring. The report concludes:

> Affirmative action remedies have led to significant improvements in the occupational status of minorities and women. Gains have occurred in the professions, in managerial positions, in manufacturing and trucking, in police and fire departments and other public service positions. These gains are linked specifically to enforcement of the goals and timetables requirements of the contract compliance program and to court orders and consent decrees for ratio hiring.[58]

The report does not purport to base this finding on a study or survey. Interestingly, although the Citizens Commission on Civil Rights sent a questionnaire to "some 200 corporations to gather data on the effects of their affirmative action programs,"[59] it contained no reference to goals and timetables or hiring ratios.[60]

The report mentions a consultation with representatives of four major corporations, all of whom "saw the establishment of 'goals and timetables' as an important part of their affirmative action programs."[61] Each, however, "stated unequivocally that the most important prerequisite for a successful affirmative action program is the expressed commitment of the Chief Executive Officer. . . ."[62] One of the representatives expressly "pointed out that affirmative action did not require 'preferential' treatment. . . ."[63] Another stated that there had been no change of standards in connection with his company's affirmative hiring program and that "it would be a mistake for a firm to hire just 'to meet the numbers'."[64]

In fact, the progress cited in the report resulted from a number of factors: the enactment of broad civil rights legislation providing a formidable arsenal of weapons against discrimination; vigorous enforcement by the courts and administrative agencies of these laws and earlier statutes;[65] a growing awareness by the business and academic communities of the many, often subtle, forms of discrimination that had, in the past, barred the way to employment and advancement of minority-group members; and a confluence of various types of affirmative action efforts by government, the private sector, universities, and others. Given the panoply of approaches, it is simply not possible to attribute the progress thus far achieved to any particular one.

Nevertheless, even if one were to assume that preferential affirmative action has been more effective in terms of numbers than affirmative action committed to the principle of nondiscrimination, the price is unacceptably high for the beneficiaries of such programs, for those deprived of equal opportunity, and for society as a whole.

For minorities, quotas and preferences tend to reinforce negative stereotypes that obscure their legitimate credentials and very real accomplishments. The impact on minority-group members of such stereotyping has been described by Dr. Kenneth B. Clark, the noted black sociologist, in the following stark terms:

> No black can yet be sure that he is being seen, evaluated and reacted to in terms of his qualities and characteristics as an individual rather than categorized and stereotyped as part of a rejected group. Until this is a fact, then racism dominates class achievements in spite of the wishful thinking of black and white liberals, social workers and social scientists.[66]

The stigma that preferential affirmative action may impose upon its beneficiaries was made painfully obvious recently when the results of an examination for sergeant in the New York City Police Department were announced. The test had been specifically designed to eliminate racial and sexual bias. It was developed by outside consultants at a cost of $500,000 and based on a new test format approved by the city and minority officers' groups. Nevertheless, only 1.6 percent of black applicants passed the test, whereas 10.6 percent of white applicants passed.[67] A previous test had been invalidated in court because 1.8 percent of blacks

[57] Citizens Commission on Civil Rights, *Affirmative Action to Open the Doors of Job Opportunity* (June 1984).
[58] Ibid., pp. 176–77.
[59] Ibid., p. 142.
[60] Ibid., pp. 216–17.
[61] Ibid., p. 133.
[62] Ibid., p. 131.
[63] Ibid., p. 132.
[64] Ibid., p. 135.
[65] *See, e.g.,* 42 U.S.C. §§1981, 1982.
[66] *New York Times,* Mar. 22, 1978, p. A25, cols. 1–4.
[67] Purnick, "Koch Defends Sergeants Test and Orders Its Results Used," *New York Times,* Sept. 4, 1984, p. A1.

taking the examination had passed, compared to 5.1 percent of white applicants.[68]

In an editorial, the *New York Times* attempted to explain this seemingly anomalous result by suggesting that the black patrolmen who took the more recent test "came from a poorly qualified group hired as patrolmen under a court imposed quota."[69] Noting that the Guardians Association, which represents black officers, planned to challenge the test results in court, and once again to seek promotion on the basis of a quota, the editorial observed that, even if the Guardians were to prove that the test did not accurately measure job skills, "the remedy would be a better test system not a quota."[70] "Promotion by quota," it cautioned, "could prove even more demoralizing than allegations that the test was unfair. A two-tier corps of 'merit' sergeants and 'quota' sergeants could seriously erode authority."[71] Thus spoke the *New York Times,* a respected newspaper that has consistently supported affirmative action.

As a result of such stories, affirmative action has become associated in the public mind with failure and mediocrity, rather than success and competence. This unfortunate, and often unjustified, association, more than any residue of discrimination, is likely to blight the opportunities of minorities today.

Equally damaging to minorities is the tendency of the preferential approach to encourage the misconception that numbers are the essence of affirmative action, so that the education and training required to increase the pool of qualified minority-group members is neglected. The need to overcome the tragic legacy of disadvantage, which lives on in the form of inferior education and lack of training in a technological society, was cogently argued in an article by Dr. Joseph L. Henry, associate dean and chairman of the Department of Oral Diagnosis and Radiology, Harvard School of Dental Medicine. Dr. Henry stated:

> [W]hen disadvantaged minority persons somehow become motivated to aspire to the opportunities in the health care professions, they frequently find that they are victims of poor educational preparation from the primary grades through high school. . . .It is appalling to meet bright, young teenagers and college-age students, interested in entering the health professions, and discover that they can't read, can't write, can't spell, and cannot express themselves adequately. A literacy hoax is being perpetrated on the students enrolled in our public schools today.[72]

The first of a series of specific recommendations made by Dr. Henry was to "[s]upport the strengthening of public school systems generally, with special emphasis on strong programs in reading, language arts, and mathematics. Also, special programs are needed for identification of and challenge to gifted black students."[73]

The need for a good secondary school education, as a cornerstone of progress for minorities, was also stressed in a recent report issued by the National Commission on Secondary Education for Hispanics.[74] The commission's fundamental finding was that "a shocking proportion of this generation of Hispanic young people is being wasted. Wasted because their educational needs are neither understood nor met, their high aspirations unrecognized, their promising potential stunted."[75] The report noted that:

> the nation is in the midst of a dramatic change in the nature of its job markets. The growing service and information sectors demand higher skills precisely when over a third of the Hispanic 18 to 19 year-olds lack high school diplomas [and] when there is no sign of a decline in the rate of Hispanics who leave school before graduation. . . .[76]

Accordingly, the Commission stated that it:

> favors elimination of tracking and encourages a core curriculum of four years of English, three years of mathematics, three years of science, three years of social studies, one-half year of computer science, and two years of foreign language. These courses should have clearly defined academic content and should emphasize the development of analytical skills.[77]

In addition, noting that "41 percent of the Hispanic males who leave school cite economic reasons. . .as the cause,"[78] the Commission expressed its belief that:

[68] "Two Tests of Affirmative Action," *New York Times,* Sept. 6, 1984, p. A22, col. 1.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Henry, "Increasing Recruitment and Retention of Minority Students in Health Programs—Dentistry," *Journal of Dental Education,* vol. 44, no. 4 (April 1980) p. 191.
[73] Ibid., pp. 192–93.
[74] National Commission on Secondary Education for Hispanics, *Make Something Happen* (1984).
[75] Ibid., vol. I, preface.
[76] Ibid., p. 45.
[77] Ibid., p. 34.
[78] Ibid., p. 35.

inadequate attention has been paid to the stark realities that make early job experience crucial both to the future economic well-being and the educational progress of significant numbers of poor Hispanic and other low-income students.[79]

Preferential affirmative action, with its narrow focus on numbers, cannot even begin to cope with these needs.

Finally, affirmative action based on racial preference tends to create divisions among the groups preferred. Thus, one recent article speaks of the perception among some Hispanics that the EEOC is a "black agency" that "has primarily assisted the Black community and done little if anything to serve other minorities."[80] That agency will, presumably, take steps to increase its service to the Hispanic community; the distrust, however, is likely to linger on. The struggle among minority groups for a piece of the pie is destined to continue as long as we think in terms of dividing the pie rather than protecting the rights of individuals.

For those who are denied equal opportunity as a result of preference- and quota-oriented programs, the impact is far more direct. Such individuals know firsthand that, given a limited number of job opportunities, the so-called benign or inclusive quota becomes restrictive and exclusionary. We should remember that these people are not part of a monolithic power structure simply because they are white. On the contrary, the white majority is pluralistic, containing within itself a multitude of religious and ethnic minorities—Catholics, Jews, Italians, Irish, Poles—and many others who are vulnerable to prejudice and who, to this day, may suffer the effects of past discrimination.

Furthermore, as Justice Stewart observed in *Fullilove,* "[n]o race. . .has a monopoly on. . .disadvantage."[81] By way of example, he observed that, in 1978, 83.4 percent of persons over the age of 25 who had not completed high school were white and that, in 1977, 79 percent of households with annual incomes of less than $5,000 were white.[82] These disadvantaged people are themselves in need of special consideration. They ought not be asked to step aside in order to benefit others.

For society as a whole, preferences and quotas inevitably create divisiveness and a loss of confidence in laws that treat some people as "more equal" than others. Indeed, the civil rights movement, so effective in the 1950s, 1960s, and early 1970s, has itself become a victim of the corrosive effect of quotas. The broad national consensus fueling that vital movement has been lost. Universalism has given way to parochialism, optimism to cynicism and apathy, and, in the process, we have all been diminished.

If we are to achieve a society that is at once just and whole, we must balance the dual principles of equal opportunity and nondiscrimination in a way that fulfills them both. That is what nonpreferential affirmative action should be all about.

Toward a Better Future

In approaching the future, we need not start from an entirely clean slate. Many elements of nonpreferential affirmative action have already proven their worth.

For example, as previously noted, the clear commitment to affirmative action is essential. Similarly, those in charge of the program should be held accountable for its effectiveness, qualitatively and in terms of good-faith efforts. An effective program might include, among other things: recruitment at colleges with high concentrations of minorities, summer employment programs that can serve as a recruitment device for young people, inservice training opportunities for employees, "sensitivity" training for managers and supervisors, an open and responsive internal complaint procedure, and sponsorship of special educational programs in high schools within the local minority community.

Nor would nonpreferential affirmative action require a return to rank-order listing on standardized written tests as the *sine qua non* of merit selection. Broader, more flexible criteria, designed to consider the entire person, can be of value to all groups, so long as the flexibility provided thereby does not become an instrument for racial preference.

Changes in Approach

A fundamental change in the present approach to affirmative action would involve the elimination of government-required goals and timetables and a

[79] Ibid.

[80] "Hispanics Are Shortchanged At EEOC, Commission Study Finds," *Daily Labor Report,* no. 242, Dec. 15, 1983, p. A-1.

[81] 448 U.S. at 529–30 (Stewart, J., dissenting).

[82] *Id.* at 530 n.11.

corresponding shift in emphasis from quantitative to qualitative objectives.[83] All individuals hired would be required to meet the same basic qualifications. This would maximize the likelihood of success, both for entry-level positions and in terms of upward mobility.

A change in approach is also needed in connection with racial set-asides designed to assure minority contractors a fixed percentage of work on government-financed construction projects. The indictment of our Secretary of Labor on charges of larceny and fraud in connection with an alleged scheme to circumvent such a set-aside (by overstating the amount of business given to a minority subcontractor)[84] should not have been necessary to alert Congress and State legislatures to the potential for abuse in such legislation. Minority contractors would be better served by easier access to badly needed financing and less rigorous bonding requirements, both of which would enable them to compete more effectively for government business.

With respect to court-ordered remedies for discrimination, judges should consider the demoralizing effects of a two-tiered workplace composed of "merit" employees and "quota" employees. In pattern and practice litigation, actual victims of discrimination are, of course, entitled to backpay and competitive seniority. Beyond this, however, implementation of good-faith, nonpreferential affirmative action efforts and, where appropriate, the appointment of a special master to monitor the elimination of discriminatory bars should, in the long run, prove more beneficial to minorities (and society as a whole) than hiring quotas.

Finally, given the extent of disadvantage within minority communities, it is now apparent that, if there is to be any substantial increase in the pool of qualified applicants, particularly for higher level positions and the professions, affirmative action must begin in elementary and secondary schools. This expansion is essential to assure that talented minority youngsters are motivated to fulfill their potential and do not drop out along the way.

Such an approach has been suggested in a paper published by the Law School Admission Council.[85] In discussing the need to consider "[n]ew avenues for minority recruitment and enrollment," the paper states:

> Evidence suggests that efforts must reach into elementary and secondary schools. For example, studies show that parents and elementary/secondary school teachers are a crucial factor in career choice in the minority as well as the majority community. Efforts to reach these groups may be most rewarding in increasing the applicant pool.[86]

An Encouraging Development

An encouraging development for the future is the emergence in recent years of an array of organizations to assist in affirmative action efforts. For example, in Washington, D.C., there is the National Association for Equal Opportunity in Higher Education, which maintains a student talent identification bank consisting of top students from 114 predominantly black institutions. The function of the organization is to match these students with participating employers.

In North Carolina, the Committee for Education, Inc., seeks out bright minority youngsters to compete in Duke University's Talent Identification Program for junior high school students. The criteria for admission are SAT scores of 550 math and 500 English. In 1981, the first year of Duke's program, only one minority student competed successfully. By 1984 the number had increased to 51, 7.6 percent of the total.

In Portchester, New York, the Pre-Employment Training Program offers a free, 10-week course in word processing, data entry computer keyboarding, typing, and other office skills to disadvantaged minorities 17 to 25 years old. The program also provides advice on job hunting and helps trainees find jobs.

These and many other organizations also worthy of note provide models for effective nonpreferential affirmative action. What is required is a willingness to learn from past mistakes and the determination to get on with the job.

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[83] The absence of goals and timetables would not mean that quantitative results would be ignored. Progress in hiring and promoting minority-group members would be a factor in evaluating the effectiveness of nonpreferential affirmative action programs. Meeting particular numbers, however, would not.

[84] *See* Finder and Roberts, "'Minority' Firms Are Disqualified," *New York Times,* Oct. 7, 1984, sec. 1, pt. 1, p. 45, col. 1. The article, published shortly after Secretary Donovan's indictment, reported that the New Jersey Transportation Department had decertified almost one-quarter of the "minority-owned" companies doing road work in the State as "fronts for white male owners." Ibid.

[85] Law School Admission Council, *The Challenge of Minority Enrollment* (December 1981).

[86] Ibid., pp. 7–8.

Conclusion

In a recent article[87] the director of the Office of Career Planning and Placement at Yale Law School cautioned that a firm's recruiters "need to understand the sensitivity many minorities and women feel when they see or hear the word 'qualified' before the words 'minorities and women' in statements about affirmative recruiting."[88] She advised against use of the word, even in a broader context such as "all qualified applicants."[89]

This hostile reaction to a word omnipresent in affirmative action plans, as well as in court decrees mandating minority hiring, reflects a system that pays lipservice to merit while exalting numbers. The attitudes it fosters are frequently a recipe for failure. With the use of nonpreferential affirmative action, however, the word "qualified" need not be a pejorative term, since qualification is not in doubt. Its beneficiaries are not robbed of accomplishment, and its role models are real. Progress is, therefore, not ephemeral and can provide a sound foundation for the future.

It is important to recognize that, except perhaps for a reduction in paperwork associated with goals and timetables, effective nonpreferential affirmative action will require greater effort and dedication than the present system. The potential reward, however, is incalculably greater: the emergence of a society under law in which race will have truly become irrelevant to the enjoyment of every civil right and liberty.

[87] Lhamon, "Recruiting Minority Lawyers Successfully," *ABA Journal,* vol. 70 (December 1984), p. 80.

[88] Ibid.

[89] Ibid.

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