AN ASSESSMENT OF AFFIRMATIVE ACTION

THESIS

Presented to the Graduate Council of
Southwest Texas State University
in Partial Fulfillment of
the Requirements

For the Degree

Master of ARTS

by

Ben Arnold, B.A.

San Marcos, Texas
May, 1999

Dedicated to my family -
Mom, Dad, Joe, Stephanie, and Ally.

TABLE OF CONTENTS

CHAPTER 1

AN INTRODUCTION

With many subjects in the political arena, it is often difficult for a person to stay objective. In other words, quite simply, people get passionate when exploring some political issues. Affirmative action is one of those issues that is emotionally charged.

If a good political scientist is to analyze and answer important political questions, however, he cannot fall into the trap of becoming too emotionally involved about a particular political issue. Once inside the trap, the political scientist is nothing more than an advocate. A political advocate, while searching for explanations that best fit his theory of how the world should be, will often miss important data that would, if he were completely neutral, lead him in a different direction.

When writing about an issue that is as politically intense as affirmative action, especially in a format such as this, it is hard to keep this objectiveness. This author is confident that the following is, however, in the true spirit

of political science. In other words, the following study has, admittedly, produced different conclusions than the pre-conceived ideas with which this author started.

As a study in political science, this paper tries to follow form. In doing so, the question that first arises is "What is affirmative action?" Therefore, this study begins with an insight into the meaning of the term 'affirmative action'. By looking at its historical development, it will be shown that the term's connotation has changed from what it meant when President John F. Kennedy first used the phrase in 1961 to the way that the term is perceived by most Americans today. While most people think of affirmative action in relation to racial preference and quotas, the term's original meaning - to affirmatively promote equal opportunity - is often overlooked.

Each strand of the meaning of the term is, however, a viable way to look at affirmative action. Indeed, any discussion of affirmative action must take into account both strands of the phrase. Therefore, in Chapter 2, each meaning of the term is separated and analyzed. In doing so, it will be shown that each strand of the phrase has a rich history.

For instance, under the original meaning of affirmative action (to affirmatively promote equal opportunity), one of

the ideas that this study examines is the development of the phrase 'disparate impact'. Disparate impact is anything, such as a test, that adversely affects the chances of blacks having an equal opportunity to compete fairly for jobs. An example of an affirmative action measure would be the removal of a barrier causing the disparate impact.

Similarly, when racial preference is analyzed, the concept of 'strict scrutiny' can be examined. As the Court struggled with racial preference, it began to apply strict scrutiny to reverse discrimination cases. When the Court orders that strict scrutiny be applied, it simply means that it will hold programs that discriminate between the races to a higher judicial standard than that of normal legislation.

Also, as will be shown, strict scrutiny, as it is applied more closely, puts racial preference in a precarious constitutional situation.

Once the meaning of affirmative action has been properly dealt with, the second question that arises is "Why is racial preference so controversial?" Chapter 3 explores some of the reasons why so many people vehemently oppose racial preference. If racial preference is a sustainable social policy, then questions that attack its foundation cannot be

ignored. Therefore, Chapter 3 takes a critical look at some of the arguments against racial preferences and quotas.

For instance, one of the common arguments against racial preference is that a stigma is placed on its beneficiaries. Opponents of racial preference argue that it does not matter how qualified a beneficiary of racial preference is, he will always have to overcome the perception that the only reason he was hired was because of race. In this way, racial preference is counter-productive because it intensifies the belief that blacks can only succeed if held to a lower standard than whites.

Chapter 3 is filled with similar arguments that show that there is a strong case against racial preference programs.

Finally, if racial preference is on shaky constitutional ground, and there are such strong political arguments against it, then the following question arises: "Are there alternatives to our current affirmative action strategy?" In the fourth and final chapter, just such an alternative is offered.

For a various number of reasons, this author believes that a class-based approach to affirmative action is a

possible solution to some of the problems created by the race-conscious strategy. For instance, one of the arguments made in Chapter 4 is that a class-based approach to affirmative action is important to many sociologists who believe that class factors and issues often get overlooked because of America's anxiety over race. Indeed, these sociologists claim that inequities between the classes is a larger societal problem than differences between the races. While not ignoring the fact that there are critical discrepancies between the races, their argument is that institutional discrimination, which affects the whole of the underclass, is the key factor in social stratification. Therefore, while we concentrate our energies using a race-based approach, we often ignore the larger problem of class.

Consequently, in Chapter 4, it is argued that a class-based approach to affirmative action would be free from many of the constitutional and political questions that surround our current race-conscious strategy.

CHAPTER 2

THE HISTORY AND MEANING OF AFFIRMATIVE ACTION

FRAMING THE DEBATE

Events in history are so interconnected that it is often hard to precisely pinpoint the exact origins of a particular issue. As with many historical debates, the origins of affirmative action are somewhat nebulous. For instance, one could reasonably argue that the first 'affirmative' steps to dismantle racism in the workplace was in 1941 when President Frankin D. Roosevelt created the Fair Employment Practices Commission (FEPC). The FEPC, which was eliminated after World War II, was formed as part of the wartime effort to increase black employment by defense contractors.[1]

Despite Roosevelt's order and other vague notions that there should be positive action to end racism in hiring practices, the term 'affirmative action' did not come into use until the early 1960s. The person given credit for coining the phrase 'affirmative action' was President John F. Kennedy. In actuality, it was black lawyer Hobart Taylor Jr. and future Supreme Court justices Abe Fortas and Arthur

---

[1] Darien McWhirter, The End of Affirmative Action: Where Do We Go From Here? (New York: Carol Publishing Group, 1996) 30.

Goldberg who authored the order which contained the words 'affirmative action'.[2] At any rate, in 1961, Kennedy signed Executive Order 10925, which created the President's Committee on Equal Employment Opportunity, to encourage federal contractors to hire more blacks.[3] The Committee was commissioned with the responsibility to "collect employment statistics, investigate contractor practices, and impose sanctions against those not in compliance."[4]

Constitutional scholar William Bradford Reynolds argues that the affirmative action presented in Executive Order 10925 is not necessarily the affirmative action that we think of today. Reynolds writes that affirmative action:

> ...was originally defined in terms of active recruitment and outreach measures aimed at enhancing employment opportunities for all Americans. Its race-neutral character could not have been more clearly expressed: employers contracting with the federal government were directed to 'take **affirmative action** to ensure that applicants are employed, and that employees are treated during their employment, without regard to race, creed, color, or national origin.'[5]

---

[2] McWhirter, 32 - 33.

[3] William Bradford Reynolds, "Affirmative Action and Its Negative Repercussions," *Taking Sides:* Clashing Views on Controversial Legal Issues ed. M. Ethan Katsh. (Guliford, CT: Dushkin Publishing Group, 1997) 218.

[4] John Hird and Michael Reese, "Should Affirmative Action Policies Continue?" Controversies in American Public Policy eds. John Hird and Michael Reese. 2nd ed. (New York: Worth Publishers, 1999). 241.

[5] Reynolds, 218.

The first real congressional action to combat discriminatory practices in education and employment was the Civil Rights Act of 1964. The Act's main provision relating to affirmative action is Title VII. Title VII states:

> (a) It shall be unlawful for an employer:
>
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
> or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which deprive or 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.[6]

There is considerable evidence, according to some constitutional scholars, that in the congressional debates leading up to the passage of the Civil Right Act of 1964 there was an understanding that "the bill would not result in 'reverse discrimination' against whites."[7] Reynolds argues that "proponents of the bill's employment provision - Title

---

[6] 42 U.S.C. Sec. 2000e [Section 703].

[7] McWhirter, 33.

VII of the act - uniformly and unequivocally denied that any legislation should or could be...interpreted"[8] as to giving preferential treatment to black employees. Indeed, even liberal-minded Senator Hubert Humphrey, who was the principle force behind the passage of the Act in the Senate, was clear when he noted that:

> ...the title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota system may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices.[9]

It is important to note that the term 'affirmative action', with regards to its early usage, carried quite a different connotation than it does today. One can only assume from the term's usage that the original meaning and intention behind 'affirmative action' was to affirmatively promote equal opportunity by tearing down racial barriers.

---

[8] Reynolds, 219.

[9] Reynolds, 219.

There is nothing within the early history that seems to indicate that affirmative action meant racial preference or group quotas. In fact, the record seems to indicate the opposite. Reynolds argues that we should not be surprised that the early history of affirmative action steers clear of racial preferences because "discrimination on account of skin color was, after all, the evil identified as constitutionally intolerable in the Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954),"[10] which was resolved just a few years previous to Executive Order 10925 and the Civil Rights Act of 1964.

Shortly after the Civil Rights Act of 1964 was passed, however, the term 'affirmative action' began to take on the connotations that it is linked to today. In 1965, in addition to Title VII, President Lyndon B. Johnson issued Executive Order 11246, which prohibits "federal contractors from practicing employment discrimination on account of race."[11] Also, and perhaps most importantly, Executive Order 11246 "required contractors to submit affirmative action plans which analyzed demographics of their existing work

---

[10] Reynolds, 218.

[11] Abraham Davis and Barbara Graham, The Supreme Court, Race, And Civil Rights (Thousand Oaks, CA: SAGE Publications, 1995) 239.

force and indicated proactive measures the employer would take toward greater equality."[12]

Therefore, Executive Order 11246, for the first time, attempted to provide a framework by which Title VII could be followed. Although Title VII only forbade discrimination by employers, i.e. it did not require employers to take a proactive, affirmative approach to dismantling discrimination, Executive Order 11246, applying to federal contractors, provided an example of the steps that could be taken by an employer, an affirmative action plan, to prevent possible violations of Title VII.[13] In doing so, however, the meaning given to the term 'affirmative action' began to change.

In addition to Executive Order 11246, President Johnson gave an influential commencement speech at Howard University on June 4, 1965. In the commencement address, Johnson put forth his conception of affirmative action. He noted:

> You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "You are free to compete with all the others," and still justly believe that you have been completely fair...This is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. We seek not just equality as a right and a theory but equality

---

[12] Americans United for Affirmative Action (AUAA), internet.

[13] Jeanne Gregory, Sex, Race, and the Law (London: SAGE Publishers, 1987) 48.

as a fact and equality as a result.[14]

Combined with Executive Order 11246, Johnson set forth a new meaning for affirmative action. This 'equality of results' meaning is what affirmative action scholar Richard Tomasson calls "*preferential* affirmative action."[15]

Whatever its name, the fact that affirmative action's meaning had changed from the time of its conception in Executive Order 10925 to Johnson's pronouncement is quite obvious. Therefore, within the early history of affirmative action, two meanings of the term are evident. Executive Order 11246 and Johnson's speech gave rise to the notions of what most people think when affirmative action is discussed; i.e. quota systems or plans that seek to give preferential treatment to minorities. Although there are many important cases dealing with racial quotas and now more recently the reverse discrimination aspect of affirmative action, the

---

[14] Dinesh D'Souza, The End of Racism: Principles for a Multiracial Society (New York: The Free Press, 1996) 217.

[15] Richard Tomasson, "Affirmative Action: An Idea Whose Time Has Passed (And Perhaps Never Was)," Affirmative Action: The Pros and Cons of Policy and Practice ed. Rita Simon. (Washington, D.C.: American University Press, 1996) 132 -133.

original, and still viable, meaning of affirmative action is often ignored. The original idea behind affirmative action was to affirmatively promote equal opportunity by tearing down racial barriers. This strand of affirmative action, although often neglected, also has a rich case history.

Each strand of affirmative action, however, is linked to the concept of discrimination. For legal purposes, discrimination has been defined as when an actor treats some people less favorably than others because of their race, color, sex, national origin, or religion.[16] However, discrimination need not be defined as such. Instead of focusing on the qualities of the victim, discrimination could be found by identifying the motivations of the discriminating party. In other words, discrimination occurs when an actor does not give someone equal opportunity, for whatever reason. The need to classify victims is unnecessary in this sense because the focus is now on the discriminator. In this way, a neutraled principle can be built. A neutraled principle is important if we want to begin to get beyond the need to make racial classifications a part of our society.

For the most part, however, the arena by which discrimination has been fleshed out, at least what discrimination has meant legally, has been in the courts; the vehicle by which the meaning of discrimination has been

---

[16] Nancy Sedmak and Chrissie Vidas, Primer on Equal Employment Opportunity 6th ed. (Washington, D.C.: The Bureau of National Affairs, Inc., 1994). 138.

interpreted is Title VII of the Civil Rights Act of 1964. Therefore, Title VII, as we will see later on, became the "chief statutory weapon"[17] by which challenges were made, whatever the strand of affirmative action, to employment behaviors or educational practices in the courts. While Title VII contains neutral language, it forces us to make distinctions because it focuses on the qualities of the victim, not the actions of the discriminator.

Whatever the case, Title VII serves as a bridge to both meanings of affirmative action. Title VII, in other words, is not only used by minority groups seeking to tear down barriers in the workplace, but also by whites to combat 'reverse discrimination'.

AFFIRMATIVE ACTION: TEARING DOWN RACIAL BARRIERS

As previously mentioned, since Title VII case law has provided much of the framework by which the alleviation of discriminatory practices in employment and education, i.e.

---

[17] Davis and Graham, 239.

affirmative action, has been generated.[18] As a part of this, "rules barring racial discrimination in the private sector began to be enforced, and affirmative action remedies were developed to redress violations of the law."[19] For instance, one of the first major statutory challenges involving Title VII was *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, a "unanimous Court interpreted Title VII to prohibit the use of hiring practices that are not job-related and that operate to exclude blacks."[20] The Court held that Duke Power Company had violated Title VII by using a high school diploma and an intelligence test to qualify workers for jobs.

The Court, in *Griggs*, went on to note that "the tests bore no demonstrable relationship to the jobs for which they were required, and since blacks had long received an inferior education, the tests could be presumed to, and did in fact, discriminate against them."[21] *Griggs* established what is known to many who study constitutional law as the rule of 'disparate' or 'adverse' impact. If a company were to use a qualification that had an adverse impact on racial

---

[18] Barbara Lerner, "Employment Discrimination: Adverse Impact, Validity, and Equality," The Supreme Court Law Review: The Law School of the University of Chicago - 1979 eds. Phillip Kurland and Gerhard Casper. (Chicago: The University of Chicago Press, 1980) 18.

[19] Susan Liss and William Taylor, "Affirmative Action in the 1990s: Staying the Course," Taking Sides: Clashing Views on Controversial Legal Issues ed. M. Ethan Katsh. (Guliford, CT: Dushkin Publishing Group, 1997) 213.

[20] Louis Fisher, American Constitutional Law 2nd ed. (New York: McGraw-Hill, Inc., 1995) 1049.

[21] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

minorities, such as the test that Duke Power Co. used, the company would then have the burden to show that the qualification served as a 'business necessity'.

Griggs can rightly be called an affirmative action case, within the original meaning of the term, because of the removal of a discriminatory policy, the aptitude test, as a means to promote equal opportunity in the work place.

In a related case, the Court, in *Washington v. Davis,* 426 U.S. 229 (1976), muddied the *Griggs* precedent. The *Davis* case involved two blacks who claimed that a verbal ability test, required as a condition of admission to the Washington, D.C. police department, bore no demonstrable relationship to the job of police officer. Therefore, since the two had failed the test, they claimed racial discrimination on the part of the police department.

The Supreme Court ruled in *Davis* that the test the police department used was not "unconstitutional *solely* because it has a racially disproportionate impact;"[22] there must be, in other words, "a purpose to discriminate."[23] While

---

[22] *Washington v. Davis,* 426 U.S. 229 (1976).

[23] Fisher, 1049.

the ruling seemed to be in conflict with the *Griggs* precedent, "the Court justified a different conclusion" because the plaintiffs did not sue under Title VII. Instead, the two sued under the Due Process of the Fifth Amendment.[24]

Davis deserves attention as an affirmative action case because it brought an important, and still unanswered question to the forefront: If because of "educational background white applicants are better qualified, how is the balance of race to be addressed?"[25] Breaking down discriminatory barriers can only lead us so far; hence, proponents of racial preference would argue that there must be programs in place, like ones involving preferences and quotas, to close the gap.

This idea is what President Johnson was trying to convey during his Howard commencement speech. Johnson saw that tearing down racial barriers would not be enough. As in the *Davis* case, there would be situations in which blacks, because of previous hardship, would not be able to compete on the same level as their white counterparts. Even if there is no overt discrimination by anyone, the system is likely to produce racially disproportionate results. This question, which is at the heart of the affirmative action debate, will be addressed in the final section of this paper, when a

---

[24] Fisher, 1049.

[25] Robert Cushman, Cases in Constitutional Law 7th ed. (Englewood Cliffs, NJ: Prentice Hall, 1989) 507.

possible solution to the affirmative action predicament is provided.

Whatever the case, in 1989, a more conservative Court sought establish a new precedent on the issues of 'disparate impact' and 'business necessity'. The Court all but reversed *Griggs* in *Wards Cove Packing Co. v. Antonio,* 490 U.S. 642 (1989). In *Wards Cove,* minority employees claimed that using statistical comparisons between minorities in skilled and unskilled jobs in fishing canneries in Alaska was enough for a prima facie case showing disparate impact. The Court disagreed when it held that "the proper comparison is generally between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market."[26]

In addition, the Court ruled that the petitioners had to show exactly which practice by the employer harmed them. The Court ruled that a "mere showing that nonwhites are underrepresented in the at-issue jobs in a manner that is acceptable under the standards set forth herein will not alone suffice."[27] Consequently, the alleged victim had to

---

[26] *Wards Cove Packing Co. v. Antonio,* 490 U.S. 642 (1989).

[27] *Wards Cove Packing Co. v. Antonio,* 490 U.S. 642 (1989).

show "specific causation"[28] as to the reason for disparate impact.

Finally, the Court went further to weaken the 'business necessity' requirement. The Court ruled that "employers did not have to show that a practice causing disparate impact was 'essential' or 'indispensable', but something more on the order of business convenience needed to be shown."[29] With that, *Wards Cove* virtually did away with the concept of 'disparate impact' because qualification standards did not have to be "essential to the employer's business."[30]

Despite the Court's sweeping rejection of *Griggs*, we must remember that legislatures also play a role in defining public policy. Since the decision in *Wards Cove* was a statutory interpretation of Title VII of the Civil Right Act of 1964, and not a constitutional interpretation, Congress could, and in fact did, rewrite the statute to modify the

---

[28] *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

[29] John David Skrentny, The Ironies of Affirmative Action: Politics, Culture, and Justice in America (Chicago: The University of Chicago Press, 1996) 236 - 237.

[30] Gertrude Ezorsky, Racism and Justice: The Case for Affirmative Action (Ithaca: Cornell University Press, 1991) 50.

Court's decision.[31] First, the Civil Rights Act of 1991 "re-established the concept of 'disparate impact' as the proper legal interpretation of the Civil Rights Act of 1964."[32] Second, with the Act, Congress returned to the employer "the burden of proving that a discriminatory practice is a business necessity."[33] Congress, quite clearly, had the intention, with these two provisions, to make it "easier for minorities to initiate and win litigation"[34] in disputes in which there may be disparate impact. Congress did, however, agree with the Court's ruling in *Wards Cove* that "a lack of minorities or women in a particular job category is not proof of discrimination."[35]

These examples have shown that not all affirmative action cases and laws lean in the same direction. In other words, while *Griggs* and the Civil Rights Act of 1991 led to a further breakdown of discriminatory barriers, *Davis* and *Wards*

---

[31] Fisher, 1055.

[32] Tomasson, 140.

[33] Fisher, 1055.

[34] T.R. Carr, Clarke Cochran, Lawernce Mayer, and Joseph Cayer. American Public Policy: An Introduction 6th ed. (New York: Worth Publishers, 1999) 385.

[35] McWhirter, 26.

Cove, at least in the eyes of minority leaders, proved to be a setback. *Davis* and *Wards Cove*, however, deserve attention as affirmative action cases because, whatever the decision, there was a genuine discussion as to what constitutes a barrier to fair hiring decisions in employment.

Also, *Griggs, Davis, Wards Cove,* and the Civil Rights Act of 1991 are clear examples that show that not all affirmative action means quotas and racial preference. As mentioned earlier, each strand of the meaning of affirmative action has a rich history, and these examples are certainly not the only Supreme Court decisions and legislative action to fall within this strand of tearing down racial barriers to affirmatively promote equal opportunity. For instance, the modification of *Wards Cove* was not the only objective of the Civil Rights Act of 1991. As Louis Fisher, author of *American Constitutional Law*, indicates, the Act "reversed or modified nine Court rulings dealing with employment discrimination."[36]

For example, the Civil Rights Act of 1991 helped overturn *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989). In *Patterson*, a black woman, Brenda Patterson, sued her employer for racial harassment under § 1981 of the Civil Rights Act of 1866. The Court ruled Patterson's suit was not actionable under § 1981 because the section is restricted to the 'making and enforcing' of contracts. In other words, the Court ruled that § 1981 "is limited to prohibitionary

---

[36] Fisher, 1055.

discriminatory actions *before* someone is hired, not after."[37] If Patterson had been able to sue under § 1981, however, she would be eligible for damages. Therefore, Congress, in the Civil Rights Act of 1991, reversed the holding in *Patterson* by "defining § 1981 'to make and enforce contracts' to include 'performance, modification, and termination' as well as 'enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."[38] With the change, victims of racial discrimination, like Patterson, would be eligible for more compensation if it is found that they were racially discriminated against.

Patterson falls under this meaning of affirmative action because it clearly involves the exploration as to how to combat discrimination in the workplace. If employers are made to pay significant amounts of damage when they discriminate, then another barrier for blacks to have an equal opportunity to succeed is removed.

Finally, there also must be a mention of a certain set of cases that one would not normally associate with the term 'affirmative action'. Cases like *Plessy v. Ferguson,* 163

---

[37] Fisher, 1055.

[38] Mack Player, Federal Law of Employment Discrimination (St. Paul: West Publishing Co., 1992) 118.

U.S. 537 (1896), *Sweatt v. Painter,* 399 U.S. 629 (1950), and *Brown* certainly deserve to be included in the realm of affirmative cases previously mentioned. These classic cases involve the tearing down, or at least the attempt to tear down, discriminatory barriers in the larger societal framework. The reason these cases are not usually associated with the preceding cases and do not elicit the term 'affirmative action' upon most analysts' description is two-fold. First, these cases precede any use of the term 'affirmative action'. We must remember that the first time the term 'affirmative action' was used was in 1961 by President John F. Kennedy. Affirmative action, however, would not have been possible without the *Plessy, Sweatt,* and *Brown* forerunners. These cases, in other words, broke down discriminatory barriers to a point in society that made affirmative action possible in the workplace and the educational setting. While certainly working to tear down discriminatory barriers, *Plessy, Sweatt,* and *Brown* were affirmatively promoting equal opportunity before the term 'affirmative action' was even coined.

Second, and quite simply, *Plessy, Sweatt,* and *Brown* do not elicit the term 'affirmative action' upon discussion because these cases are so large and encompassing that the term 'affirmative action' somehow does not seem appropriate. With its current connotation, the term intuitively means less than it once did. These classic cases were about tearing down racial barriers on a larger societal scale than the

affirmative action cases of today. Therefore, they seem to belong to some other sanctified category of cases in 'American Constitutional Law'. Hence, it is important these cases not be left out of any discussion that involves affirmative action.

AFFIRMATIVE ACTION AS RACE-CONSCIOUSNESS

Although the preceding cases and legislative actions have been important to the discussion within the original meaning of affirmative action, the current deliberation over the phrase can be traced to the Supreme Court's momentous decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Although Johnson's executive order and commencement speech certainly laid the foundation, *Bakke* is a point in which affirmative action and its current connotation began to become affixed in people's minds. With *Bakke*, the term no longer meant the tearing down of discriminatory barriers that prevent equal opportunity; affirmative action came to mean quotas and race-consciousness. Affirmative action ceased to be, in people's minds, the exploration of a minority's rights under the Constitution, and came to mean

the assertion of an entitlement. This is a less meaningful definition.

Therefore, while the term 'affirmative action' can certainly and properly be used within the original strand of its meaning, the applicability of using the term in relation to quota and reverse discrimination cases is more troublesome. In fact, one could reasonably argue that quota systems are the antipathy of the original meaning of affirmative action. Thinking in terms of discrimination, quota systems create a situation in which people think and act in terms of race; hence, a case could be made that it is more appropriate to use the terms 'race-conscious', 'racial preference', or 'quotas' when exploring programs and cases involving this strand of the meaning of affirmative action.

Darien McWhirter, author of *The End Of Affirmative Action: Where Do We Go From Here?*, makes a similar distinction when he writes:

> Put simply, achieving civil rights requires an effort by American society to remove factors such as race and gender from the society's decision-making processes. Affirmative action, to the extent that it means affirmative preference, accomplishes just the opposite. It attempts to force decision-makers to take race or sex into account in order to achieve a goal such as faster integration or greater diversity. America has been particularly confused about this...Equal opportunity means ignoring race, while affirmative action means taking race into account.[39]

[39] McWhirter, 14-15.

Whatever the case, *Bakke* not only changed the way in which affirmative action is thought of, but it is also the defining case in an issue that is perhaps the most widely talked about, and most volatile, of all issues in race-based discussion.

Before *Bakke* can be discussed, however, there are some important cases that acted as precursors to *BAKKE*. For instance, in *McDonald v. Santa Fe Transportation Co.*, 427 U.S. 273 (1976), the Supreme Court ruled that the "language and legislatively history of Title VII apply to both whites and non-whites."[40] Although *Bakke* primarily dealt with Title VI of the Civil Rights Act of 1964, which outlaws discrimination in federally-funded programs, both Title VI and Title VII are tied to the 'Equal Protection Clause' of the 14th Amendment. Justice Lewis Powell remarked in his summary of *Bakke* that the *McDonald* case showed that "the Amendment (the 14th Amendment) was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude."[41]

---

[40] Davis and Graham, 241.

[41] Harold Chase and Craig Ducat, Constitutional Interpretation 4th ed. (St. Paul: West Publishing Company, 1988) 682.

Similarly, in a much earlier case, the Supreme Court in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), held that the guarantees of equal protection are framed in universal terms in their application...without regard to any differences of race, of color, or of nationality."[42] Emphasizing this idea, the Court in *Yick Wo* clearly argued that "the equal protection of the laws is a pledge of the equal protection of the laws."[43]

The *Yick Wo* and *McDonald* cases previewed the arguments used by victims of reverse discrimination. In this argument, opponents of racial preference contend that Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment prohibit quotas and other forms of racial preference because of the universal, race-neutral language contained in both. If a person of one race is given preferential treatment, he will necessarily benefit at the expense of a person from another race. This violates the race-neutral principle.

---

[42] taken from *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

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

In an interesting note, *Bakke* was not the first time a similar issue appeared before the Supreme Court. In *DeFunis v. Odegaard,* 416 U.S. 312 (1974), a white male, Marco DeFunis, had been denied admission to the University of Washington School of Law. Under its admissions procedures, the law school had set aside a specific number of its 150 openings for first-year students for minority applicants. However, "had the minority applicants been considered under the same procedure applied to him [DeFunis], none of those eventually enrolled would have been admitted."[44] The Supreme Court, in a 5 - 4 decision, held the case moot, however, because a lower court had ordered DeFunis into the school and he was already about to graduate.

In his dissenting opinion in *DeFunis,* Justice William O. Douglas foreshadowed the difficulty that the Court would have in future years in tackling the issue of 'reverse discrimination'. In his examination of Douglas's opinion in *DeFunis,* McWhirter writes that Douglas was "torn between supporting efforts to help African Americans get a boost up in life and the strong desire to reject anything that might be called 'reverse discrimination' against whites."[45] Indeed, while Douglas argued that state-sponsored preference was "'invidious' and violative of the Equal Protection Clause,"[46]

---

[44] Fisher, 1051.

[45] McWhirter, 85.

[46] *DeFunis v. Odegaard,* 416 U.S. 312 (1974).

he ruled in favor of the law school's quota system.[47] "It is almost as if," McWhirter continues, "he were going to rule against the university and wrote his opinion accordingly but then changed his mind at the last minute" to rule in favor of the university.[48] Just as Douglas struggled with the issue of racial preference and quotas, the Court would also.

The *Bakke* case had very similar circumstances to that of *DeFunis*. In *Bakke*, a white student, Allan Bakke, that was denied admission to the University of California Medical School at Davis brought suit against the university because he claimed that he was better qualified than some of the minority students that were admitted. Bakke claimed that he should have been admitted because he had a higher grade point average and Medical College Admission Test (MCAT) scores than some of the minority students. The university had set aside sixteen of its hundred seats for minority and disadvantaged students, i.e. a quota system. Bakke claimed that since the university could not show him that he would not have been admitted had there been no quota, he was a victim of reverse

---

[47] McWhirter, 87.

[48] McWhirter, 87.

discrimination, in violation of Title VI of the Civil Rights Act of 1964 and the 14th Amendment's Equal Protection Clause.

The Supreme Court held, in a schizophrenic decision, that although race-conscious programs were not unconstitutional, the quota system used by the University of California at Davis was unacceptable. Justice Powell, who cast the deciding 5-4 vote in *Bakke*, wrote that "race and ethnic background may be deemed a plus in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for available seats."[49] While certainly outlawing the university's quota system, the Court left open a window for race-conscious programs that had diversity as its goal. Powell went on to say that the Court was not going to take a colorblind approach to the matter, but an approach that would help to mainstream minorities.[50]

Powell's decision must be looked at in context, however. Powell was the swing vote; whatever his decision, the two opposing camps of Justices Brennan, White, Marshall, and Blackmun versus Justices Stevens, Burger, Stewart, and Rehnquist were not going to completely agree. The *Bakke* decision, in other words, far from cleared the debate over racial preference.

---

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

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

It is important to note once again, that the *Bakke* case dealt with Title VI, a state-funded program, and not Title VII. The next year, however, the Court gained an opportunity to decide whether employers in the private sector could take voluntary initiatives that take race into account in employment decisions. In *United Steel Workers of America v. Weber,* 443 U.S. 193 (1979), the Kaiser Aluminum Company, a company in the private sector, had instituted a voluntary affirmative action plan, in which 50% percent of the openings of an in-plant craft-training program were reserved for black employees.[51] The program was designed "to eliminate conspicuous racial imbalances in Kaiser's almost all-white craftwork force."[52] At the time, blacks made up 39 percent of the local labor force where the Kaiser plant was located, but held only 2 percent of craftsman jobs at the plant.[53] A white male worker, Brian Weber, was denied admission to the program although he had more seniority than some of his black co-workers who were admitted. The Supreme Court, in a 5-2

---

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

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

[53] Lydia Chávez, The Colorblind: California's Battle to End Affirmative Action (Berkley, CA: The University of California Press, 1998) 19.

decision, left employers in the private sector free to take race-conscious steps "to eliminate manifest imbalances in traditionally segregated job categories."[54]

The Supreme Court went on to hold in *Weber* that Kaiser's ameliorative race-conscious relief program did not violate Title VII because the plan was in the spirit of Title VII's purpose "to remedy the effects of racial discrimination in skilled craft positions that were the result of past patterns of racial segregation."[55] Justice William Brennan, who wrote for the Court in *Weber*, argued:

> 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 for so long,' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[56]

If Congress wanted to outlaw racial preference programs, Brennan reasoned, it should have specifically said so in Title VII.

However, many, who believed that Title VII clearly prohibits <u>all</u> discrimination on the basis of race, were

---

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

[55] Davis and Graham, 248.

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

uncomfortable with the *Weber* decision. These analysts argue that the legislative history of Title VII clearly indicated Congress's intent to prevent the creation of racial preference programs. For instance, McWhirter writes that Brennan's use of Title VII "was one of the great acts of judicial legerdemain in Supreme Court history."[57] Likewise, Justice William H. Rehnquist, in his dissenting opinion in *Weber*, argued:

> By a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, 'uncontradicted' legislative history, and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions.[58]

The following year, the Court continued to widen the scope of acceptable forms of racial preference and quota-type programs in *Fulliluve v. Klutznick*, 488 U.S. 448 (1980). In 1977, Congress had passed the Public Works Employment Act, which provided that at least 10 percent of federal funds

---

[57] McWhirter, 97.

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

granted to state and local governments for public works projects go to businesses owned by minority groups. These minority groups were defined by the Act as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Eskimoes, and Aluets."[59]

In *Fulliluve*, the Court, in a 6 - 3 decision, ruled that Congress did indeed have the power to give preferential treatment for minorities through such things as the set-aside program it had passed with the Public Works Employment Act. Writing for the Court, Justice Warren Burger argued that Congress with its power in the 14th Amendment to 'provide for the...general Welfare of the United States' and 'to enforce, by appropriate legislation' the guarantee of equal protection had the power to require that local governments who received federal funds be obliged to set-aside opportunities for minorities.[60]

Importantly, an idea that became prominent in *Fulliluve* is whether or not 'strict scrutiny' should have been applied to Congress's set-aside program. Government, for the better part of this century, has been free to treat citizens unequally as long as the unequal treatment can pass a simple test of rationality.[61] The major exception to this free reign has been in the area of race. As McWhirter indicates, "If a government...wanted to single people out because of their

---

[59] *Fulliluve v. Klutznick*, 448 U.S. 448 (1980).

[60] *Fulliluve v. Klutznick*, 448 U.S. 448 (1980).

[61] see *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

race, that kind of discrimination would be subjected to strict scrutiny."[62] "To survive strict scrutiny," McWhirter continues, "the action in question would have to be motivated by a 'compelling' reason and be 'narrowly tailored' to achieve that purpose."[63] In *Fulliluve,* the question became whether or not cases of 'reverse discrimination' should invoke strict scrutiny from the Supreme Court.

While Burger only made passing reference as to whether strict scrutiny should be applied in *Fulliluve*, he failed to go further. Justice Powell, on the other hand, argued in his concurring opinion that while he believed strict scrutiny should be applied in *Fulliluve* because racial classifications are "fundamentally at odds with the ideals of a democratic society implicit in the Due Process and Equal Protection Clauses,"[64] he found that Congress's desire to eradicate the continuing effects of past discrimination was enough of a compelling interest to not invalidate the program.[65]

The dissenting justices in *Fulliluve* disagreed with Powell's assessment. Justice Potter Stewart, for instance, invoked the memory of Justice John Harlan's dissenting opinion in *Plessy,* in which Harlan criticized the Court for institutionalizing the separate-but-equal doctrine. Justice

---

[62] McWhirter, 10 - 11.

[63] McWhirter, 11.

[64] *Fulliluve V. Klutznick,* 448 U.S. 448 (1980).

[65] McWhirter, 98.

Stewart argued in his dissenting opinion in *Fulliluve* that because of the Court's decision, "our statute books will once again have to contain laws that reflect the odious practice of delineating qualities that make one person a Negro and make another a white...I think today's decision is wrong for the same reason that *Plessy v. Ferguson* was wrong."[66] Stewart would find support for his evaluation in the years to come.

Throughout the 1980s, the Supreme Court began to grow more conservative with each new Reagan appointee. With that, the Supreme Court began to apply strict scrutiny to racial preference programs. For instance, the Court, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), ruled that preference programs for minorities in cities and states must meet a higher standard than that set for federal programs in *Fulliluve*. In *Croson*, the City of Richmond, borrowing from Congress's lead and the words contained in the Public Works Employment Act, created, in an apparent attempt to remedy past societal discrimination, its own minority set-aside program. Richmond's plan mandated that 30 percent of all city construction contracts go to "black, the Spanish-

---

[66] *Fulliluve v. Klutznick*, 448 U.S. 448 (1980).

speaking, Orientals, Indians, Eskimoes, or Aluet citizens."[67]

The Court ruled in *Croson*, however, that the "gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation."[68] In her opinion in *Croson*, Justice Sandra Day O'Connor argued that while there was no doubt that the history of both private and public discrimination has led to a lack of opportunity for blacks, "this observation, standing alone, cannot justify a rigid racial quota."[69]

The Court, in *Croson*, indicated that plans designed to make up for past discrimination, such as Richmond's, had to show a desire to remedy 'real' discrimination to pass the standard of strict scrutiny.[70] Since, as Justice O'Connor writes, there was "*absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aluet persons in any aspect of the Richmond construction industry,"[71] the plan was not 'narrowly tailored' as such to meet the demands of strict scrutiny.

In other words, McWhirter indicates that just because Richmond simply called its plan remedial, it did not necessarily make it so. Likewise, Ronald Ficus, in his book *The Constitutional Logic of Affirmative Action*, asserts that

---

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

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

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

[70] McWhirter, 108.

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

the *Croson* decision showed that "the Court never accepted the argument that racial disparity was in and of itself evidence of discrimination that would justify affirmative action quotas."[72]

Adarand Construction, Inc. v. Pena, 515 U.S. 200 (1995) extended the *Croson* decision and its standard of 'strict scrutiny' to include federal affirmative action measures. In doing so, the Court overturned the precedent it had set in *Fulliluve*.

The *Adarand* case involved the Surface Transportation and Uniform Relocation Assistance Act of 1987, which, similar to that of the Public Works Employment Act in *Fulliluve*, gave a 1.5 percent bonus to localities that subcontracted to small businesses owned and controlled by 'socially and economically disadvantaged' individuals. Although he was the low bidder, Adarand (who is ironically Hispanic) lost out on a contract to a black-owned business.

Adarand was the most significant step the Supreme Court had taken in its application of strict scrutiny. The Court

---

[72] Ronald Ficus, The Constitutional Logic of Affirmative Action (Durham, NC: Duke University Press, 1992) 5.

went further than previous decisions in ruling that the mere goal of creating a diverse society would not allow racial preference to stand up to strict scrutiny any longer. In other words, David Strauss, in his article entitled "Affirmative Action and the Public Interest," argues that the *Adarand* decision shows that government racial preference programs "will be constitutional only if they satisfy 'strict scrutiny' that is, only if they 'promote a compelling state interest' and are 'necessary' or 'narrowly tailored' to that objective."[73] As Justice O'Connor summed in the *Adarand* case, "Any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[74]

The idea of 'strict scrutiny', which began to be applied to racial preference programs in *Croson* and *Adarand,* represented a turning point in the debate over racial preference programs. The difficulty of overcoming strict

---

[73] David Strauss, "Affirmative Action and the Public Interest," The Supreme Court Review: The Law School of the University of Chicago - 1995 (Chicago: The University of Chicago Press, 1996) 2.

[74] *Adarand Construction, Inc. v. Pena,* 515 U.S. 200 (1995).

scrutiny cannot be overlooked. For instance, Richard Kahlenberg, in his book *The Remedy*, argues that the last time "the Supreme Court upheld a classification against strict scrutiny was in 1944."[75] Likewise, Paul Gerwitz, in a recent *Wall Street Journal* article, argues that the new standard of strict scrutiny that the Court has applied to racial preference programs is so tough to overcome that supporters of preference must realistically look at alternatives.[76]

A standard of 'strict scrutiny', though a tough criterion to overcome, does not, however, mean the end of race-consciousness. For instance, Justice O'Connor left the door open ever so slightly for racial preference in *Adarand* when she wrote that "the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[77] Whatever the case, strict scrutiny is certainly more palatable to the critics of racial preference than that of *Fulliluve*.

Others, however, believe that the conservative turn the Court has taken is one for the worse. Writing about the new conservatism, Justice Harry Blackmun ponders "whether the

---

[75] Richard Kahlenberg, The Remedy, (New York: Basic Books, 1996) 107.

[76] Paul Gerwitz, "Affirmative Action: Don't Forget the Courts," Wall Street Journal (August 2, 1995): A11.

[77] *Adarand Construction, Inc. v. Pena*, 515 U.S. 200 (1995).

majority still believes that discrimination is a problem in our society, or believes it ever was."[78] For the proponents of racial preference, the increasingly tougher standards of strict scrutiny being applied by the Court represents an obvious obstacle to the proportionalism for which they strive.

RECENT DEVELOPMENTS IN RACIAL PREFERENCE

Another interesting case, tried in the 5th Circuit Court of Appeals in 1996, that also deserves mention in this strand of the meaning of the term affirmative action is that of *Hopwood v. State of Texas,* (Case No. 94-50569). Cheryl Hopwood, whose application to the University of Texas Law School was rejected, brought suit against the university after learning that minorities with much lower LSAT scores and grade-point averages had been admitted. While it was clear that the law school was using some form of racial preference, it was later revealed that the school had been operating an admissions process in which minority candidates'

---

[78] *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989).

files were separated out and assessed differently than the rest of the applicants. In other words, the University of Texas Law School, by setting a lower standard for the admittance of blacks, had gone well beyond Powell's decision in *Bakke* that race could be one of many factors used that helped determined admission. For many minority applicants (and conversely those whites who should have been admitted), race became the factor which determined the fate of their admission. Of *Hopwood,* Jeffrey Rosen, in his article "The Day the Quotas Died: Affirmative Action's Posthumous Life," writes:

> Powell never specified the mystic point at which a benign 'plus factor' became a malignant 'decisive' factor; but he did stress that the search for racial diversity should not 'insulate' minority candidates from 'competitive consideration' with white candidates who might bring diverse perspectives of their own. And Hopwood tests the limits of Powell's euphemism. The gap between the test scores of white and black candidates is so stark that, to admit more than token numbers of minority candidates, race must be used not as a 'plus factor' but as the decisive factor in case after case.[79]

Indeed, as a highly selective institution, it appears that very few, if any, blacks would have been admitted to the law school. According to reports filed by Hopwood's lawyers, between 600 to 700 higher-scoring white candidates were

---

[79] Jeffrey Rosen, "The Day the Quotas Died," The New Republic (April 22, 1996).

passed over before the first blacks were denied admission.[80] Writing about the difficulties in finding qualified black candidates because of the disparity seen in the scores of white applicants versus black applicants, James Traub, in his article "Testing Texas," sarcastically argues that "it seems the only way to admit large numbers of blacks is to admit them *because* they are black."[81]

Whatever the case, in its historic decision in *Hopwood*, the 5th Circuit Court of Appeals held:

> ...the University of Texas School of Law may not use race as factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.[82]

The reason that the 5th Circuit's decision is so important is that the Supreme Court decided not to hear the case. Therefore, the 5th Circuit's ruling that race cannot be used as a criterion in college admissions is a matter of

---

[80] *Hopwood v. State of Texas*, 5th Circuit Court of Appeals - Case No. 94-50569, (1996).

[81] James Traub, "Testing Texas," The New Republic (April 6, 1998): 20.

[82] *Hopwood v. State of Texas*, 5th Circuit Court of Appeals - Case No. 94-50569, (1996).

law within those states (Texas, Louisiana, and Oklahoma) who are located within its jurisdiction.

Many believe that the case of *Board of Education of the Township of Piscataway v. Taxman* (Case No. 96-679), which was scheduled to go to the Supreme Court in 1997, would have helped to end much of the remaining controversy over racial preference programs. *Taxman* was thought to be important by many because it was "a singularly crystal-clear case of two opposing views on the limits of affirmative action."[83]

Taxman was reminiscent of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), in which the Court invalidated a school board plan that would, in the event that lay offs were necessary, dismiss white teachers with more seniority in favor of black teachers with less seniority. In *Wygant*, the Court ruled that an effort to overcome societal discrimination and promote diversity was not in itself a reason for retaining some teachers over others solely on the basis of race. There must be, in other words, (foreshadowing the rulings in *Croson* and *Adarand*) a compelling state interest to sustain the use of racial preference.

---

[83] Tomasson, 162.

Similar to the circumstances in *Wygant*, Sharon Taxman, white, was selected for layoff over Debra Williams, black. Although both Taxman and Williams were hired on the same day, and were regarded as equally competent teachers, Taxman was released as part of a diversity building racial preference program. Taxman's lawyers argued that "diversity was not sufficient enough reason to lay-off Taxman"[84] without evidence of past discrimination, of which both sides agreed that there had been none. Since both teachers were regarded as equally competent (and there was no disparity in seniority as in the *Wygant* case) a ruling on the case would have indicated how far the Supreme Court was willing to push its decision in *Wygant*.

The Supreme Court did not hear the case, however, because the issue over lost pay became moot when supporters of race-conscious programs, fearful of a decision that would put an end to racial preference, paid Taxman to drop her suit.

While case law steals much of the spotlight in the racial-preference strand of affirmative action, it must be remembered that legislatures, voters, and the executive offices play a role as well. For instance, President George

---

[84] Tomasson, 162.

Bush successfully lobbied against, and even vetoed one version of the Civil Rights Act of 1991. Bush was afraid that some of the requirements in the bill's precursor, the Civil Rights Act of 1990, would force employers to fill racial quotas to avoid liability. It was only after he was convinced that the Act was not a 'quota bill' when President Bush finally did compromise and sign the legislation.[85]

Also, another example of the drama outside the court system is when California voters decided to take the matter of racial preference into their own hands with the passage of Proposition 209. Proposition 209, also known as the California Civil Rights Initiative (CCRI), effectively ends quotas or racial preference plans in state agencies in California. CCRI reads:

> Neither the State of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as criterion for either discriminating against, or granting preferential treatment to, any individual or group in operation of the state's system of public employment, public education or public contracting.[86]

Interestingly, with Proposition 209, the voters of California in essence one-upped the Supreme Court. Lydia

---

[85] Skrentny, 227.

[86] quoted from Chávez, 271.

Chávez, in her book on Proposition 209 called *The Colorblind*, contends that the authors of the initiative, Glynn Custred and Thomas Wood, received their inspiration, ironically, from Justice Brennan in the *Weber* case.[87] In his opinion in *Weber*, Brennan essentially challenged his detractors by arguing that if they did not like his decision they could always go back and change Title VII to specifically include an outlaw of racial preference and quotas. The voters of California decided to take Justice Brennan up on that offer with their initiative.

The Court decided not hear any challenges to CCRI. Since the Court does have the power to make a statutory interpretation of California law, there is only one thing the Court could do with CCRI - make a constitutional ruling on racial preference and quotas. There remains the possibility that the Court is unwilling to make that leap at this time.

Meanwhile, Chávez reports that California's decision has had ramifications across the United States with at least six other states considering similar initiatives.[88] Also, Chávez reports that there has been a recent push in Congress to end all federal affirmative action programs aimed at minorities and women.[89]

---

[87] Chávez, 18 - 19.

[88] Chávez, 253.

[89] Chávez, 253.

With the new onslaught of legislation regarding racial preference programs and its own unwillingness to put forth any clear-cut decisions, it is likely the courts will have their hands busy with racial preference programs for a long time to come.

CHAPTER 3

THE ATTACK ON RACE-CONSCIOUS RELIEF

To understand that there is a dual meaning for the term 'affirmative action' is important because one of the term's meanings - racial preference - provokes much controversy, debate, and division in our society. Consequently, it is important to realize that when people criticize or praise the attributes of racial preference, they often use the broader term 'affirmative action'.

The significance of displaying the difference in the two strands of affirmative action would not be so critical if the racial preference meaning were not so controversial. Indeed, racial preference is an issue in which people's beliefs are so strong that the problem seems to be intractable. If any solutions are to be provided for this puzzle, there must first be a general fact-finding mission as to why some people passionately protest against our current affirmative action strategies. In other words, what is the controversy over racial preferences all about?

This chapter is devoted to show some of the political and constitutional arguments that form attack on racial preference.

AMELIORATIVE RACE-CONSCIOUS RELIEF

Those critics who disagree with current racial-conscious strategies often begin by attacking the notion that preference programs should help to assist and redress the discrimination to which minorities have been subjected throughout our nation's history. These critics argue that while atonement may be a fine goal, as the old saying goes, 'two wrongs don't make a right'. While showing sympathy for the historical discrimination blacks have suffered, Supreme Court Justice Antonin Scalia argues that ameliorative race-conscious relief is not supported by the Constitution. In his concurring opinion in *Adarand*, he writes:

> ...Government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole, but under our Constitution there can be no such thing as either a creditor or a debtor race.[1]

---

[1] *Adarand Constructors v. Pena,* 515 U.S. 200 (1995).

Similarly, Justice Lewis Powell writing for the Supreme Court argued in *Bakke,* "Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups."[2] Racial-preference programs do ask certain individuals to carry the burden of past mistakes.

These critics go on to argue that a government that purports 'Equal Protection of the Laws' as a fundamental principle governing its society cannot simply redress its past mistakes. From time immemorial, governmental systems, in deciding the political questions of who gets what, when, and how, have made distinctions between different types of people, from the rugged to the frail, from the man to the woman, from the skilled to the unskilled, to name a few. As a society, however, the United States has decided to take ethnic, racial, religious, and gender differences away from government, and others, as a way of determining the political questions of who gets what, when, and how. Therefore, these opponents argue that any attempts to redress past mistakes along these lines would not only be in violation of this fundamental principle of society, but it would also compound

---

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

the mistakes of the past by making them over again. As the Supreme Court ruled in *Bakke*:

> ...the mutability of a constitutional principle, based upon shifting political and social judgments, undermines for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation.[3]

In other words, a government may not simply "abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."[4]

Also, the argument that racial preference should be used to make up for past discrimination has a problem in its application. If ameliorative race-conscious relief is granted to blacks, why not other groups? There is an innumerable number of groups who can make claims based upon past wrongs. Even if we could possibly identify the groups which deserve compensation for historic suffering, how would we even attempt to gauge how much one group has been discriminated against over another? Supreme Court Justice Sandra Day O'Connor summarizes this issue in the *Croson* case when she writes:

---

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

[4] *Burton v. Wilmington Park Authority*, 365 U.S. 715 (1961).

> To accept...that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs...[5]

STIGMA

Opponents of racial preference programs also often criticize the ends of such strategies. As noted scholar on affirmative action Terry Eastland writes, "distinctions drawn on the basis of race inevitably lead to racial discrimination."[6] Eastland's theory holds that the beneficiaries of racial preference programs are marked as inferior, i.e. "a stigma produced by affirmative action."[7] Therefore, instead of breaking down barriers to discrimination, affirmative action, in this sense, widens the divisions between the races. Charles Murray, in his article

---

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

[6] Terry Eastland, Ending Affirmative Action (New York: Basic Books, 1996) 195.

[7] Eastland, 195.

"Affirmative Racism," echoes Eastland's assertion when he writes:

> 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 has to put up with the knowledge that many of his co-workers believe that he was hired because of his race; and he has to put up with the suspicion that in his own mind they might be right.[8]

Likewise, Nicholas Capaldi, in his article in the book *Affirmative Action: Social Justice or Unfair Preference?*, argues that racial preference programs are "counterproductive, for what it reinforces is the perception that African Americans can only succeed if held to lower or different standards."[9] Dinesh D'Souza, in his book entitled *The End of Racism,* also claims that one of the arguments against racial preferences is that "while minorities might gain materially from preferences...they...suffer

---

[8] Charles Murray, "Affirmative Racism," Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion ed. Nicolaus Mills. (1984; New York: Bantam Doubleday Dell Publishing Group, Inc., 1994) 204.

[9] Nicholas Capaldi, "Affirmative Action: Con," Affirmative Action: Social Justice or Unfair Preference? (New York: Rowan and Littlefield Publishers, Inc., 1996) 83.

psychologically, because their achievements would always be considered suspect."[10]

Justice Powell also examines this issue in *Bakke* when he writes:

> ...preferential programs may only reinforce stereotypes holding that certain groups are unable to achieve success without special protections based on a factor having no relationship to individual worth."[11]

Eastland summarizes the mark of inferiority placed on an individual by race-conscious programs by connecting it to what he believes is the only proper way to ensure 'Equal Protection' - the observance of a neutraled principle, a colorblind approach to the Constitution. He writes:

> Here the negative experience of affirmative action makes a powerful argument for colorblind law. Because affirmative action is stigmatizing, even for those who do not 'benefit' from it, it is better to forego affirmative action altogether in favor of procedures for admitting students or hiring workers or awarding contracts that do not brand their targets as inferior and do no provide the basis for generalizing about minority achievement. Such procedures,

---

[10] Dinesh D'Souza, The End of Racism (New York: The Free Press, 1995) 219.

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

> of course, are those that do not distinguish on the basis of race, that do not 'take race into account' in deciding who gets ahead.[12]

RACIAL PREFERENCE: A BENIGN INCONVENIENCE?

Another one of the arguments the critics of affirmative action enjoy attacking is the notion forwarded by some proponents of racial preference that the inconvenience (inconvenience being a nice way of saying discrimination) felt by whites who are affected by such programs is benign. Barbara Bergmann, a supporter of racial preference, ponders this very idea in her book *In Defense of Affirmative Action*, when she asks of the *Taxman* case:

> Was an injustice done to the white teacher because her race was taken into account, and used against her? If she had lost out because of one extra sick day, or her pronunciation was slightly less standard than that of the other teacher; one might say that her interests were sacrificed to a purpose of the school, although relatively a minor one. In actuality, her interests were sacrificed to another purpose of the school - that the school might have the benefit of maintaining

---

[12] Eastland, 198.

> racial diversity - and perhaps to the benefit of the community's interest in greater equality between black and white citizens. Is the sacrifice of her interests less ethically sound in one case than in the other?[13]

Critics argue resoundingly, "YES!" People like Bergmann, opponents contend, believe that whites cannot be excluded in the same way as blacks. In other words, racial preference proponents are convinced that "excluded whites will not feel inferior or stigmatized; hence they can be discriminated against in a manner that blacks cannot."[14] Therefore, it is okay to sacrifice the white for the good of whatever system a case is being made for diversity at that particular moment.

Likewise, advocates of quota systems also argue that these practices "do not represent a covert attempt to stigmatize the majority race as inferior."[15] The arguments that pundits like Bergmann make, however, is like saying that ice cream ceases to be ice cream when chocolate fudge is poured on top. It matters not whether there is a little or a lot of discrimination, whether there is a little or a lot of sacrifice, or whether there is or is not a stigma attached;

---

[13] Barbara Bergmann, In Defense of Affirmative Action (New York: Basic Books, 1996) 111.

[14] Ralph Rossum, Reverse Discrimination: The Constitutional Debate (New York: Marcel Dekker, Inc., 1980), 65.

[15] Rossum, 65.

discrimination is discrimination, whatever the form. The idea that one cannot be discriminated against unless they are a part of some 'suspect class' is, for a lack of a better term, according to critics, ludicrous. As the Supreme Court said in *Bakke*, "It is far too late to argue that the guarantee of equal protection to *all* person permits the recognition of special wards entitled to a degree of protection greater than that accorded to others."[16]

This is where the definition of discrimination becomes important. Racial preference, according to its critics, by definition discriminates between the races. As controversial University of Texas Law Professor Lino Graglia writes, "A racially discriminatory act is, quite simply, an action taken on the basis of race."[17] Likewise, historian Hugh Davis Graham points out that it is paradoxical to utilize "the means of discrimination to achieve the ends of nondiscrimination."[18] Turning Bergmann's argument upside-down is simply done by asking, "Would anyone contend for an instant that a Black had been given equal protection of the laws if he had been similarly excluded by special privileges

---

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

[17] Lino Graglia, "Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Discrimination in Employment," Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion ed. Nicolaus Mills. (1991; New York: Bantam Doubleday Dell Publishing Group, Inc., 1994) 108.

[18] D'Souza, 219.

accorded to whites solely on the basis of race?"[19] The answer is obvious, and anyone that did contend otherwise would most likely be considered a racist. Legal scholar, Alexander Bickel, succinctly summarizes frames this argument when he writes:

> If the Constitution prohibits the 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.[20]

Therefore, the issue comes down to an interpretation of the Equal Protection Clause.

A LOWERING OF STANDARDS?

Yet another angle that critics of race-consciousness employ is that racial-preference ultimately leads to a lowering of standards because it is in opposition to the simple notion of the best man for the job. Darien McWhirter,

---

[19] Rossum, 64.

[20] D'Souza, 219.

in his book *The End of Affirmative Action: Where Do We Go From Here?*, argues:

> ...affirmative-preference programs have have sometimes meant hiring or promoting people who were not qualified or were clearly not *as* qualified as people of the "wrong" race or sex. To deny that is to ignore the obvious.[21]

If we ignore, what McWhirter calls the 'obvious', then we also ignore that race-conscious relief reduces us, as a nation, to the brutality of subscribing to the Machiavellian method of "believing the end justifies the means."[22] In this case, the 'means' involve "penalizing innocent individuals by denying them opportunities."[23] These innocent individuals are the Allan Bakkes and the Cheryl Hopwoods of the world. While advocates of racial preference like to talk in the abstract about the benefits of such programs, they often fail to see that on the microlevel each time a more deserving candidate is passed over because of affirmative action an injustice is done; the policy ultimately affects the lives of real people.

Besides the fact that a lowering of standards hurts innocent individuals, the argument presents another key

---

[21] Darien McWhirter, The End of Affirmative Action: Where Do We Go From Here? (New York: Carol Publishing Group, 1996) 56.

[22] Capaldi, 78.

[23] Capaldi, 72.

logistical problem for proponents of race-conscious relief. The whole idea behind affirmative action is to give an opportunity to blacks who could, barring discrimination, do equally as well a job as their white counterparts. The problem is, however, that when equal standards are applied, blacks do not often stack up. D'Souza hints at this logistical problem when he writes:

> These merit gaps are significant because companies do not hire people randomly or based on the lottery, but generally based upon some test of qualifications or achievement. Consequently, courts, government officials, and civil rights activists who seek racial proportionalism have found themselves compelled to sidestep or confront the reality that on virtually every measure of achievement, some racial groups do better than others.[24]

For example, when the University Texas Law School was forced by the decision in *Hopwood* to apply standards evenly, black enrollment dropped from an average of seventy five students a year (out of an entering class of five hundred) to only four in 1997.[25] This drop in enrollment indicates that when the University of Texas Law School was compelled to take the best man for the job, so to speak, a good majority of

---

[24] D'Souza, 302.

[25] James Traub, "Testing Texas," The New Republic (April 6, 1998): 20.

students who would have made it in the 'old system' did not.

Indeed, D'Souza indicates that many universities, like the University of Texas, knowingly enroll minority students who are not qualified and are "simply not competitive with their peers."[26] This is evidenced, D'Souza continues, by an increasing amount of data that shows "preferential admissions seriously exacerbate what universities euphemistically term 'the retention problem'."[27] In other words, many minority students enrolled under preferential programs are forced to drop out because they simply cannot meet the challenge in which they are presented.

Seeing that they cannot win battle on this front, proponents of racial preference often stress the need for diversity in a thinly veiled attempt to hide the harsh truths about racial preference. Shelby Steele, author of "A Negative Vote on Affirmative Action," however, uncovers the frailty of the diversity argument when he contends that the drive for diversity (which Steele argues is only really a cosmetic diversity) masks the true problem of inequalities in performance between blacks and whites. He writes:

> Too often the result of this [diversity], on campuses for example, has been a democracy of colors rather than of people,

---

[26] Dinesh D'Souza, "Sins of Admission," Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion ed. Nicolaus Mills (1991; New York: Bantam Doubleday Dell Publishing Group, Inc., 1994) 233.

[27] D'Souza, 233.

> an artificial diversity that gives the appearance of educational parity between black and white students that has not been achieved in reality. Here again, racial preferences allow society to leapfrog over the difficult problem of developing blacks to parity with whites and into a cosmetic diversity that covers the blemish of disparity - a full six years after admission, only 26 to 28 percent of blacks graduate from college.[28]

Here is where the crux of the affirmative action problem lies. Many institutions have gone well beyond any notion of Justice Powell's standard of using race as just one of many factors in a particular applicant's file. Despite the fact that this may lead to lowering of standards, because of an apparent need for diversity, many institutions are so desperate for minority candidates that race becomes the only factor when considering who gets an opportunity and who does not. Because of intense political pressure and constitutional questions surrounding racial preference as previously outlined, this standard may not likely hold for long. Therefore, if blacks cannot even 'catch up' with racial preference, how are they to do so without it? Is there an alternative that might better meet the needs of blacks? Is this necessarily a black versus white issue; or is it an issue of the haves versus have nots?

---

[28] Shelby Steele, "A Negative Vote on Affirmative Action," Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion ed. Nicolaus Mills. (1990; New York: Bantam Doubleday Publishing Group, Inc., 1994) 40 - 41.

THE CREATION OF A BLACK ELITE

The final, and perhaps most convincing, argument against our current affirmative action strategy, related to the preceding discussion about the inequality between the haves and the have-nots, is that racial preference creates a perpetual cycle whereby only a privileged part of black society stands to gain from the benefits of such a program. In other words, opponents of affirmative action argue that racial preference programs often do not even benefit the people they are instituted for. Those who gain from race-conscious relief are people with the skills and talents who would have already been assured a preferred place in society. As sociologist William Julius Wilson argues:

> Talented and educated blacks are now entering positions of prestige and influence at a comparable rate to, and in some situations exceeding, that of whites with equivalent qualification. It is equally clear that the black underclass is in a hopeless state of economic stagnation, falling further and further behind the rest of society.[29]

---

[29] William Julius Wilson, "The Declining Significance of Race," Majority and Minority ed. Norman Yetman. (1978; Boston: Allyn and Bacon, 1991) 125.

Consequently, the benefits of quota programs creates, according to Wilson, a class of privileged minorities, while those minorities that could actually use help are left to continue to flounder. Eastland argues that "the 'truly disadvantaged' lack the threshold skills needed to be considered for an opportunity under an affirmative action program."[30] Therefore, as Eastland writes, "affirmative action can do very little to improve...conditions" that the "so-called underclass of blacks" face.[31]

Also, beneficiaries from of our current racial preference strategy, regardless of actual economic circumstances, are "assumed to be socially and economically disadvantaged."[32] Consequently, if Wilson and Eastland are correct by arguing that the beneficiaries of racial-preference are those who already have particular skills and abilities, we can also assume that our current approach towards affirmative action helps those who are already in an economic position to take advantage of the opportunities that racial preference creates. Thus, once again, leaving the

---

[30] Eastland, 155.

[31] Eastland, 154-155.

[32] Darien McWhirter, The End of Affirmative Action: Where Do We Go From Here? (New York: Carol Publishing Group, 1996) 54.

'truly disadvantaged' in a position in which they are left out.

Wilson's studies of differential rates of progress between black economic classes confirms that our current racial-preference strategy has only really helped the privileged, few blacks. As Wilson writes:

> Affirmative action policies...did not really open up broad avenues of upward mobility for the masses of disadvantaged blacks...Recent data on income, employment opportunities, and educational attainment confirm that relatively few individuals who reside in the inner-city ghettos have benefited from affirmative action.[33]

Thus, race-conscious programs only create a further barrier between the haves and have-nots of society.

---

[33] William Julius Wilson. "Race-Neutral Programs and the Democratic Coalition," Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion ed. Nicolaus Mills. (1990; New York: Bantam Doubleday Dell Publishing Group, Inc., 1994) 167.

CHAPTER 4

RACE OR CLASS

THE CASE AGAINST RACE: A FURTHER LOOK

It has been shown that, with the Court's use of strict scrutiny, racial preference programs have an uncertain constitutional future. Also, it has been noted that there are compelling arguments against the use of racial preference programs. At this point, however, it might be useful to step away from the political and constitutional analysis of affirmative action to gain a new perspective, thereby adding new light to help frame and clarify the debate. By taking a sociological approach in examining race-conscious programs, it will be shown exactly what can be changed in the equation that characterizes affirmative action to make the system more equitable and less divisive. This new construction will also be attractive because it will put affirmative action on solid constitutional ground. First, however, a sociological framework for this approach must be built; this framework will rest upon a sociological view of race.

While a viable argument can be made that race-conscious relief does help certain members of society, this author argues that affirmative action has, up to now, worked to pull the races in our society further apart, rather than closer together. We need no reminder of the racial name-calling and the tension that accompanied California's passage of Proposition 209 and, closer to home, the reaction to the *Hopwood* decision. Of Proposition 209, Lydia Chávez, in her book on the subject, asserts that the issue ultimately boiled down to one thing - a racial divide. In the eyes of opponents to the proposition, those supporting the initiative were associated with the likes of David Duke. Conversely, proponents of the proposition portrayed the opposition as either violent demonstrators or radical students.[1] If an issue such as our current affirmative action strategy breeds so much tension and hatred, then the legitimacy for it to bring about positive change must be questioned.

Indeed, the history of the United States is replete with stories of horrid injustices, tragedies, conflict, and social unrest caused by the powerful forces of racial divide and discrimination. A grim chapter in history need not

---

[1] Lydia Chávez, The Color Blind: California's Battle To End Affirmative Action (Berkley, CA: University of California Press, 1998) 198 - 203.

necessarily spoil the entire epic. It is not too idealistic to believe that we can say 'no' to our historical tendencies, and write an alternate ending with a brighter future to our course. With America's history in mind, the question introduced in this final section is two-fold. First, must affirmative action be a racial issue? In other words, what would happen to affirmative action if 'race' were taken from the dialogue? Second, are there any other variables that can be used in the place of 'race' to make affirmative action a better overall policy for society? In other words, what might happen if we exchanged the independent variable of 'race' for another variable such as 'class'?

THE MEANING OF RACE

To begin to answer these questions, it must first be realized that many analysts examine racial preference programs as if they were standing high above a large cornfield. From the analyst's perspective, as he gazes down on that vast ocean of amber and gold, the individual stalks of corn can be hardly distinguished, much less closely examined. What happens in the affirmative action debate is precisely what happens to the analyst standing atop the cornfield; individual issues and ideas tend to get overlooked. The idea of 'race' is just one of those issues. By using their pre-existing notions of the term, many

investigators of affirmative action take for granted what 'race' means; they use the term 'race' indiscriminately. Therefore, to better understand affirmative action as a whole, one of its individual stalks - the idea of 'race'- must be clarified.

Many sociologists contend that differences associated with race are merely products of a social construct, not some fixed genetic category. To begin, Stanley Lieberson, in his article entitled "A New Group in the United States," writes that "racial and ethnic groups are not merely static entities, but also products of labeling and identification *processes* that change and evolve over time;...groups appear and disappear."[2] What Lieberson seems to indicate is that the idea of race, and what race means to different societies at different times, is constantly being modified and altered. In other words, "a person defined as black in Georgia or Michigan might be considered white in Peru."[3]

Race, construed under Lieberson's approach, is a "floating signifier,"[4] with the only importance attached to

---

[2] Stanley Lieberson, "A New Ethnic Group in the United States," Majority and Minority, ed. Norman Yetman. 5th ed. (1984; Boston: Allyn and Bacon, 1991) 444-445.

[3] Norman Yetman, Majority and Minority (Boston: Allyn and Bacon, 1991) 3.

[4] Stuart Hall, film, Race the Floating Signifier.

differences in stature, hair, color, and skin is the significance that society gives to it. Hence, society, with its need to categorize, reads the body as a text, assigning varying social qualities and abilities to members based upon their individual characteristics.

Similarly, Immanuel Wallerstein, in his article entitled "The Construction of Peoplehood: Racism, Nationalism, and Ethnicity," argues that rather than accepting the biological oneness of the human race, we do, in fact, try to place people into categories. Analysts who argue that racial and ethnic groups are or act as they do because of either genetic characteristics or sociopolitical history miss the point according to Wallerstein. "The whole point of these categories," Wallerstein argues, "seems to enable us to make claims based upon the past against the manipulable 'rational' processes of the present."[5] Hence, we assign traits to certain people, based upon they way they look, so that we can treat them differently.

While he produces a fine example as for the possible reason as to why we make these categorizations, the point is, according to Wallerstein, that these categorizations are not based upon any biological facts. In this sense, race is a social construct. Therefore, as many sociologists indicate,

---

[5] Immanuel Wallerstein, "The Construction of Peoplehood: Racism, Nationalism, and Ethnicity," Race, Nation, and Class: Ambiguous Identities, eds. Etienne Balibar and Immanuel Wallerstein. (London: Verso, 1991) 78.

"race is not a function of biological or genetic differences between groups, but of society's perceptions that such differences exist and that they are important;...the term *race* is meaningless in a biological sense."[6]

Many sociologists shun the recent attempts of popular sociobiology to try to link certain social skills, such as intelligence, with the physical characteristic of the color of one's skin. One example of this popular sociobiology is the controversial best-selling book *The Bell Curve* written by Charles Murray and Richard Herrnstein in 1994. In assessing *The Bell* Curve, Hugh Pearson argues, "Murray and Herrnstein sound like two people who have found a way for racists to rationalize their racism without losing sleep over it. One could call what they are facilitating Racist Chic.[7] Likewise, Dinesh D'Souza, author of *The End of Racism: Principles for a Multiracial Society,* writes:

> By asserting that blacks and Hispanics were on average less intelligent than Caucasians and Asians - deficiencies alleged to be possibly inherited - Herrnstein and Murray supplied what to

---

[6] Yetman, 3.

[7] Hugh Pearson, "Race Mutters," The New Republic (October 31, 1994): 16.

> many angry whites must have been an appealing explanation for why groups differ in academic performance and economic achievement.[8]

The big question, as D'Souza continues, is that if Murray and Herrnstein are correct about there being genetic differences between the races, "then the free competition of a multiracial society is likely to produce a natural hierarchy of groups."[9]

Therefore, if we were to accept Murray and Herrnstein's thesis we would not be far off from ideas similar to that contained in Herbert Spencer's theory of Social Darwinism. Nathan Glazer hints at this when he argues that Murray and Herrnstein "project a possible utopia in which individuals accept their places in an intellectual pecking order that affects their income, their quality of life, their happiness."[10] No reminder is needed that such is not too far from Spencer, who, while calling for man to rise to its "highest creation,"[11] endorses the idea that the "sickly, the

---

[8] Dinesh D'Souza, The End of Racism: Principles for a Multiracial Society (New York: The Free Press, 1995) 12.

[9] D'Souza, 435.

[10] Nathan Glazer, "The Lying Game," The New Republic (October 31, 1994): 16.

[11] Herbert Spencer, "Social Statics," Great Political Thinkers: Plato to the Present. ed. William Ebenstein and Alan O. Ebenstein. 5th ed. (1851; San Antonio, TX: Harcourt Brace College Publishers, 1991), 858.

malformed, and the least fleet or powerful"[12] be eliminated in a type of purification process. In this context, there is then no wonder as to why some liberal thinkers and groups compare Murray and Herrnstein's work to Neo-Nazism.[13]

Murray and Herrnstein cannot be dismissed, however, just because we do not like the content of their findings. Consequently, if biological differences do in fact exist, "they cannot be wished away."[14] While acknowledging Lieberson's claim that racial classification is an arbitrary social construct, D'Souza argues:

> Of course racial classifications are variable in that they involve a human decision to categorize in this way rather than that, but it does not follow that these classifications do not describe real differences in genetic composition (genotype) or its manifestations (phenotype). Clearly, human beings do differ biologically and it is difficult for scholars to avoid some system of classification.[15]

---

[12] Spencer, 858.

[13] Charles Lane and Jeffrey Rosen, "Neo-Nazis!" The New Republic (October 31, 1994): 14 - 15.

[14] D'Souza, 437.

[15] D'Souza, 449.

The question, however, is not that differences do exist, but as to why they exist. If we address this question, we can perhaps find a middle ground between Lieberson and Wallerstein's claims on the one hand and Murray and Herrnstein's on the other.

The answer is that these differences can be explained through variances in environmental, cultural, sociological, and historical conditions. While there may be some truth to D'Souza's statement, many sociologists claim that the problem with studies like *The Bell* Curve is that race has been the "cheap explanation tyros offer for any collective trait that they are too stupid or too lazy to trace its origins in the physical environment, the social environment, or historical conditions."[16]

This may be better explained through use of an example. Take for instance a trait that is common among many blacks - lactose intolerance. Environmental and historical circumstances can be ascribed, in large part, to this widespread attribute among blacks. Because of the hot African climate, milk could not be kept cold. The heat would cause the milk to spoil rapidly. Consequently, milk, because of environmental reasons, was not as large a part of the African diet as it was a part of the diets of those with European descent, where a cooler climate helped to keep milk

---

[16] Gerald Berreman, "Race, Caste, and Other Invidious Distinctions in Social Stratification," *Majority and Minority*, ed. Norman Yetman. 5th ed. (1972; Boston: Allyn and Bacon, 1991), 35.

cold. The condition of lactose intolerance among blacks can therefore likely be traced to being a byproduct of the environmental forces that kept Africans from not having milk as a regular part of their diet.

Differences in intelligence among the races, like that of the condition of lactose intolerance, can consequently be understood through these historical, social, and environmental conditions, as D'Souza admits.[17] As he says, "My view is that...it is a reasonable hypothesis that IQ differences can be explained by culture and environment."[18]

Studies like Murray and Herrnstein's are dangerous and misleading because they provide ammunition for people who would want to attribute these differences in traits to biological differences in the races. While, in fact, "groups differ in all sorts of other ways that might produce ability profile differences."[19] Although Murray and Herrnstein may be right in that there are genetic differences between the races, they make a mistake because they do not trace these differences to environmental and historical conditions.

With this analysis, a middle ground can perhaps be drawn between Murray and Herrnstein's thesis on the one hand, and Lieberson and Wallerstein's on the other. Groups do differ in

---

[17] D'Souza, 476.

[18] D'Souza, 476 - 477.

[19] Richard Nisbett, "Blue Genes," The New Republic (October 31, 1994): 15.

all sorts of ways, but variances in environment may be the cause of those differences.

Whether or not one agrees with the preceding analysis, the point of all this is that there is considerable debate as to what actually constitutes race. Just by acknowledging that there are such questions as to what constitutes race, a governmental unit that attempts to classify and categorize its citizens into racial and ethnic categories would be mistaken. Indeed, a governmental unit would be presumptuous to classify its citizens based on racial and ethnic identity because a growing number of citizens cannot even place themselves into any racial category. This would seem to suggest that boundaries between the races do not exist in actuality. Indeed, many sociologists claim, quite simply, "pure races"[20] do not exist.

Consequently, as we will see, classifications based on race, whether it be by the government or some other social institution, cannot do justice to the diversity seen in the American culture.

---

[20] Yetman, 3.

Due to a multitude of reasons, millions of Americans struggle with their own self-identity. Indeed, a growing number of people in our highly assimilated society cannot even place themselves in any 'correct' racial category.[21] Even for those that are lucky enough to be able to trace a mixed heritage, there is often confusion not only as to how to properly identify one's self, but also as to how a person from a mixed background is labeled by the rest of society. The boundaries that we as a society place between the races, in other words, act like shackles for some that seem to cross the line of demarcation. Mitzi Uehara-Carter, born to a 'black' father and a 'Japanese' mother echoes these sentiments as she reflects on her childhood when she writes:

> Our bodies, our presence, our reality is a nuisance to some because we defy a definite and demarcated set of boundaries. We confuse those who are trying to organize ethnic groups by highlighting these boundaries because they don't know how to include us or exclude us.[22]

---

[21] Lieberson, 452.

[22] Mitzi Uehara-Carter, "On Being Blackense," The Social Construction of Race and Ethnicity in the United States, eds. Prince Brown Jr. and Joan Ferrante (New York: Addison-Wesley Publishers, Inc., 1998) 57.

RACE AS A POLITICAL CONSTRUCTION

This conception of race creates problems for a governmental institution that attempts to create fixed boundaries between the races. Besides the fact that it is in poor sociological form, one of the problems with a government that uses an antiquated notion of what race means is that its laws do not reflect reality. Throughout its history, the United States has attempted to enact laws that clearly demarcate the lines between the races. For instance, during the Jim Crow era, many states institutionalized the 'one-drop rule'.[23] In Tennessee, "all negroes, mulattoes, and mestizos, and their descendants, having any blood of the African race in their veins" were to be considered as being black.[24]

The false social constructions that gave meaning to race in the past are still being used. Even today, for instance, "multiracial offspring are assigned to the race of the mother or father depending on the state or to the parent with lower

[23] Paul Knepper, "Historical Origins of the Prohibition of Multiracial Legal Identity in the States and the Nation," The Social Construction of Race and Ethnicity in the United States, eds. Prince Brown Jr. and Joan Ferrante. (New York: Addison-Wesley Publishers, Inc. 1998) 126.

[24] Knepper, 127.

ascribed social status...the federal government prohibits multiraciality as well."[25] Whether its the human need to categorize others or its the continuing legacy of a racist past, the amazing thing is that we continue to live with these boundaries that we know to be completely and thoroughly false.

While the states and the federal government have had different legal standards for this false concept of race at different times, the point is that our government, to this day, refuses to acknowledge the legal concept of multiraciality. The reality of race, especially in our society where there is a high degree of assimilation of these so-called ethnic groups into the mainstream of American culture, and its current legal concept do not mesh. Therefore, as suggested earlier, these current laws do not reflect reality.

Ironically, Dinesh D'Souza points out that many civil rights organizations, eyeing the benefits to be had from the 'one drop rule', now "strongly resist" getting rid of the concept that once served to oppress them.[26] "Thus," as D'Souza continues, "on an essential element of ideological doctrine - the existence of clear lines of demarcation between the races - the contemporary civil rights movement is in basic agreement with the old racists."[27]

---

[25] Knepper, 123.

[26] D'Souza, 205.

[27] D'Souza, 205.

Whatever the case, using governmental definitions of 'race' to place a line of demarcation between people is, as by now we can probably guess, an impractical depiction of reality. Furthermore, Paul Knepper, author of "Historical Origins of the Prohibition of Multiracial Legal Identity in the United States and the Nation," argues that we should stop trying to preserve these outmoded definitions of race as if it were some sacred cow. He sums:

> It would seem to acknowledge the reality of multiraciality would expose official racial categories as fluid and elastic, not discrete, mutually exclusive divisions of humankind determined by biology or social interaction.[28]

The attempts to define and characterize race by government, a social institution, can be referred to as the 'political construction' of race. Race, as a political construction, like any other socially constructed view of race, is therefore, at best, imprecise. This inexact demarcation of the races that government constructs in the form of public policy creates its own set of problems.

---

[28] Knepper, 129.

For instance, Joane Nagel, in her article, "The Political Construction of Ethnicity," argues that one of the ways in which society gives meaning to race is through this political construction. While affirmative action does in fact help some citizens, Nagel points to some of the negative effects that the institutionalization of race by government into public policy (i.e. affirmative action) has on society. According to Nagel, a person will choose the most politically advantageous ethnic affiliation available to him in a particular situation.[29] As Nagel contends:

> ...the recognition and institutionalization of ethnicity in politics [1]*increases the level* of ethnic mobilization among all ethnic groups...and [2] *determines the boundaries* along which ethnic mobilization and/or conflict will occur by setting down the rules for political participation and political access.[30]

In other words, these boundaries not only work to create ethnic mobilization along false lines, but also the demarcation of the lines themselves can cause friction between those singled out for special treatment versus those who are not given special treatment.

As Nagel continues, a racial preference program like affirmative action tends "to legitimate ethnic divisions,"

---

[29] Joane Nagel, "The Political Construction of Ethnicity," Majority and Minority, ed. Norman Yetman. 5th ed. (1986; Boston: Allyn and Bacon, 1991) 78.

[30] Nagel, 79-80.

encourages "organization and affiliation consistent with official boundaries rather than more culturally relevant units," and it leads to "communal conflict in the form of 'backlashes' *against* official groups."[31]

For instance, I would be more than willing to reveal my Cherokee Indian heritage (1/16 Cherokee - give or take a generation) if it meant gaining a scholarship to a high ranking university as part of an affirmative action program. As Nagel predicts, the affirmative action program would encourage me to identify with a cultural unit in which I would not normally associate. Also, I might, as a beneficiary of a preference program, encounter hostility from those not selected for preferential treatment. Therefore, the false divisions among people, created by government, is, as Nagel contends, a source of conflict.

Viet D. Dinh, in his article "Multiracial Affirmative Action," echoes Nagel's argument when he writes that "affirmative action entitlements can fan the flame of racial animosity."[32] "Each racial and ethnic group," as Dinh continues, "looks on the others as competitors rather than allies in the fight for share of the American pie."[33]

---

[31] Nagel, 84-85.

[32] Viet D. Dinh, "Multiracial Affirmative Action," Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion ed. Nicolaus Mills. (New York: Bantam Doubleday Dell Publishing Group, Inc., 1994) 280.

[33] Dinh, 280.

Likewise, Terry Eastland, noted scholar on affirmative action, sums this idea of race as a misguided political construction nicely when he points out that "this type of affirmative action (quotas) makes a virtue out of race...in order to determine who gets an opportunity and who does not."[34] In this way, our current affirmative strategy works to not only pull the races further apart, rather than closer together, but also it works to create agitation among the races in our society.

An addendum, however, is needed to serve as a caveat to the previous argument. Just as it would be naive, if not wrong, to argue that government was the sole creator of the divisions between the so-called 'races', it would be equally incorrect to argue that there would be no more racial conflict if only government were to take the correct approach with regards to the meaning of race. This argument is just plain common sense. Nagel's contention, however, is that programs like affirmative action only work to perpetuate these false divisions, thus creating conflict; this is undoubtedly true.

To reiterate, however, the source of the problem of race as a political construction lay in the fact that this construction, by its nature, is an imprecise characterization; the imprecise characterization, in turn, creates its own set of problems, as Nagel described. If the

---

[34] Terry Eastland, Ending Affirmative Action (New York: Basic Books, 1996) 2.

problem is dealt with at the core, which would involve attacking the use of an antiquated meaning of race, then some of the problems that Nagel details could be alleviated.

RACE: IN SUM

In review, the role that 'race' has played in our nation's history must be acknowledged. Because the historical tendencies in the United States, Nagel's argument about the problems caused by the institutionalization of 'race' into politics is noteworthy. Also, as noted earlier, laws and policies that attempt to classify the 'races' do not serve justice to the diversity and the multiraciality seen in American culture. Furthermore, since no pure races exist, all attempts by government to demarcate the boundaries between the 'races' is necessarily inexact. In fact, it is even argued by some that there is no such thing as 'race' in a biological sense. Social inequalities, like intelligence, cannot be linked, as some might like to suggest, to a person's stature, hair, or skin color. 'Race', therefore, is a social construct; society gives meaning to differences in physical appearance.

From what has been learned about race, we have come a long way in deciding whether or not 'race' should be used as the determining variable in social policy, such as affirmative action. Just from what we have learned about race, we can make the following damning statements:

> *1) Race should not be used as the key ingredient in the formation of social policy because of our historical tendencies. Political constructions, like affirmative action, work to make the divisions in our society more evident. Therefore, creating unnecessary angst and further division between the 'races' should be avoided.*

> *2) Race should not be used as the key ingredient in the formulation of social policy because it does not reflect reality. No pure races exist; consequently, no social policy demarcating divisions between 'races' can accurately reflect the identity of a person, whatever his background may be.*

While these arguments may be convincing in and of themselves, the next section will further show why race should not be used as the determining variable in affirmative action. It will be demonstrated what happens when 'race' is taken from the dialogue. In the end, it will be shown that using 'class', instead of 'race', would be a far better alternative in making good social policy.

AN ALTERNATIVE: CLASS-BASED AFFIRMATIVE ACTION

The statistics are harsh. While blacks (as socially and politically defined) make-up 13 percent of the population, they represent 28.4 percent of all those living below the poverty line.[35] While white unemployment rates usually fall somewhere between 4 and 5 percent, black unemployment rates are usually near 10.5 percent.[36] Annual incomes for blacks who are employed in full-time jobs amount to about 60 percent of that of whites.[37] More young black males are in prison than college.[38] While the next several pages could be filled with similar statistics, the point is obvious; blacks are represented disproportionately in the lower socioeconomic levels of society.

Many analysts use these numbers to justify race-conscious relief programs. While the basic proposition that something must be done to correct these imbalances is

---

[35] The World Almanac and Book of Facts - 1998 (NJ: K-III Reference Corporation, 1997) 376, 387.

[36] The World Almanac and Book of Facts - 1998, 145.

[37] D'Souza, 6.

[38] D'Souza, 6.

correct, the system of using race as a virtue is simply a shortsighted policy. A course of action designed to help all those of a lower socioeconomic class, and not just those of a particular race, would be a more appropriate policy decision. Therefore, in the following, I argue that affirmative action, in its current state, may help those blacks who are victims of historical circumstance, but it leaves out many whites, who are, due to the effects of institutional discrimination, also a part of the permanent underclass. A policy that attacks the problem on a socioeconomic level would continue to help underprivileged blacks and other minorities. The difference, however, lies in the fact that the socioeconomic approach would be free from many of the sociological, political, and constitutional questions surrounding our current affirmative action strategy.

Indeed, many sociologists claim that obvious questions and issues relating to class structure are often ignored because we, as a society, are too concerned with racial classification and racial stratification. As Colin Gree, author of "Divided Society: The Ethnic Experience in America," contends, "Lost in the ethnic interstices of the American social structure, the larger issue of class is never engaged, nor even at issue;...we continue to ignore the real factors of class in our society."[39]

---

[39] Colin Gree, Divided Society: The Ethnic Experience in America. (New York: Basic Books, 1974).

What would lead Gree, and other sociologists, to essentially argue that our focus should be on class factors, rather than race? The answer lies in the distinction between *attitudinal* and *institutional* discrimination.

Attitudinal discrimination occurs when the "actor is prejudiced, defers to, or is influenced by the sanctions of a prejudiced group or the norms of a racially based culture."[40] In other words, the discriminatory practice or action stems from the prejudice of the person or group participating in the discrimination.

On the other hand, institutional discrimination refers to:

> ...organizational practices and societal trends that exclude minorities from equal opportunities for positions of power and prestige...Institutional or structural discrimination involves policies or practices which appear to be neutral in their effect on minority individuals or groups, but which have the effect of disproportionately impacting in them in harmful or negative ways. The effects or consequences of institutional discrimination have little relation to racial or ethnic attitudes or the majority group's racial or ethnic prejudices.[41]

In other words, institutional discrimination has little or nothing to do with the prejudice or racist attitudes found in

---

[40] Yetman, 26.

[41] Yetman, 26.

certain individuals or groups. Indeed, institutional discrimination cannot be tied to the prejudicial attitudes of anybody. Discrimination still often occurs, however, because the linkages between some institutional or structural arrangements may have adverse consequences on certain portions of society, such as blacks or the poor.

While the statistics show that there are some structural arrangements that act to negatively and disproportionately affect blacks, the socioeconomic approach is important to many sociologists who claim that institutional discrimination in today's society strikes more at an individual's class position, rather than his racial classification. There is no doubt that institutional discrimination continues to affect the life chances of many black individuals. The point is, however, that institutional discrimination does not only affect blacks, but the whole of the underclass. For instance, a poor white man and a poor black man may both be equally affected by institutional discrimination. Each may be forced to overcome many of the same obstacles and societal hardships to get ahead; institutional discrimination hits each because of their 'class', not their 'race'.

Jennifer Hochschild, author of the article "Race, Class, Power, and Equal Opportunity," frames this discussion when she ponders:

> Does it *feel* different to be a poor black

> than a poor white, in ways that affect how one acts to shape or take advantage of one's life chances? Is the problem of black poverty like that of white poverty, only worse; or is it a problem because poor blacks live in a different culture from poor whites?[42]

While Hochschild believes that these questions are difficult to answer,[43] she admits that race is "at least as much a problem of class."[44]

University of Chicago Sociologist William Julius Wilson is more firm on the issue when he argues that the status of many blacks today has more to do with "the historical consequences of racial oppression rather than with the current effects of race."[45] Furthermore, Wilson contends that "the life chances of individual blacks have more to do with their economic class than with their day-to-day encounters with whites."[46] Therefore, while there is no doubt that many blacks are still subject to attitudinal discrimination, the type of discrimination that most significantly contributes to the continuation of black plight is institutional;

---

[42] Jennifer Hochschild, "Race, Class, Power, and Equal Opportunity," Equal Opportunity ed. Norman Bowie. (Boulder, CO: Westview Press, 1988) 84.

[43] Hochschild, 85.

[44] Hochschild, 86.

[45] William Julius Wilson, "The Declining Significance of Race," Majority and Minority ed. Norman Yetman. 5th ed. (1978; Boston: Allyn and Bacon, 1991) 136.

[46] Wilson, 125.

institutional discrimination, however, is, as Wilson agrees, a problem that strikes at the whole of the underclass, not just blacks.

In light of Wilson's research and, as will noted later, current public attitudes towards our policy concerning affirmative action, to deal with today's institutional discrimination it would make more sense to take an approach that attacks class inequalities (i.e. between the haves and the have-nots of society). While not specifically calling for class-based legislation, Wilson argues for "race-neutral" strategies, such as "full employment policies, job skills training, comprehensive health-care legislation, educational reforms in the public schools, child care legislation, and crime and drug abuse prevention."[47] Likewise, Supreme Court Justice Clarence Thomas argues that:

> Rather than offer the individuals pity or handouts, we should provide them with the tools necessary that may allow them to help themselves...Moreover, to whatever extent we do want to give preferences to compensate those who have been unfairly deprived of certain advantages, we should do so in a manner that is just. Any preferences given should be directly related to the obstacles that have been unfairly placed in those individuals' paths, rather than on the basis of race or gender, or on other characteristics that are often poor proxies for true

---

[47] William Julius Wilson, "Race-Neutral Programs and the Democratic Coalition," Debating Affirmative Action: Race, Gender, Ethnicity, and The Politics of Inclusion ed. Nicolaus Mills. (1990; New York: Bantam Doubleday Dell Publishing Group, Inc., 1994) 168.

disadvantage.[48]

One question that must be addressed here is: Why does institutional discrimination attack at an individual's class position, rather than his racial classification? Some analysts theorize that stratification among the classes is a part of the grand scheme of the "capitalist society of inequality and limited opportunity."[49] While most analysts refuse to go that far, there is some merit to the argument that our economic system thrives when a segment of the population is subjected to the "bottom level of the occupational and reward hierarchy."[50] Although the system may consist of what Etienne Balibar, in her article "Class

---

[48] Clarence Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!" Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion ed. Nicolaus Mills. (1987; New York: Bantam Doubleday Dell Publishing Group, Inc., 1994) 98-99.

[49] Alexander Liazos, People First: An Introduction to Social Problems (Boston: Allyn and Bacon, 1982) 237.

[50] Immanuel Wallerstein, "The Ideological Tensions of Capitalism: Universalism Versus Racism and Sexism," Race, Nation, and Class: Ambiguous Identities, eds. Etienne Balibar and Immanuel Wallerstein. (London: Verso, 1991) 33.

Racism," calls the "institutional racialization of labor,"[51] it could be argued that racial groups were historically used as manual labor as a means to serve an economic end. As Immanuel Wallerstein, in his article entitled "The Ideological Tensions of Capitalism: Universalism versus Racism and Sexism," powerfully argues:

> They [races] are always there and always ranked hierarchically, but they are not always exactly the same. Some groups can be mobile in the ranking system; some groups can disappear or combine with others; while still others break apart and new ones are born. But there are always some who are 'niggers'. If there are no Blacks or to few to play the role, one can invent 'White Niggers'.[52]

As Wallerstein suggests, the institutional discrimination that keeps groups as part of the permanent underclass is more a function of serving the economic system, rather than the racist attitudes of society. The fact that blacks represent a disproportionate number in the underclass of manual labor is a product of historical circumstance, as Wilson previously contended.

What the preceding argument suggests then is that if 'race' were not at issue, the underlying problem of 'class' would still exist. Irving Louis Horowitz writes, in his book

---

[51] Etienne Balibar, "Class Racism," Race, Nation and Class: Ambiguous Identities, eds. Etienne Balibar and Immanuel Wallerstein. (London: Verso, 1991) 210.

[52] Wallerstein, "The Ideological Tensions of Race...," 34.

Winners and Losers: Social and Political Polarities in America, that the racial and ethnic "aspects of the problems are simply expressions of such universal class dilemmas."[53] Therefore, by only attacking hierarchical problems in the economy with 'race' as the variable in affirmative action type programs, the larger core issue of 'class' still remains.

For these reasons, our current affirmative action strategy is shortsighted; while the problem is attacked at its periphery, the roots remain. The roots, like any system that perpetuates a disparity between the haves and have-nots of society, are the access in opportunities afforded to members of different classes. This is where I believe I differ from Wilson. While he believes that legislation should be broad-based to help benefit the whole of society (certainly some programs, as he admits, would disproportionately aid the truly disadvantaged), I believe that our policies should be more precise in targeting the disparities between the haves and the have-nots. We should, in other words, combat inequality with class-based legislation. By attacking disparity at the socioeconomic level, the entire question is addressed because all members of the underclass are now given opportunity, whereas the

---

[53] Irving Louis Horowitz, Winners and Losers: Social and Political Polarities in America (Durham, NC: Duke University Press, 1984) 30.

system using 'race' only guaranteed that a segment of the underclass would be granted equality in opportunity.

Also, it must realized that the inequalities seen between race and class cannot be made up at the university level or by just hiring more people from the underclass. The chasm between the haves and have-nots of society must be addressed much earlier. How can we expect to have the underclass compete for jobs or positions in universities if they do not have the proper skills and tools to do so?

For instance, a recent affirmative action bill produced by the Texas legislature would allow the top 10% of students from any public school in Texas into the Texas-university system. While this may be a proper step in terms of a race-neutral approach, the legislation is not the solution; it is only a part of the solution. There are most likely vast inequalities between the top 10% of students in the rich (mostly white) Highland Park section of Dallas versus the top 10% of students in the poor (mostly black) area of South Oak Cliff in Dallas. The serious disparities between Highland Park and South Oak Cliff must first be addressed before any affirmative action program can be effective. Therefore, affirmative action, whether it uses the standard of race or class, can never be the answer; affirmative action can be a part of the solution, if used only as part of a larger program to attack the inequalities between the haves and the have-nots.

As before, another item to our growing list of reasons why 'race' should not be the determining variable in an affirmative action-type social policy can be added. From what we now have learned about 'class' we can argue that:

> *3) 'Race' should not be used as the key ingredient in the formulation of social policy because institutional discrimination attacks more at a person's class position, rather than his racial classification. Using 'race' is only a partial solution and does not attack the entire problem of disparity between the haves and have-nots of society.*

Alternatively, the following statement can be provided as our first step in finding a different solution than 'race' to the problem of equality in opportunity:

> *1) 'Class' should be used as the key ingredient to attack the disparities caused by institutional discrimination because it provides a solution that encompasses the entire problem of equality in opportunity between the haves and have-nots of society.*

THE CONSTITUTIONALITY OF CLASS

At this point in the paper, I think it may finally be okay to show my hand, so to speak. My insistence that inequalities in opportunity must be attacked at the socioeconomic level is generated from my belief that a way to ensure 'Equal Protection' in our laws and our policies is to follow a neutraled principle (a colorblind principle). By following a colorblind principle, we take away the right from government, and others, to make distinctions based upon the color of one's skin. One would think that a colorblind approach and 'Equal Protection' mean one in the same, but this has not been the case.

In *Plessy*, Justice John Marshall Harlan wrote his famous dissent, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[54] Harlan's words, however, seemed destined to be forgotten until the Supreme Court decided *Brown* in 1954.

Some analysts argue that the *Brown* decision "not only reversed the Court's position sixty years earlier but vindicated the judgment of Justice Harlan."[55] Yet other

---

[54] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[55] Ralph Rossum, Reverse Discrimination: The Constitutional Debate (New York: Marcel Dekker, Inc., 1980) 60.

analysts, however, argue that Harlan's colorblind approach was never adopted by the Supreme Court.[56] D'Souza draws a line between these two sets of opinions arguing that the Court "while embracing a colorblind result [in *Brown*], had rejected color blindness as a basis for constitutional reasoning."[57] D'Souza's analysis makes sense in light of the Court's constitutional record.

Whatever the case, there is not many that would disagree with the idea that at the very least our Constitution, especially with regards to its application, should aspire to follow a neutraled, colorblind principle. As Terry Eastland writes, "colorblindness lay...at the core of American ideals."[58] The distinctions made by race-conscious programs are, therefore, fundamentally opposed to Harlan's notion of a colorblind Constitution.

I do not want to make the argument, however, that racial preference programs are clearly unconstitutional. At best, I argue that race-conscious relief under the Constitution is unclear. Constitutional expert John Hart Ely, in his book *Democracy and Distrust: A Theory of Judicial Review,* agrees. He contends, "There does not exist an unambiguous American tradition on the question of whether racial majorities can

---

[56] Paul Moreno, From Direct Action to Affirmative Action (Baton Rogue, LA: Louisiana State University Press, 1997) 19.

[57] D'Souza, 192.

[58] Eastland, 22.

act to aid minorities, and one can make it seem there is only by quoting out of context."[59]

Therefore, my argument is not that racial preference is unconstitutional (although I do have grave concerns about its constitutionality). I contend, however, that there must be a better way than the current approach in which we employ; I think a colorblind approach, in which we use 'class' as the key variable, is that way.

Someone may argue, "The colorblind principle is all well and good, but the socioeconomic approach to affirmative action is no less a neutraled principle than a race-conscious relief program. While it may seem that the preceding observation is a valid prima facie statement, upon further inspection we will clearly see that the socioeconomic approach is on solid constitutional ground, and therefore congruent with constitutional ideals.

Many scholars who argue that race-based affirmative action is unconstitutional argue for class-based preferences. These scholars, however, casually forget to ask whether or not the socioeconomic approach is constitutional; they just assume it to be so. While I will argue in the end that the

---

[59] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge, MA: Harvard University Press, 1980) 62.

class-based approach is indeed constitutional, I do not think it is so cut and dry as most analysts would believe.

The key to understanding the constitutionality of the class-based approach lies within the words of *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938). In famous footnote 4, Justice Harlan Stone writes:

> There may be narrower scope for the operation and presumption of constitutionality where legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth... It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions under the Fourteenth Amendment than are most other types of legislation...Nor we need inquire whether similar considerations directed at particular religious...or national...or racial minorities...; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry.[60]

In the *Carolene Products* case, the Court upheld the Filled Milk Act of 1923, which prohibited the sale of filled

---

[60] *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938).

milk in interstate commerce. The Court ruled that economic regulation is "presumatively within the scope of the power to regulate interstate commerce and consistent with due process,"[61] if the legislation can pass a simple test of rationality. In doing so, the Court gave legislatures wide latitude to pursue economic regulation. More importantly, however, in famous footnote 4, Justice Harlan Stone indicates that the "presumption of constitutionality had a narrower application to legislation impinging"[62] on the individual freedoms found within the first ten amendments.

To begin to analyze the *Carolene Products* case, it is first important to note the distinction that Stone makes between economic rights and individual freedom. As Law Professor James W. Ely argues:

> By separating property rights from individual freedom, the *Carolene Products* analysis instituted a double standard of constitutional review under which the Supreme Court afforded a higher level of judicial protection to the preferred category of personal rights. Economic rights were implicitly assigned a secondary constitutional status... consequently, the Court gave great latitude to Congress and state legislatures to fashion economic policy.[63]

---

[61] *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938).

[62] James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights (New York: Oxford University Press, 1992) 133.

[63] James W. Ely, Jr., 133.

How does this relate to the class-based approach? This is understood in the link between class legislation and economic regulation. By definition, class legislation, according to Justice Stephen Field, is fashioned "whenever a distinction is made in the burdens a law imposes or in the benefits it confers"[64] on citizens based on *wealth.* Wealth, as property, consequently, falls under the domain of economic regulation. The *Carolene Products* footnote, seen in these terms, ushered in an era in which Congress would be free to enact such class legislation as long as it passed the simple test of rationality. In fact, James W. Ely argues, "owners in this country have never enjoyed absolute domain over their property...at no time has the Court blocked all regulatory or redistributive legislation."[65]

There have been times, however, especially in the days of laissez faire constitutionalism, when many people, including Field, argued that "class legislation, discriminating against some and favoring others, is prohibited."[66] The arguments against class legislation during Field's era, however, were understood in a different way. The objections to class legislation during laissez faire

---

[64] Paul Kens, Justice Stephen Field: Shaping Liberty From the Gold Rush to the Gilded Age (Lawrence, KS: University Press of Kansas, 1997) 267.

[65] James W. Ely, Jr., 4 - 5.

[66] Kens, 267.

constituionalism dealt primarily with the effort to protect certain classes of citizens, such as the poor, against legislation in which they might be adversely affected. Hence, there was this idea that legislation should be neutral. The *Carolene Products* footnote, however, rejected this notion. When proponents of class-based approaches use the term today, they do so in terms of acting towards the benefit of a certain class of citizens, such as the poor.

One may argue, however, "If you act in the benefit of a certain group, you would be doing so at the expense of another." This is it not necessarily the case. During the 1980s, many conservatives praised the benefits of trickle-down economics. The argument went that if the wealthy were given tax breaks, they would be more likely to invest in business. These investments would in turn benefit the rest of society by stimulating economic growth and creating more jobs for those less fortunate. The argument for a class-based approach is essentially the same; it is trickle-up economics. By helping to advance the underclass, society is served in a number ways, ranging from such things as a reduction in crime to a more educated populace.

This, I believe, is the very essence of what the Court had in mind in the *Carolene Products* case - to give more latitude to legislatures in the area of economic policy to attempt to take measures, assuming the legislation's rationality, that would help to benefit society. In this

way, the socioeconomic solution to affirmative action is a logical extension of the *Carolene Products* footnote.

We must remember that in footnote 4 of the *Carolene Products* case, however, Justice Stone suggested that "mere rationality might not always be enough."[67] The presumption of constitutionality, in other words, would be looked at with more scrutiny in legislation relating to the individual freedoms contained in the Bill of Rights. Indeed, some analysts argue that Stone's "formulation later evolved into a 'strict scrutiny' analysis for protecting fundamental rights."[68] We must be careful, therefore, to make sure that our socioeconomic approach does not fall under this level of judicial inquiry which seems to, as we remember from our historical analysis of racial preference, afflict our current race-based affirmative action strategy.

Suppose for a moment that someone came up with a strong argument that the class-approach acted towards the detriment of the wealthy. With Stone's pronouncement, we need to ask ourselves the following, "Does 'class' fall into the category

---

[67] John Hart Ely, 75.

[68] Louis Fisher, American Constitutional Law, 2nd ed. (NY: McGraw-Hill, 1995) 1005.

of a 'discrete' or 'insular' minority which deserves more scrutiny from the Court?" In terms of today's constitutional language, "Is socioeconomic status a 'suspect classification'?" The answer is quite simply, "No!"

The case in which the Court ruled that socioeconomic status does not rise to the level of a 'suspect class' is *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). The *Rodriguez* case evolved from Texas's system of financing its schools by using both state and local funds (primarily from property taxes). Rodriguez claimed that Texas's system was discriminatory towards poor families because the reliance upon property taxes favored the more wealthier school districts. Rodriguez therefore claimed that the dual system of finance was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. In words reminiscent of the *Carolene Products* footnote, Justice Lewis Powell ponders in *Rodriguez*:

> Texas virtually concedes that its historically rooted dual system of financing could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications...We must decide, first, whether system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.[69]

---

[69] *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973).

Ultimately, the Court decided in *Rodriguez* that it could not find wealth to be a suspect classification requiring strict judicial scrutiny. Therefore, the Court held that Texas's financing system, although it may be what Justice Potter Stewart called in his concurring opinion "chaotic and unjust," is constitutional.

Indeed, John Hart Ely argues that the Court has retreated from its once growing set of suspicious classifications to include only those of race and national origin.[70] About the effort to extend suspicious classification to the poor, Ely writes that "the retreat from the once glittering crusade to extend special constitutional protection to the poor has turned into a rout."[71] Therefore, even if someone were to argue that the socioeconomic approach adversely affects the wealthy in favor of the underprivileged, socioeconomic status does not rise to that of a suspect class. Consequently, the conclusion that must be drawn is that class-based affirmative action is constitutional.

Therefore, we can add another reason as to why 'class' should be used over 'race' as the determining variable in the formulation of a policy to combat the problem of equality in opportunity:

---

[70] John Hart Ely, 148.

[71] John Hart Ely, 148.

2) *'Class should be used over 'race' as the key ingredient to attack the disparities between the haves and have-nots of society because, unlike racial-preference, class-based legislation is on firm constitutional ground.*

THE ADVANTAGES OF A CLASS-BASED APPROACH

Finally, a class-based approach is free of some the political problems created by race-conscious relief programs. In other words, the socioeconomic approach is politically advantageous.

To begin to understand why the class-based approach is advantageous we must look at how the public feels about our current affirmative action strategy. A recent poll conducted by the *New York Times* reveals that only 41 percent of Americans agree to the statement, "Affirmative action programs should be continued."[72] When asked more specifically as to some of the reasons why we should pursue our current affirmative action strategy, 44 percent of Americans believe

---

[72] Sam Howe Verhovek, "In Poll, Americans Reject Means but Not Ends of Racial Diversity," New York Times (December 14, 1997): A32.

we should do so to ensure that "companies have racially diverse workforces,"[73] while only 35 percent believe that "preferences in hiring and promotion should be given to blacks to make up for past discrimination."[74]

What about the attitudes of blacks towards affirmative action? While polls consistently record that blacks are in favor of our current affirmative action policies, there is some indication that blacks, when asked about the specifics of racial-preference, are less supportive of affirmative action then one may assume. For instance, one poll asks the following:

Which of these statements comes closer to the way you feel?

(A) Diversity benefits our country economically and socially, so race and ethnicity should be a factor when deciding who is hired, promoted, or admitted to college.
(B) Hiring, promotion, and college admissions should be strictly based on merit and qualifications other than race.

To the preceding statements, blacks agree with the latter statement over the former statement at rate of 68 percent to 28 percent.[75] The results seem to indicate that blacks, while enamored with the idea of 'affirmative action', do not

---

[73] Verhovek, A32.

[74] Verhovek, A32.

[75] Edward Greenberg and Banjamin Page, The Struggle for Democracy 4th ed. (New York: Addison-Wesley Educational Publishers, Inc., 1999) 564.

support preference as it is applied today. As presently constituted, therefore, a strong majority of blacks oppose affirmative action.

These polls show that most Americans believe there is something inherently wrong with our current race-based strategy. Many analysts argue that the reason most people oppose racial-preference is because "they believe that affirmative action is fundamentally unfair and opposed to American values."[76] Indeed, a recent *New York Times/CBS News* poll indicates that 68% percent of Americans believe that we should either change or do away with our racial-preference systems.[77] We must remember that for policy to be successful in a democratic society, it must be backed with the support of the citizens within the society. The polls show that the public demands change.

Change to what? Luckily, we have an alternative - class-based affirmative action. It seems that most Americans would be open to such an approach. In fact, 56 percent of Americans agree to the following statement: "It is a good idea to select a person from a poor family over one from a middle-class or rich family if they are equally qualified."[78] Consequently, this shows that a socioeconomic approach to

---

[76] Greenberg and Page, 563.

[77] New York Times/CBS News Poll, December 1997.

[78] Verhovek, A32.

affirmative action could quickly gain the consensus and the support of the American public.

Beyond public opinion, some of the problems created by using racial-preference can be avoided with the socioeconomic approach. First, society would be free from the sociological problems of trying to fit people into nice and neat racial categories. By using class, however, "it is possible to devise a series of fairly objective and verifiable factors that measure the degree"[79] to which a person is socioeconomically disadvantaged. Therefore, unlike the unrealistic boundaries created by using 'race' as the key variable in policy formation, using 'class' gives our laws a chance to begin to reflect the social realities of our society.

Also, and perhaps most importantly, if a consensus can be built around a socioeconomic strategy, then the racial tensions caused by racial-preference can be reduced. While the class-based approach is not a cure as far as racial tensions are concerned, it does provide some relief. Anytime that it might be possible to erase race as a factor in the minds of the public, that course should be pursued vigorously.

Finally, there is the argument that class-based affirmative action would actually work to increase diversity seen the classroom. Many opponents of affirmative action

---

[79] Richard Kahlenberg, "An Affirmative Action That Works: Class, Not Race," The New Republic (April 3, 1995).

argue that our current affirmative action system creates a hierarchy of black elites who cycle through the system. "The ends of diversity are not served," however, "by people who look black and think white."[80] If college presidents are worried about diversity, then they should care about what the poor white, or those students of Slavic or Irish descent, have to offer.[81] If diversity truly is a goal (which sometimes I have my doubts), then we need the assurance that we are getting what we paid for, so to speak. Class-based affirmative action virtually guarantees that we are helping someone with a different background and viewpoint, and not someone who is there for the sole purpose to enhance the "cosmetic diversity of the freshman yearbook."[82]

For these reasons, we can add one final reason why the class-based approach may be an improvement upon our current affirmative action strategy:

> *3) 'Class' should be used over 'race' as the key ingredient in social policy to attack the disparities between the haves and the have-nots because the socioeconomic approach is a more politically advantageous method.*

---

[80] Kahlenberg.

[81] for an opposing viewpoint see Nathan Glazer, "In Defense of Preference," The New Republic (April 6, 1998) or Jeffrey Rosen, "The Day The Quotas Died," The New Republic, (April 22, 1996).

[82] Kahlenberg.

CLASS: A CONCLUSION

It is time to change our course. We should begin to look for an alternative to racial-preference. My idea is that we should follow a neutraled principle, a color-blind approach. We must attack the disparities between the haves and have-nots of society.

Any type of affirmative action, however, whether it be race- or class-based, is not enough. To close this gap, we must provide help for Wilson's 'truly disadvantaged' in all aspects of life. We must go into the neighborhoods; we must go into the elementary schools; we must do all we can to break the cycle of poverty. Therefore, affirmative action can never be the only solution; it must coupled with a larger effort to aid the 'truly disadvantaged'.

We have lost our way. In our debate over racial preference, quotas, strict scrutiny, and the such, we have forgotten about those for whom the Civil Rights movement was intended. Martin Luther King once noted that the Civil Rights movement was "something bigger than just a civil rights movement for Negroes."[83] The Civil Rights effort was, after all, based on King's dream "not of success but of

[83] Kahlenberg.

opportunity, not of happiness but the pursuit of happiness, not of entitlements based on birth or color but of rights granted on an equal basis to all citizens."[84]

Speaking about college admissions, D'Souza sums these ideas perfectly when he writes:

> It may be time for college leaders to consider basing affirmative action programs on socioeconomic disadvantage rather than ethnicity. This strategy would reach those disadvantaged blacks who desperately need the education our colleges provide, but without the deleterious effects of racial head-counting. And it would set a color-blind standard for civilized behavior, which inspired the civil rights movement in the first place.[85]

---

[84] D'Souza, 166.

[85] Dinesh D'Souza, "Sins of Admission," Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion. ed. Nicolaus Mills. (1991; New York: Bantam Doubleday Dell Publishing Group, Inc., 1994) 236.

REFERENCES

Adarand Construction, Inc. v. Pena, 515 U.S. 200 (1995).

Americans United for Affirmative Action (AUAA) internet timeline. Unpublished.

Balibar, Etienne. "Class Racism." *Race, Nation, and Class: Ambiguous Identities.* Eds. Etienne Balibar and Immanuel Wallerstein. London: Verso, 1991.

Bergmann, Barbara. *In Defense of Affirmative Action.* New York: Basic Books, 1996

Berreman Gerald. "Race, Caste, Ethnicity, and Other Invidious Distinctions in Social Stratification." *Majority and Minority.* Ed. Norman Yetman. 5th ed. 1971; Boston: Allyn and Bacon, 1991.

Burton v. Wilmington Park Authority, 365 U.S. 715 (1961).

Capaldi, Nicholas. "Affirmative Action: Con." *Affirmative Action: Social Justice or Unfair Preference?* New York: Rowan and Littlefield Publishers, Inc., 1996.

Carr, T.R., Clarke Cochran, Lawrence Mayer, and Joseph Cayer. *American Public Policy.* 6th ed. New York: Worth Publishers, 1999.

Chase, Harold and Craig Ducat. *Constitutional Interpretation.* 4th ed. St. Paul: West Publishing Company, 1998.

Chávez, Lydia. *The Color Blind: California's Battle To End Affirmative Action.* Berkley, CA: University of California Press, 1998.

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

Cushman, Robert. *Cases in Constitutional Law.* 7th ed. Englewood Cliffs, NJ: Prentice Hall, 1989.

Davis, Abraham and Barbara Graham. *The Supreme Court, Race, and Civil Rights.* Thousand Oaks, CA: SAGE Publications, 1995.

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

Dinh, Viet D. "Multiracial Affirmative Action." *Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion.* Ed. Nicolaus Mills. New York: Bantam Doubleday Dell Publishing Group, Inc., 1994.

D'Souza, Dinesh. "Sins of Admission." *Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion.* Ed. Nicolaus Mills. 1991; New York: Bantam Doubleday Dell Publishing Group, Inc., 1994.

D'Souza, Dinesh. *The End of Racism: Principles for a Multiracial Society.* New York: The Free Press, 1995.

Eastland, Terry. *Ending Affirmative Action.* New York: Basic Books, 1996.

Ely Jr., James W. *The Guardian of Every Other Right: A Constitutional History of Property Rights.* New York: Oxford University Press, 1992.

Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, MA: Harvard University Press, 1980.

Ezorsky, Gertrude. *Racism and Justice: The Case for Affirmative Action.* Ithaca, NY: Cornell University Press, 1991.

Ficus, Ronald. *The Constitutional Logic of Affirmative Action.* Durham, NC: Duke University Press, 1992.

Fisher, Louis. *American Constitutional Law.* 2nd ed. New York: McGraw-Hill, Inc., 1995.

Fulliluve v. Klutznick, 448 U.S. 448 (1980).

Gerwitz, Paul. "Affirmative Action: Don't Forget the Courts." *Wall Street Journal.* 2 August 1995.

Glazer, Nathan. "The Lying Game." *The New Republic.* 31 October 1994.

Glazer, Nathan. "In Defense of Preference." *The New Republic.* 6 April 1998.

Graglia, Lino. "Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Discrimination in Employment." *Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion.* Ed. Nicolaus Mills. 1991; New York: Bantam Doubleday Dell Publishing Group, Inc., 1994.

Gree, Colin. *Divided Society: The Ethnic Experience in America.* New York: Basic Books, 1974.

Greenberg, Edward and Benjamin Page. *The Struggle for Democracy.* 4th ed. New York: Addison-Wesley Educational Publishers, Inc., 1999.

Gregory, Jeanne. *Sex, Race, and the Law.* London: SAGE Publishers, 1987.

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

Hall, Stuart. film. *Race the Floating Signifier.*

Hird, John and Michael Reese. "Should Affirmative Action Policies Be Continued?" *Controversies in American Public Policy.* Eds. John Hird and Michael Reese. 2nd ed. New York: Worth Publishers, 1999.

Hochschild, Jennifer. "Race, Class, Power, and Equal Opportunity." *Equal Opportunity.* Ed. Norman Bowie. Boulder, CO: Westview Press, 1988.

Hopwood v. State of Texas, 5th Ct.- Case No. 94-50569 (1996).

Horowitz, Irving. *Winners and Losers: Social and Political Polarities in America.* Durham, NC: Duke University Press, 1984.

Kahlenberg, Richard. "An Affirmative Action That Works: Class, Not Race." *The New Republic.* 3 April 1995.

Kahlenberg, Richard. *The Remedy.* New York: Basic Books, 1996.

Kens, Paul. *Justice Stephen Field: Shaping Liberty From the Gold Rush to the Gilded Age.* Lawrence, KS: University Press of Kansas, 1997.

Knepper, Paul. "Historical Origins of the Prohibition of Multiracial Legal Identity in the States and the Nation." *The Social Construction of Race and Ethnicity in the United States.* Eds. Prince Brown Jr. and Joan Ferrante. New York: Addison-Wesley Educational Publishers, Inc., 1998.

Lane, Charles and Jeffrey Rosen. "Neo-Nazis!" *The New Republic.* 31 October 1994.

Lerner, Barbara. "Employment Discrimination: Adverse Impact, Validity, and Equality." *The Supreme Court Law Review: The Law School of the University of Chicago - 1979.* Eds. Gerhard Casper and Phillip Kurland. Chicago: The University of Chicago Press, 1980.

Liazos, Alexander. *People First: An Introduction to Social Problems.* Boston: Allyn and Bacon, 1982.

Lieberson, Stanley. "A New Ethnic Group in the United States." *Majority and Minority.* Ed. Norman Yetman. 5th ed. 1984; Boston: Allyn and Bacon, 1991.

Liss, Susan and William Taylor. "Affirmative Action in the 1990s: Staying the Course." *Taking Sides: Clashing Views on Controversial Legal Issues.* Ed. Ethan Katsh. 7th ed. Guliford, CT: Dushkin Publishing Group, 1997.

McWhirter, Darien. *The End of Affirmative Action: Where Do We Go From Here?* New York: Carol Publishing Group, 1996.

Moreno, Paul. *From Direct Action to Affirmative Action.* Baton Rogue, LA: Louisiana State University Press, 1997.

Murray, Charles. "Affirmative Racism." *Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion.* Ed. Nicolaus Mills. 1984; New York: Bantam Doubleday Dell Publishing Group, Inc., 1994.

Nagel, Joane. "The Political Construction of Ethnicity." *Majority and Minority.* Ed. Norman Yetman. 5th ed. 1986; Boston: Allyn and Bacon, 1991.

New York Times/CBS News Poll. December 1997.

Nisbett, Richard. "Blue Genes." *The New Republic.* 31 October 1994.

Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

Pearson, Hugh. "Race Mutters." *The New Republic.* 31 October 1994.

Player, Mack. *Federal Law of Employment Discrimination.* St. Paul: West Publishing Co., 1992.

Plessy v. Ferguson, 163 U.S. 537 (1896).

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

Reynolds, William Bradford. "Affirmative Action and Its Negative Repercussions." *Taking Sides: Clashing Views on Controversial Legal Issues.* Ed. Ethan Katsh. 7th ed. Guliford, CT: Dushkin Publishing Group, Inc., 1997.

Rosen, Jeffrey. "The Day The Quotas Died." *The New Republic.* 22 April 1996.

Rossum, Ralph. *Reverse Discrimination: The Constitutional Debate.* New York: Marcel Dekker, Inc., 1980.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

Sedmak, Nancy and Chrissie Vidas. *Primer on Equal Employment Opportunity.* 6th ed. Washington D.C.: The Bureau of National Affairs, Inc., 1994.

Skrentny, John David. *The Ironies of Affirmative Action: Politics, Culture, and Justice in America.* Chicago: University of Chicago Press, 1996.

Spencer, Herbert. "Social Statics." *Great Political Thinkers: Plato to the Present.* Eds. William Ebenstein and Alan O. Ebenstein. 5th ed. 1851; San Antonio, TX: Harcourt Brace College Publishers, 1991.

Strauss, David. "Affirmative Action and the Public Interest." *The Supreme Court Law Review: The Law School of the University of Chicago - 1995.* Chicago: The University of Chicago Press, 1996.

The World Almanac Book of Facts - 1997. NJ: K-III Reference Corporation, 1998.

Thomas, Clarence. "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!" *Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion.* Ed. Nicolaus Mills. 1987; New York: Bantam Doubleday Dell Publishing Group, Inc., 1994.

Tomasson, Richard. "Affirmative Action: An Idea Whose Time Has Passed (And Perhaps Never Was)." *Affirmative Action: The Pros and Cons of Policy and Practice.* Ed. Rita Simon. Washington, D.C.: American University Press, 1996.

Traub, James. "Testing Texas." *The New Republic.* 6 April 1998.

Uehara-Carter Mitzi. "On Being Blackanese." *The Social Construction of Race and Ethnicity in the United States.* Eds. Prince Brown Jr. and Joan Ferrante. New York: Addison-Wesley Publishers, Inc., 1998.

U.S. v. Carolene Products Co., 304 U.S. 144 (1938).

42 U.S.C. Section 2000e [Section 703].

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

Verhovek, Sam Howe. "In Poll, Americans Reject Means but Not Ends of Racial Diversity." *The New York Times.* 14 December 1997.

Wallerstein, Immanuel. "The Construction of Peoplehood: Racism, Nationalism, and Ethnicity." *Race, Nation, and Class: Ambiguous Identities.* Eds. Etienne Balibar and Immanuel Wallerstein. London: Verso, 1991.

Wallerstein, Immanuel. "The Ideological Tensions of Capitalism: Universalism versus Racism and Sexism." *Race, Nation, and Class: Ambiguous Identities.* Eds. Etienne Balibar and Immanuel Wallerstein. London: Verso, 1991.

Washington v. Davis, 426 U.S. 229 (1976).

Wards Packing Co. v. Antonio, 490 U.S. 642 (1989).

Wilson, William Julius. "The Declining Significance of Race." *Majority and Minority.* Ed. Norman Yetman. 5th ed. 1978; Boston: Allyn and Bacon, 1991.

Wilson, William Julius. "Race-Neutral Programs and the Democratic Coalition," *Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion.* Ed. Nicolaus Mills. 1990; New York: Bantam Doubleday Dell Publishing Group, Inc., 1994.

Yetman, Norman. *Majority and Minority.* 5th ed. Boston: Allyn and Bacon, 1991.

VITA

Ben Arnold was born in Texarkana, Texas, on September 16, 1974, the son of Jim and Barbara Arnold. After completing his work at Arlington High School, Arlington, Texas, in 1993, he entered Texas Lutheran College in Seguin, Texas. After much wine, women, and song, he received the degree of Bachelor of Arts from Texas Lutheran University in May, 1997. In August, 1997, he entered the Graduate School of Southwest Texas State University, San Marcos, Texas. While attending Southwest Texas State University, he served as an instructor's assistant, and later as a graduate teaching assistant.

Permanent address: 1713 W. Second
Arlington, TX 76013

This thesis was typed by Ben Arnold and his kitty, Ally.