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Affirmative Action

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Draft: February 5, 1995 (rev'd)
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Affirmative Action[1]

I. The Need

A. Political

There is no generally understood core set of civil rights policies identified with New Democrats. The corollary is that Clinton's civil rights "definition" is hazy. The political challenge is to provide the intellectual content, and then a message and communication strategy to match.

Civil rights liberals, including most Blacks, *assume* Bill Clinton is "sympathetic" to the traditional aspirations, but have nagging anxiety about whether this sympathy equates to reliable support for efforts to reverse the Reagan Era retrenchments, or even reliable support for current legal doctrines and public policies, such as business set-asides. Civil rights conservatives assume Clinton is generally liberal in his racial sentiments, and then divide into two camps: the cynics expect pandering to the Democratic base in as disguised a way as possible, but conservatives looking for a reason to support the President *hope* they will see significant cracks in the orthodoxy.

In truth, many civil rights liberals may also hope for a crack in the orthodoxy -- at least in the *expression* of the orthodoxy -- because they fear that the old approaches and the old language have stalled our progress and produced a crisis in persuasion.

Finally, there is a strong measure of weariness among civil rights liberals. After a difficult decade of wedge politics, and after the frightening deployment of Federal resources on the opposite side of the barricades in several key litigation and policy battles, there is a deep hunger for a politics of healing, grounded in moral vision rather than electoral calculus. Beneath that hunger is an even deeper need among civil rights liberals and among minorities -- a need to know "Is the cause *safe*? Are *we* safe?"

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[1] *Notes:*

This essay is written with reference to issues of race-based affirmative action, with specific concern for the political issues related to the African American community.

This essay does not represent Clinton Administration policy, nor the policy of any office, agency or official.

B. Substantive

The Administration faces several policy issues that we should address within a thoughtful (conceptual *and* political) framework, rather than piecemeal. The broad categories of immediate importance include:

- The permissible reach of judicial remedies in school and employment cases, especially when *de jure* discrimination and disparate treatment have ended, and the remedy seeks to address lingering effects embedded in a web of economic and social joint causation.
- The reach of voluntary affirmative action in employment and higher education, when such measures benefit individuals who are not themselves identified victims of specified acts of discrimination.
- The use of set-asides to enhance business opportunities.
- The upcoming California ballot initiative which, in the view of civil rights traditionalists, uses "color blindness" and anti-discrimination rhetoric to eviscerate affirmative measures by the State.

II. Basic Policy Framework

A. Moral Costs

Preferences have a moral cost, and therefore (i) must be justified and (ii) must be narrowly tailored, in means and duration, to fit that justification.

1. There is an important *ethical* distinction between preferences adopted as a remedy for past discrimination or exclusion, and those adopted to further other important ends such as diversity. The former purposes, being remedial in nature, generally carry more weight. They have, however, a factual predicate of wrongdoing and specific injury which makes them more difficult to use as justification for a racial preference.

2. There is an important *doctrinal* distinction between preferences adopted by a court for adjudicated remedial purposes, and those adopted voluntarily by governments or private persons.

   - Voluntary government actions deserve special scrutiny because, as the product of a political process, there is the familiar risk of majority tyranny. The *Croson* requirement of legislative findings is a valuable safeguard, provided it is not interpreted to require findings comparable in detail and specificity to what would be required in court to prove intentional discrimination against a specified individual. It is, in essence, a requirement of *deliberation* which forces a political legislature to think and weigh carefully. This is a valuable check on state power, though not an absolute one.

- Voluntary government actions also deserve scrutiny because as wrong as it is when we injure one another, it is even worse when we are injured by our government. We therefore have a heightened collective duty to prevent abuses at the hand of government.

- Voluntary private actions deserve scrutiny (but not generally as much as governmental action) because of the risk that even well-intentioned private action will do unnecessary and unwarranted injury to the interests of non-beneficiaries. Private action may not fairly balance the ethical costs and benefits.

B. Defining Affirmative Action and Preferences

1. Varied Tools.

Affirmative action is a family of tools -- a range of measures which in practice stretches from low-intensity outreach, all the way to court-ordered goals and timetables and, in very rare cases, quotas.

- Quotas are and should be rarely employed, and never outside the court-approved remedial context. *Voluntary quotas, public or private, should be prohibited.*

- Set-asides are a form of affirmative action. If they establish a rigid numerical test, they are quotas.

2. Merit.

Affirmative action, when used properly, is consistent with merit. There are very rare instances when, in a court-ordered remedy, some aspects of merit have to take a back seat to righting a wrong. But these instances are and must be rare.

- When people design their affirmative action, they should make every effort to define a preference narrowly as a criterion for pulling someone into a pool for further consideration or, when the ultimate hiring or other decision is made, as a tie-breaking factor among comparably qualified individuals.

- "Comparably qualified" means just that. Qualifications that are sham devices to exclude mean nothing. Qualifications that are not reasonably related to the work or other tasks involved mean nothing. And when the "merits" are vague, the selection process highly subjective, and the history suggests exclusion, then it is especially important to be inclusive in defining what "qualified" actually means.

- Merit is important; indeed, it is an American value. It is one of the principles that distinguish us from other societies and cultures, now and historically, where life, liberty and happiness were contingent on heredity, caste and privilege.

- But we should also recognize that in many areas of our social and economic life, we look for "qualified" people or firms, and then use something other than merit to make the ultimate decision. We often make final decisions among the qualified randomly, or based on convenience, familiarity, or instinct. This is natural and fine, assuming the selection isn't tainted with prejudice. But we shouldn't confuse these nonformal ways of selecting among comparably qualified individuals with rigorous systems of pure merit. They are not. And modifying such "fuzzy" systems to include narrowly tailored affirmative action is just not as ethically objectionable as interfering with selection mechanisms truly based on merit.

C. Narrowly Tailoring Preferences: Preferences Have Costs

Because preferences are not costless in ethical or moral terms, any preference or affirmative action measure should be tailored to minimize the injury (actual or perceived) to the interests of non-beneficiaries. We must be especially concerned with legally cognizable interests, but not with those interests alone. And we must be especially concerned with non-beneficiaries who have not in any way benefited personally from patterns of exclusion.

1. "Tailoring" means:

   - Clarify what the objective is. That is, state the intended result in terms of removing any vestiges of exclusion or securing the benefits of inclusion. This means being clear about what the evidence is that leads us to believe there is a problem in the first place -- typically a gross imbalance, viewed in the totality of the circumstances.[2]

   - Understand the interests at stake, on all sides.

   - Try to state what constitutes acceptable progress and success. When will the preference have served its purpose and no longer be needed?

   - Consider the range of measures in increasing order of intrusiveness. One way of listing these is:

     (i) review selection criteria to eliminate those not justified under true principles of merit;
     (ii) broad outreach and recruiting;

[2] This tracks a formulation developed by the Department of Education, during the Clinton Administration, to test the legality of minority scholarship programs.

(iii) targeted, group-specific outreach and recruiting;
(iv) pulling qualified minorities into the pool of "finalists";
(v) soft goals or targets;
(vi) quotas.

- *Select the least intrusive measure that holds reasonable promise of effectiveness.*

2. This emphasis on *least intrusive methods* is fundamental, but potentially controversial in two respects. It is fundamental because it acknowledges that there is an ethical cost to racial preferences, and that we must judge in a given instance whether that cost justifies the progress that will result. By tailoring preferences to the least intrusive method, we minimize the ethical cost, and hopefully the divisiveness and social costs as well. Effectiveness is, of course, not an absolute. There is no running away from the balancing implied by this formulation. But facing that difficulty within a framework that attempts to respect the needs and aspirations of all concerned, is the best way out of the mess we are in.

   This approach is potentially controversial because, first, it makes clear to conservatives that there will be circumstances -- and not rare ones -- when tailored race-conscious measures are desirable. But, second, the approach makes clear to liberals that they do not have a monopoly on virtue: that public policies and private practices must reflect ethical sensitivity both to the intended beneficiaries of preferences and to the unintended consequences for others.

III. Communications Framework: Curative and Remedial v. Aspirational and Empowering

A. An Edge for Pointed Clarity

To communicate the contrasts between our approach and those of the divisive Right and Old Left, we must sharp draw lines:

- Discrimination still exists. Agencies must clearly communicate research and enforcement data demonstrating that old-fashioned discrimination is alive and too well. Evidence produced by "testers" -- matched pairs of minority and majority job applicants, for example -- is especially compelling.

- Some voluntary and remedial measures are too extreme. We should point to examples that are unnecessarily intrusive, burdensome or injurious. And we should describe better alternatives

- Some specific measures that have been sharply criticized were, in fact, fully justified by the particular circumstances. Administration officials should explain a few of these pointedly, defending the appropriate use of tough medicine.

B. Curative and Remedial v. Aspirational and Empowering

As much as anything else, civic discourse on civil rights needs a language of healing rather than division. Beyond the more narrowly justifiable matters of blame-based cure and remedy, we pursue affirmative action and diversity to *empower* the individual beneficiaries and because we have *aspirations* as a nation to build strength through inclusiveness. These are alternatives to the language of blame, guilt and reparations.

There is more to affirmative action than providing a remedy to a proven incident of discrimination involving a victim and a perpetrator -- the *remedial* context. There is also the more general problem of addressing the lingering social and economic effects of past wrongs. These are manifest as contributing factors to the disadvantage suffered by many individually, and disproportionately by African Americans in the aggregate. This is the *curative* context.

But these are not enough. Both remedy and cure are terms that invoke the moral categories of victims and perpetrators, of innocence and fault. They invoke the analytical framework of cause and effect, of damages and reparations. As such, the terms are not politically effective when too many in the public simply do not believe in the predicate of wrongdoing, or feel that the preference benefits individuals whose own link to the wrongdoing is too remote to justify the preference. *Indeed, the terms are inherently divisive*, precisely because they invoke the language of blame. This does not mean that this framework is invalid or that we should scrap it. But we have to recognize the limits to its usefulness.

An alternative framework stresses the affirmative value of inclusiveness. First, inclusion is a means of empowering individuals to realize their full potential and thus contribute to the well-being of their families and communities. Second, inclusiveness benefits America as a whole, because our lives are richer as a result of social diversity, and because our communities and our economy are stronger when all of us are full participants -- carrying both a full load of responsibilities, and a full complement of opportunities. These are unifying themes of *empowerment and aspiration.*

C. Reacting v. Leading

From a political standpoint, there is an enormous difference between providing necessary reactions to the legislative or litigation developments thrust upon us, versus *leading* in a way that:

- *sets* the agenda for public discourse, rather than conveying the misimpression that New Democrats are politically timid about engaging in a debate on the issues;

- proclaims commitment and purpose by using *edges*, in a non-combative way, to make fundamental purposes clear -- identifying some measures we are *for*, and some we are *against*;

- in content, communicates to civil rights traditionalists that New Democrats have not abandoned the Democratic commitment to continuing racial progress -- meaning *both* racial harmony *and* steady, tangible progress in eliminating discrimination and its lingering consequences;

- communicates to civil rights conservatives and revisionists that New Democrats are prepared to abandon, and even criticize, private and governmental techniques that are too divisive and intrusive for the results they produce; and

- strategically mixes *narrowcasting* to key constituencies and voter blocs, with *broadcasting* to the Nation as a whole. Reliance exclusively on narrowcasting sends a message that the commitment is a politically contingent one, rather than the product of a deeply rooted value.

D. Litigation v. Policy

Perhaps because civil rights discussions are heavily populated with lawyers, they quickly become debates over recent and pending litigation. We debate policy choices within the framework of contested legal doctrines, and even mistakenly believe that most key policy decisions are about what to write in briefs and how to amend a civil rights or set-aside statute. This legalistic conception is a dangerously limited one.

Purging the lingering effects of past racial wrongs must go beyond rights-based litigation and legislation to address directly the impediments to opportunity. For example, quality K-12 schools, combatting teen pregnancy, and the community security agenda must be seen by civil rights traditionalists as absolutely critical measures for saving the next generation. (To this list one might add voter registration and participation.) The Administration can make that link, and a populist and forceful demand that we make progress on that *social policy* agenda will translate for many as a demand for *racial progress*. Which it is.

Even within the narrower range of conventional civil rights measures, it is a mistake limit policy debate to the questions presented in litigation. Research is a good example. Government and foundation funding cutbacks, together with the growing "political correctness" of conservative retreat on civil rights matters, jeopardize our intellectual capital. There is too little understanding of effective techniques of outreach, recruitment, affirmative action, conflict management, persuasion and so forth. There is too little basic data about the extent and consequences of continuing discrimination in employment, housing, credit, delivery of public services, etc. (The FY 1996 Budget includes several proposed investments to help rebuild our capacity, including resources for the Civil Rights Division to use "testers" for research and enforcement purposes, and added funding for the EEOC and the Civil Rights Commission.)

E. Policy v. Pulpit

The legalistic perspective misses the point in a more fundamental way, because its focus is on *public policy* rather than *civic virtues* and the *private practices* those virtues engender. It is a cliche to note the President's role as First Preacher and Chief Teacher. That role is often trivialized as First Lobbyist, and it can be dangerously inflated to that of Tiresome Moralist. In between, however, is an honorable role that calls us to our better selves, and recalls the Nation to its deeper meaning. The closing message of the State of the Union was quite explicitly in this vein. The question is how to sustain it in general, and how to apply it specifically in the civil rights arena.

We make the civil rights agenda the domain of political tacticians, career litigators and governance mechanics. But that is the wrong field of battle. Almost without exception, when Bill Clinton has spoken from his soul on civil rights matters he has communicated all the qualities and themes needed to lift the national discourse from the trench warfare over legal doctrine to the vastly more important plane of civic virtues.

It is also clear that communication on this higher plane can and should include a strong personal element, with Bill Clinton speaking about his own experiences and those of his family. His credibility as a leader, and his commitment to racial progress, are most firmly reinforced when he speaks with conviction about how *he* has witnessed the rewards of inclusiveness, and how *he* has come to know the scarring consequences of exclusion.

F. Some Action Items

Translating the points above into concrete action items is difficult. Here are some possibilities:

- Work with California Democrats to formulate a Clinton-backed alternative ballot proposition for California, and organize voters around it.

- Plan three high-profile Presidential speeches over the next 9 months explicitly on the civil rights agenda, delivered on the plain of values, virtues and aspirations. On selected policy speeches in education, employment, the Middle Class Bill of Rights, etc., occasionally add an explicit linkage to the civil rights "opportunity agenda."

- Have certain cabinet officers reinforce the Presidential message above with parallel speeches of their own. Have a media strategy of background interviews with thoughtful essayists and opinion-makers.

- Identify two or three programs or practices -- Federal or State -- that overstep the bounds. For example, a minority set-aside that is too rigid or not narrowly drawn.

- Identify a civil rights agency to strengthen with a high-visibility initiative. For example: new resources at EEOC to eliminate the backlog, or new resources at the Civil Rights Commission to rebuild a respectable research capability.

- Develop an initiative with a coalition of religious leaders, including broadcasters.

IV. Conclusion

From the perspective of civil rights liberals, the Reagan-Bush years were a period of unnerving and even frightening behavior by the White House, the Department of Justice, and the Congress. At times hostile, at times begrudgingly benign, the political branches have reminded anxious minorities that politics is a game designed for the majority. Compounding the anxiety, the Judiciary has similarly moved rightward, in accord with the Framers' design. The lesson is that even those doctrinal gains rooted in Constitutional interpretation are evidently contingent on politics as well, albeit with a lag.

The divisive quality of racial politics was largely quiescent on the national political stage after George Wallace's 1968 bid and until the activist revisionism of Meese and Reynolds ushered in what civil rights liberals understood to be an era of peril. They now ask whether that era is over, and what will come next.

DRAFT

THE WHITE HOUSE

WASHINGTON

AFFIRMATIVE ACTION MEETINGS AND CALL STRATEGY

I. MEETINGS

White House	WHO	PURPOSE	DATE
POTUS	Members of Congress	To consolidate support of our strategy and to ensure that any independent initiatives planned are consistent with our message.	Week of March 6th (Breakfast)
POTUS	Leading Opinion Makers/Think Tank Types	To give the President an opportunity to: (1) test his assumptions about affirmative action, and (2) to create a universe of spokespersons externally to support his strategy.	Week of March 13th (Dinner)
VPOTUS	Business Leaders Visible on Affirmative Action	To help position affirmative action issues as an economic mainstream issue, rather than in terms of the historical debate on race and quotas.	Week of March 13th (Lunch)
George S. and Senior Staff	Civil Rights Leadership Coalition	To keep the administration engaged with the historical coalition that has worked on civil rights legislation under Bush and Reagan and through the 1990's.	Week of March 6th
George S. and Senior Staff	Women's Leadership Organizations	To shift the debate away from race and get input from women, who are receiving clear benefits.	Week of March 6th
George S. and Senior Staff	Minority Business Leaders	Set-asides will emerge as the key issue of affirmative action. We need to develop alternative strategies to continue to foster economic inclusion and access.	Week of March 13th

Carrie
- AH
- Thanky

George S. and Senior Staff	Media	These are friendly reporters who want to be supportive on these issues; early cultivation can help us position our strategy.	Week of March 13th

II. CONFERENCE CALLS

The following categories of stakeholders should be cultivated through a conference call strategy with George Stephanopoulos and other senior staff in the next two weeks:

- Historical Political and Social Leadership
- Additional 'Think Tank Types' (We will not be able to accommodate everyone at the dinner.)
- Famous Americans

I will follow up with a detailed schedule of dates, times and participants next week. Attached is the proposed list of invitees by category for each of these meetings and calls.

THE WHITE HOUSE

WASHINGTON

AFFIRMATIVE ACTION MEETINGS AND CALL SHEET

CIVIL RIGHTS ADVOCATES
Pat Wright, Disability Rights Education Defense Fund
Antonia Hernadez, MALDEF
Art Crapp, People for the American Way
Hugh Price, National Urban League
Elaine Jones, NAACP Legal Defense Fund
Mary Frances Berry, U.S. Civil Rights Commission
Myrlie Evers, NAACP
Joe Lowery, Southern Christian Leadership Conference
Coretta King, MLK Center for Non-Violence
Marsha Greenberger, National Women's Law Center
Judy Lichtman,Women's, Legal Defense Fund
Ralph Neas, Leadership Conference on Civil Rights
Barbara Arnwine, CEO, Lawyer's Committee on Civil Rights
Dorothy Height, National Council of Negro Women
Raul Izaguirre, National Council of La Raza
Jesse Jackson, Rainbow Coalition
David Saperstein, Union of Hebrew Congregations
Wade Henderson, NAACP Washington Office
Laura Murphy Lee, Director ACLU
Karen Narasaki, Asian Pacific American legal Consortium
Judy Conover, Executive Director, League of Women Voters
Anne Bryant, Executive Director, AAUW
Audrey Haynes, Executive Director, Buisiness and Professional Women
John Sturdivant, AFGE
Al Shanker, AFT
Gloria Jackson, CLUW
Doug Fraser, UAW
Steve Yokich, UAW
Nancy Kreiter, Women Employed (Chicago)
Lane Kirkland, AFL-CIO
Tom Donahue, AFL-CIO
Barbara Jordan, University of Texas at Austin
Antonia Hernandez, President & General Counsel Mexican American Legal Defense & Education Fund
Juan A. Figueroa, Persident & General Counsel Puerto Rican Legal Defense & Education Fund

CONGRESSIONAL LEADERS
(Lorraine Miller)

— Civil Rts — Hist

— Still dream / lots more for

are

guidance

— Explain why AA is ok —

Not quotas,

Orig Oc

"Creates an environment in which

merit can prevail"

Supreme Court statement

NO affirm action

— Civil Rts laws cover

everything but passed

because [illegible] were

more discriminated agn

— Can't use

problem of recent

" [illegible]

Not what we are about

Pulpit

Crystal

Support of [illegible]

CORPORATE LEADERS
Hugh McColl, CEO,Nations Bank
Richard Rosenburg, CEO, Bank of America
~~Robert Allen~~, CEO, AT&T
Robert Holland Jr. CEO, Ben & Jerry's
Warren Shaw, CEO, Chancellor Capitol Management
Craig Wetherup, CEO, Pepsi Bottling Co.
Vernon Jordan, Akin & Gump
Earl Graves, CEO, Earl Graves Enterprises
Hugh Robinson, Southland Corp, Dallas
Liz Claiborne, CEO, Liz Claiborne Clothing
Ed Artzt, CEO, Proctor & Gamble
William Smithburg, CEO, Quaker Oats Company
Paul Allaire, CEO, Xerox Corporation
Reginald K. Brack, CEO, Time Warner
Justin Dart,
Ellen Gordon, Tootsie Roll Industries
Toni Fay, Time Warner
Manny Jackson
Howard Gittis, Vice Chair & Chief Administrative Officer REVLON

DEMOCRATIC LEADERSHIP COUNCIL

FAMOUS AMERICANS
Bill Cosby, Actor
Barbara Striesand, Actress, Political Activist
Steven Spielberg, Director
Denzel Washington, Actor
Sidney Poitier, Actor
Harry Belafonte, Actor/Singer
John Denver, Actor/Singer
Robert Redford, Actor
Paul Newman, Actor
Joan Woodward, Actress
Oprah Winfrey, Talk show host
Whoopie Goldberg, Actress
Connie Chung, News Anchor
James Earl Jones, Actor
Lou Gossett, Jr., Actor
Edward J Olmos, Hispanic Actor
Alvin Poussaint

FORMER GOVERNMENT CIVIL RIGHTS TYPES
Elliot Richardson, Former Nixon Cabinet Secretary
Bob Mathias, Former Republican Senator from Maryland
Birch Bayh, Former Democratic Senator from Indiana
Arthur Fletcher, Former Chair of Civil Rights Commission
Arthur Flemings, Former Secretary of HEW, Citizens Commission on Civil Rights.
Bob Brown, Minority Business Advisor to Nixon
Timothy Jenkins, National Black Republican Council
Jim Joseph, Council on Foundations, Wash, D.C.
George Schultz, Former Cabinet Secretary
Ray Marshall, Former Labor Secretary under Carter
Shirley Hufstedler, Former Secretary of Education under Carter
Carl McCall, New York State Treasurer
Clifford Alexander, EEOC - Former Chair

HISTORICAL POLITICAL AND SOCIAL LEADERS
Andrew Brimmer, Brimmer & Associates
Bill Coleman, Former Secretary of Transportation (Reagan)
Leon Higgenbotham, Retired Federal Judge
Shirley Hufftedler, Los Angeles firm with Christopher
Roger Wilkins, Historian, George Mason University
Mary Frances Berry, U.S. Civil Rights Commission
Father Theodore Hesberg, Former President, Notre Dame
Julius Chambers, Chancellor, North Carolina Central
Marian Wright Edelman, Children's Defense Fund
Taylor Branch, Author
John Hope Franklin, Author
Clifford Alexander, Former Secretary of the Army, Carter
Peter Yarrow
Arnie Aronson
David Saperstein
Hyman Bookbinder
Rev. Leon Sullivan, Founder of OIC
Dra. Antonia Pantoja, Founder of ASPIRA

MEDIA
Ellen Goodman, Syndicated Columnist, Boston Globe
Dewayne Wickman, Syndicated Columnist USA Today
Clarence Page, Chicago Sun Times
Bob Herbert, NY Times
Bill Moyers, Syndicated Columnist
Mary McGory, Syndicated Columnist
Lynn Povitch, Working Woman Magazine
Carl Rowan, Syndicated Columnist
Bill Rasberry, Syndicated Columnist
Simeon Booker, Jet Magazine
Barbara Reynolds, Syndicated Columnist, USA Today
Gwen Ifill, NBC
Juan Williams, The Washington Post
Julian Bond, PBS
Juan Gonzalez, Columnist, NY Daily News

MINORITY BUSINESS LEADERS
Bob Johnson, BET
Clarence Avant, Motown
Percy Sutton
Maynard Jackson
Andy Young
Parrin Mitchel
George Pla, CEO, Cordoba Corporation
Maria Elena Torano, CEO, META
Raydean Acevedo, President, RMCI
Teresa McBride, President, McBride & Associates
Linda Alvarado, CEO, Alvarado Constructions
Ed Romero, CEO, Advanced Sciences, Inc.
Harriet Michele, CEO, National Association Minority Suppliers, Inc.
Ernie Green, Lehman Brothers
Emma Chappell, CEO, United Bank
Ragan Henry, US Radio
James Wade, Wade Broadcasting
J. Bruce Llewellyn, Coco-Cola Phila. Franchise

THINK TANK TYPES
Eddie Williams, Joint Center for Political and Economic Studies
Robert Greenstein, CEO Center for Budget and Policy Priorities
Isabelle Sawhill, Urban Institute
Peggy McIntosh, Wellesley College Center for Research on Women
Charles Ogletree, Jr. Professor, Harvard Law School
Willaim Julius Wilson, Professor of Social Policy, University of Chicago
Angela Blackwell, Vice-President, Rockefeller Foundation
Franklyn Williams, Ford Foundation
Cornell West, Harvard University
Chang Lin Tien, U.C. Berkeley Chancellor
Eamon Kelly, President of Tulane University
Joe Scott, Professor, University of Washington
Darlene Hines, John Hannah, Professors, Michigan University
Joan Scott, Institute for Advanced Studies, Princeton University
RoseBeth, M. Kantor, Harvard Business School
Joyce Lander, Howard University
Chuck Lawrence, Georgetown Law
Henry Louis Gates, Chair, Afro-American Studies - Harvard
Ricardo Fernandez, President, Lehman College

EARL F. HILLIARD
7TH DISTRICT, ALABAMA
COMMITTEE ON AGRICULTURE
SUBCOMMITTEE ON LIVESTOCK, DAIRY AND POULTRY
SUBCOMMITTEE ON ENVIRONMENT, CREDIT, AND RURAL DEVELOPMENT
COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON MINORITY ENTERPRISE, FINANCE AND URBAN DEVELOPMENT
SUBCOMMITTEE ON RURAL ENTERPRISES, EXPORTS, AND THE ENVIRONMENT

R's cc

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March 9, 1995

MAR 10

Ms. Alexis Herman
Assistant To The President
And Director of Public Liaison
THE WHITE HOUSE
1600 Pennsylvania Avenue, N.W.
Second Floor, West Wing
Washington, D.C. 20500

Dear Ms. Herman:

Re: Submission of Materials on Affirmative Action

Per our conversation on Wednesday, March 8, 1995, please find enclosed materials on **Affirmative Action,** which should be of good use to you. Should you have questions, feel free to telephone me directly at: (202) 225-5125.

Thanks again for your good efforts.

Sincerely,

Earl F. Hilliard

Earl F. Hilliard
Member of Congress

EFH/vw

Enclosures (2)
Affirmative Action Reports
(Compiled by CRS for Congress)

95-223 A

CRS Report for Congress

Affirmative Action Revisited: Legal Overview and Prospectus

Charles V. Dale
Legislative Attorney
American Law Division

Kevin B. Greely
Legislative Attorney
American Law Division

January 30, 1995

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AFFIRMATIVE ACTION REVISITED: LEGAL OVERVIEW AND PROSPECTUS

SUMMARY

The U.S. Supreme Court has accepted for review during its 1994-95 Term a series of cases that could refine, and possibly alter, the future course of federal civil rights enforcement in the school desegregation, federal contracting and employment, and voting rights contexts. Directly implicated by each of these decisions is the scope of governmental power--in the courts, the Congress, and the executive branch--to employ racial preferences or other "affirmative action" remedies to compensate discrimination victims and to more fully integrate racial and ethnic minorities into the social and economic mainstream.

Adarand Constructors v. Pena asks the Court to review a federal highway funding program that awards incentive payments to prime contractors who subcontract with "disadvantaged" small businesses owned by minorities and women. The Court will also review recent judicial orders in lengthy litigation to desegregate the Kansas City, Mo. public schools. *Missouri v. Jenkins* concerns the proper scope and duration of federal judicial supervision of local school desegregation efforts and, in particular, may clarify for litigants and lower federal courts the end point of federal oversight when local districts have met their affirmative obligation to desegregate and achieved "unitary" status. The constitutional implications of race-conscious governmental action will also dominate review of pending congressional redistricting cases from Louisiana and Georgia in light of the Court's 1993 ruling in *Shaw v. Reno*. Other cases that may soon percolate up for High Court review involve a race-conscious policy for admission of minority law students to the University of Texas, a redux of the highly publicized *Bakke* controversy of nearly two decades ago; the legality of race as a factor in a school board decision to dismiss a white public school teacher; and an October 1994 decision by the Fourth Circuit invalidating a race-based scholarship program administered by the University of Maryland for the exclusive benefit of black students.

The cases docketed for review this term may occasion reexamination by a newly reconstituted Court of various legal issues which were either unresolved by these earlier precedents or which were decided by narrow Court majorities possibly no longer prevailing after recent changes in judicial personnel. Principal among these unsettled issues are the standards to govern judicial review of Congressionally enacted "minority set-asides" under the Constitution and the scope and duration of federal authority to enforce race conscious remedies for discrimination in the employment and education. This report explores the doctrinal development of federal affirmative action law from the perspective of cases currently pending before the High Court.

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AFFIRMATIVE ACTION REVISITED: LEGAL OVERVIEW AND PROSPECTUS

INTRODUCTION

The U.S. Supreme Court has accepted for review during its 1994-95 Term a series of cases that could refine, and possibly alter, the future course of federal civil rights enforcement in the school desegregation, federal contracting and employment, and voting rights contexts. Directly implicated by each of these decisions is the scope of governmental power--in the courts, the Congress, and the executive branch--to employ racial preferences or other "affirmative action" remedies to compensate discrimination victims and to more fully integrate racial and ethnic minorities into the social and economic mainstream.

Adarand Constructors v. Pena[1] asks the Court to review a federal highway funding program that awards incentive payments to prime contractors who subcontract with "disadvantaged" small businesses owned by minorities and women. The Court will also review recent judicial orders in lengthy litigation to desegregate the Kansas City Mo. public schools. *Missouri v. Jenkins*[2] concerns the proper scope and duration of federal judicial supervision of local school desegregation efforts and, in particular, may clarify for litigants and lower federal courts the end point of federal oversight when local districts have met their affirmative obligation to desegregate and achieved "unitary" status. The constitutional implications of race-conscious governmental action will also dominate review of pending congressional redistricting cases from Louisiana[3] and Georgia[4] in light of the Court's 1993 ruling in *Shaw v. Reno*.[5] Other cases that may soon percolate up for High Court review involve a race-conscious policy for admission of minority law students to the University of Texas, a redux of the highly publicized *Bakke* controversy of nearly two decades ago;[6] the legality of race as a factor in a school board decision to dismiss a white public

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[1] 16 F.3d 1537, *cert. gr.* No. 93-1841, 63 U.S.L.W. 3213 (S.Ct. 10-4-94).

[2] 11 F.3d 755 and 13 F.3d 1170, *cert. gr.* No. 93-1823, 63 U.S.L.W. 3211 (S.Ct. 10-4-94).

[3] *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D.La. 1993), *cert. gr. sub. nom.* Louisiana v. Hayes, No. 94-558, 63 U.S.L.W. 3454 (S.Ct. 12-13-94).

[4] *Johnson v. Miller*, 1994 U.S. Dist. LEXIS 13043 (S.D.Ga. 1994), *cert. gr. sub. nom. Miller v. Johnson*, No. 94-631 (Jan. 6, 1995).

[5] 113 S.Ct. 2816 (1993).

[6] *Hopwood v. Texas*, 1994 U.S. Dist. LEXIS 11870 (W.D.Tex. 8-19-94).

school teacher;[7] and an October 1994 decision by the Fourth Circuit invalidating a race-based scholarship program administered by the University of Maryland for the exclusive benefit of black students.[8]

Affirmative action developed as a basic tenet of federal constitutional law during the 1960's as first, the Warren, and then Burger Courts grappled with the intractable problem of racial segregation in the nation's public schools. Judicial rulings from this period recognized an "affirmative duty," cast upon local school boards by the Equal Protection Clause, to desegregate formerly "dual school" systems and to eliminate "root and branch" the last "vestiges" of state-enforced segregation.[9] These holdings ushered in a two decade era of "massive" desegregation--first in the South, and later the urban North--marked by federal desegregation orders frequently requiring drastic reconfiguration of school attendance patterns along racial lines and extensive student transportation schemes. As in the Kansas City case, school districts across the nation still operating under these decrees have increasingly sought to be declared in compliance with constitutional requirements in order to gain release from federal intervention.

Since that earlier era, Congress and the Executive Branch have crafted a wide range of federal laws and regulations authorizing, either directly or by judicial or administrative interpretation, "race-conscious" strategies to promote minority opportunity in jobs, housing, education, voting rights, and governmental contracting. The historical model for federal laws and regulations establishing minority participation "goals" may be found in Executive Orders which since the early 1960's have imposed affirmative minority hiring and employment requirements on federally financed construction projects and in connection with other large federal contracts. Presently, Executive Order 11246 as administered by the Office of Federal Contract Compliance Programs (OFCCP) requires that all employers with federal contracts in excess of $50,000.00 must file written affirmative action plans with the government. These are to include minority and female hiring goals and timetables to which the contractor must commit its "good faith" efforts. Similar affirmative action measures to redress the exclusion of minorities from federal government employment were enacted as part of the Equal Employment Opportunity Act Amendment of 1972 and the 1978 Civil Service Reform Act.

Affirmative action for minority entrepreneurs soon became a focus of efforts by the Small Business Administration (SBA) and other federal agencies to assist "socially and economically disadvantaged" small businesses under a variety of federal programs. Increasingly, an "affirmative action" model, in the form of

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[7] *United States v. Board of Education of the Township of Piscataway*, 832 F. Supp. 836 (D.N.J. 1993).

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

[9] *See e.g. Green v. County Board*, 391 U.S. 430 (1968); *Swann v. Board of Education*, 402 U.S. 1 (1971); *Keyes v. Denver School District*, 413 U.S. 189 (1973).

participation "goals" or "set-asides" for members of racial or ethnic minorities, and businesses owned or controlled by these or other "disadvantaged" persons, found legislative expression in a broad range of federal programs, from education, defense, and transportation funding to space technology.

The famous *Bakke* decision in 1978 launched the contemporary constitutional debate over state-sponsored affirmative action.[10] One five-Justice majority there invalidated a rigid state medical school admissions quota for minorities as a remedy for "societal discrimination" where the institution itself was not shown to have discriminated in the past. But another five Justices would have found that institutional interests in student diversity and academic freedom nonetheless warranted nonexclusive consideration of race in educational admissions. The *Bakke* rationale was carried forward in *Wygant v. Jackson Board of Education*, where a divided Court ruled unconstitutional the provision of a collective bargaining agreement that protected minority public school teachers from layoff at the expense of more senior white faculty members. While holding the specific layoff preference for minority teachers unconstitutional, seven *Wygant* Justices seemed to agree in principle that a governmental employer is not prohibited by the Equal Protection Clause from all race-conscious affirmative action to remedy its own past discrimination. Another series of decisions approved of congressionally mandated racial preferences to allocate the benefits of contracts on federally sponsored public works projects,[11] and in the design of certain broadcast licensing schemes,[12] while condemning similar actions taken by local governmental entities to promote public contracting opportunities for MBEs.[13] However, in each of these cases, the Justices failed to achieve a consensus on most issues, with bare majorities, pluralities, or--as in *Bakke*--a single Justice, determining the "law" of the case.

By the mid-1980's, the Supreme Court had approved the temporary remedial use of race- or gender-conscious selection criteria by private employers under Title VII of the 1964 Civil Rights Act.[14] These measures were deemed a proper remedy for "manifest racial imbalance" in "traditionally segregated" job categories, if voluntarily adopted by the employer,[15] or for entrenched patterns of "egregious and longstanding" discrimination by the employer, if imposed by judicial decree.[16] In either circumstance, however, the Court required that

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

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

12 *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, *reh'g denied*, 497 U.S. 1050 (1990).

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

14 42 U.S.C. §§ 2000e *et seq.*

15 *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

16 *Local 28 Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986).

affirmative action "goals" or "quotas" be sufficiently flexible, of temporary duration, and so hedged with safeguards as to prevent "reverse discrimination" against white male employees. Similarly, the Justices approved of affirmative action by public employers to increase promotional opportunities for women and minorities, either as a voluntary measure or pursuant to Title VII court decree.[17]

The cases docketed for review this term may occasion reexamination by a newly reconstituted Court of various legal issues which were either unresolved by these earlier precedents or which were decided by narrow Court majorities possibly no longer prevailing after recent changes in judicial personnel. Principal among these unsettled issues are the standards to govern judicial review of Congressionally enacted "minority set-asides" under the Constitution and the scope and duration of federal authority to enforce race conscious remedies for discrimination in the employment and education. This report explores the doctrinal development of federal affirmative action law from the perspective of cases currently pending before the High Court.

DISADVANTAGED BUSINESS AND MINORITY PREFERENCE IN FEDERAL PROCUREMENT LAW

The central issue presented for the High Court's consideration in the *Adarand* appeal concerns the appropriate standard of constitutional review for racial classifications enacted by the Congress to accomplish a remedial or other "benign" legislative purpose. Currently, dual lines of precedent recognize a basic distinction in judicial treatment of race-conscious affirmative action mandated by Congress and similar remedies implemented by the states or localities. A tradition of deference for Congress' role as "co-equal" enforcer of constitutional equal protection has twice led the Court to affirm racial preferences in federal legislation to promote minority group participation in federal procurement and broadcast licensing proceedings. By contrast, the Court has insisted on "strict" review of state or local affirmative action measures. Accordingly, state agencies or units of local government have been held to a constitutional standard calling for "trial-like" rigor in regard to evidentiary findings of past discrimination and remedial precision to a degree that has not infrequently led to judicial invalidation of these efforts. As a preface, however, this section briefly reviews federal statutory laws regarding federal contracts and minority goals or disadvantaged business set-asides.

The Small Business Act, as amended, provides a statutory prototype for a host of federal programs to promote opportunity for minorities as contractors or subcontractors on federally funded projects. First, the "Minority Small Business and Capital Ownership Development" or § 8(a) program authorizes the Small Business Administration (SBA) to enter into all kinds of construction, supply, and service contracts with other federal departments and agencies. The

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[17] *United States v. Paradise*, 480 U.S. 149 (1987); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

SBA acts as a prime contractor and then "subcontracts" the performance of these contracts to small business concerns owned and controlled by "socially and economically disadvantaged" individuals, Indian Tribes or Hawaiian Native Organizations.[18] To establish § 8(a) eligibility requires a demonstration by minority entrepreneurs of "socially disadvantaged" status or that they "have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities."[19] However, certain racial and ethnic groups, including Blacks, Hispanics, Native Americans, and Asian Pacific Americans as defined by the law, and implementing SBA regulations, are "presumed," absent contrary evidence, to be socially disadvantaged.[20] Any individual not a member of one of these groups must "establish his/her individual social disadvantage on the basis of clear and convincing evidence" in order to qualify for § 8(a) certification. In either circumstance, the § 8(a) applicant must, in addition, show that "economic disadvantage" has diminished its capital and credit opportunities, thereby limiting its ability to compete with other firms in the open market.[21]

Similarly, the "Minority Small Business Subcontracting Program" authorized by § 8(d) of the Small Business Act incorporates the same definition for purposes of that and other federal procurement programs requiring SBA determination of disadvantaged status.[22] Prime contractors on major federal contracts are obliged by § 8(d) to maximize minority participation and to negotiate a "subcontracting plan" with the procuring agency which includes "percentage goals" for utilization of small socially and economically disadvantaged firms. To implement this policy, a clause required for inclusion in each such prime contract states that "[t]he contractors shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, *and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to § 8(a). . .*" Accordingly, SBA has discretion in designating a firm or individual as socially and economically disadvantaged for

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18 15 U.S.C. § 637(a).

19 15 U.S.C. § 637(a)(5).

20 13 CFR § 124.105(b).

21 The statute, 15 U.S.C. § 637(a)(6)(A), defines economic disadvantage in terms of:

> socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market.

22 15 U.S.C. § 637(d). *See also* 13 CFR § 124.106.

purposes of both the § 8(a) and § 8(d) programs in conformity with specified criteria.[23]

These obligations, first codified in 1978 as an amendment to the SBA, were augmented a decade later by the Business Opportunity Development Reform Act of 1988.[24] Congress there directed the President to set annual, government-wide procurement goals of at least 20% for small businesses and 5% for disadvantaged businesses, as defined by the SBA. Simultaneously, federal agencies were required to continue to adopt their own goals, compatible with the government-wide goals, in an effort to create "maximum practicable opportunity" for small disadvantaged businesses to sell their goods and services to the government. The goals may be waived where not practicable due to unavailability of DBEs in the relevant area and other factors.[25] While the statutory definition of DBE includes a racial component, in terms of presumptive eligibility, it is not restricted to racial minorities but also includes persons subjected to "ethnic prejudice or cultural bias."[26] It also excludes businesses owned or controlled by persons who, regardless of race, are "not truly socially and/or economically disadvantaged."[27]

In addition, Congress has frequently adopted "set-asides" or other forms of statutory preference for the "socially and economically disadvantaged," minority groups, and women as part of specific grant or contract authorization programs. Thus, minority business set-asides or preferences have been included in major authorization or appropriation measures for agriculture,[28] communications, defense,[29] education,[30] public works,[31] transportation,[32] foreign

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23 15 U.S.C. § 637(d) (emphasis added). Criteria set forth in the regulations permit an adminstrative determination of socially disadvantaged status to be predicated on "clear and convincing evidence" that an applicant has "personally suffered" disadvantage of a "chronic and substantial" nature as the result of any of a variety of causes, including "long term residence in an environment isolated from the mainstream of American society," with a negative impact "on his or her entry into the business world."13 C.F.R. § 124.105(c).

24 P.L. 100-656, § 502, 102 Stat. 3887, codified at 15 U.S.C. § 644(g)(1).

25 *See e.g.* 49 C.F.R. §§ 23.64(e), 23.65 (setting forth waiver criteria for the Department of Transportation).

26 15 U.S.C. § 637(a)(5).

27 *See* 49 C.F.R. Pt. 23, Subpt. D, App. C.

28 7 U.S.C. § 2279 (outreach and assistance for socially disadvantaged farmers and ranchers).

29 10 U.S.C. § 2323 establishes a goal of awarding five percent of the total value of Department of Defense (DOD) procurement contracts to minority firms, historically black colleges and universities, and other minority institutions through fiscal year 2000.

30 10 U.S.C. § 1069f (25% allotment for institutional aid to minority and historically black colleges and universities); 20 U.S.C. § 1070a-41 ("priority" funding for model programs serving minority and economically disadvantaged students); 20 U.S.C. § 1112d ("special consideration" for

relations,[33] energy and water development,[34] banking,[35] scientific

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teacher training program given to minority and historically black colleges and universities); 20 U.S.C. § 5889(c)(50% of subgrant funds for local reform and professional development to be awarded institutions with disproportionate percentage of disadvantaged students); 20 U.S.C § 6031(c)(5)(initiatives and programs to increase participation of "historically underutilized" minority researchers and institutions); 42 U.S.C. § 293d (priority funding to institutions that increase enrollment of disadvantaged students in health professions programs by 20% over three years and benefits to be "equitably allocated among various racial and ethnic populations"); P.L. 103-322, 108 Stat. 1796, § 31001 (10% of amount for contracts and subcontracts for crime education and substance abuse programs to be expended on small businesses controlled by socially and economically disadvantaged individuals and minority educational institutions.

[31] The Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. §§ 6701 *et seq.*, was amended the following year by the Public Works Employment Act of 1977, P.L. 95-28, 91 Stat. 116, to add a requirement that applicants for public works grants assure that ten percent of the grant would be expended for "minority business enterprises." This requirement was upheld by the U.S. Supreme Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

[32] Section 105(f) of the Surface Transportation Act of 1982, P.L. 97-424, 96 Stat. 2097 (1983) as reauthorized and extended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, P.L. 100-17, 101 Stat. 132 (1987) provided for a ten percent set-aside for work to be performed by minority small businesses under that Act. The Intermodel Surface Transportation Efficiency Act, P.L. 102-240, 105 Stat. 1914, § 1003 (b) continues the minority business set-aside for transportation funding through fiscal year 1997. 49 U.S.C. §47107 requires federally aided airport operators to insure "to the maximum extent practicable" that at least 10% of contracts for consumer services to the public be placed with disadvantaged businesses.

[33] Section 402(d) of the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, P.L. 99-399, 103 Stat 853, required that ten percent of the total value of contracts for embassy construction and maintenance over a five year period be awarded to minority construction firms in the U.S. A similar ten percent set-aside from development assistance funds and funds for African famine relief was included in § 579 of P.L. 101-167, 103 Stat. 1195, making fiscal 1990 foreign operations appropriations. Under the federal Anti-Aparteid Act, heads of federal departments and agencies are "to the maximum extent practicable" to procure goods and services in South Africa from minority-owned businesses. 22 U.S.C. § 5031. P.L. 103-306, 108 Stat 1608, § 555 allocates not less than 10% of certain foreign operations appropriations funds for activities by socially and economically disadvantaged individuals, and black and minority educational institutions.

[34] 42 U.S.C. § 13556 (10% of funding on contracts and subcontracts under the Energy Policy Act to to be awarded disadvantaged business enterprises and minority educational institutions); 42 U.S.C. § 7141 (Department of Energy management, technical assistance, and loan program for minority business enterprises; Section 303 of the fiscal 1990 Energy and Water Development Appropriations Act made by P.L. 101-101, 103 Stat. 641 required "to the fullest extent possible" that at least ten percent of the funds for the Superconducting Super Collider be made available to small disadvantaged businesses and minority educational institutions.

[35] 12 U.S.C. § 1441 (r)-(w) provides for various incentives, including "preference points" on proposals and minority capital assistance programs, to preserve and expand bank ownership by minorities and women; authorizes establishment of Resolution Trust Corporation (RTC) guidelines to achieve parity in distribution of RTC contracts, and "reasonable goals" for subcontracting, to minority and women-owned businesses and firms; and provides a "[f]irst priority for disposition of assets" of a failed depository institution in a minority neighborhood to other minority-owned individuals, firms, or financial institutions. 12 U.S.C. § 1823 (f)(12) authorizes Federal Deposit Insurance Corporation approval of minority bank acquisition by minority holding company without regard to asset size. *See also* 31 U.S.C. § 3718 (10% of contracts for collection

research,[36] and space exploration.[37] Other federal laws, mainly education, appear to target federal efforts or financial largess to enhance minority participation in program benefits but without directly mandating minority preferences or set-asides.[38] While not exhaustive, these programs are indicative of the range and varied nature of minority group preferences embedded in current federal statutory law.

Supreme Court Precedents on Minority Preference and Set-Aside Laws

A triad of Supreme Court rulings currently defines the constitutional parameters of legislative power--federal, state, or local--to adopt minority participation goals or set-asides with respect to governmental contracts or in the expenditure of public funds. Of particular importance to the *Aderand* appeal may be the current Court's views respecting the reach of constitutional standards promulgated by the 1989 ruling in *City of Richmond v. J.A. Croson, Co.*.[39] Although the *Croson* holding pertained to local governmental action, and the lead opinion by Justice O'Connor specifically distinguished the powers of Congress, intervening changes in Court composition could reopen that issue for further inquiry in *Aderand*.

The Supreme Court in *Croson* struck down as an equal protection violation a municipal ordinance which reserved 30% of city-financed construction

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services to be awarded to socially and economically disadvantaged law firms).

36 42 U.S.C. § 1862d (12% of National Science Foundation grants for research facilities modernization must be set-aside for historically black and minority colleges and universities); P.L. 101-549, Title X, 104 Stat. 2708 (10% of total federal funding for clear air research allotted to disadvantaged business enterprises).

37 The NASA Administrator is required by 42 U.S.C. § 2473b to annually establish a goal of at least eight percent of the total value of prime and subcontracts awarded in support of authorized programs to be made to small disadvantages businesses and minority educational institutions.

38 *See, e.g.*, 10 U.S.C. §2191 (Secretary of Defense shall take "all appropriate actions" to encourage minority applications for graduate fellowships in science and mathematics); 20 U.S.C. §§ 1134 *et seq.* (Grants to Institutions and Consortia to Encourage Women and Minority Participation in Graduate Education); 20 U.S.C. § 1135c-2 (Minority Science and Engineering Improvement Programs); 20 U.S.C. § 1431(a)(7)(Grants to minority higher educational institutions for training special education personnel); 20 U.S.C. §§ 2986(c), 2987(b)(2), 2988(b)(2)(F), 2989(b)(5) ("Special consideration" to be given demonstration projects and programs in math and science serving minorities and other "historically underrepresented and underserved populations"); 20 U.S.C. § 3156a (Selection procedures for National Geography Studies Centers to "take into account" needs of minorities and other historically underrepresented groups); 20 U.S.C. § 5004 (Services of American Competitiveness funds recipients shall be made available to minorities and other underrepresented and underserved groups);and 42 U.S.C. § 1862c(d)(4)(National Science Foundation planning guidelines to consider unique research facilities needs of minority institutions).

39 488 U.S. 469 (1989).

contracts for minority owned businesses. Typical of its earlier skirmishes over affirmative action, only an imperfect judicial consensus was reached on controlling principles. However, for the first time, a six-member majority led by Justice O'Connor agreed that the Constitution requires all governmental classifications by race, whether invidiously discriminatory or motivated by a "benign" remedial purpose, be subjected to "strict judicial scrutiny." Measured against this standard, the Richmond set-aside program was flawed both by absence from the legislative record of "specific" and "identified" instances of past discrimination in city contracting and because of the plan's "gross overinclusiveness." That is, it applied not only to blacks but to various other groups, Indians, Eskimos, and Aleuts, for example, as to whom "there is *absolutely no evidence* of past discrimination." Thus, Justice O'Connor could find no "compelling" governmental objective for the plan other than "outright racial balancing."

Strict judicial review, in the O'Connor view, meant that to pass constitutional muster any race conscious decisionmaking by state or local government must have adequate remedial justification, in terms of a demonstrable record of "specific" and "identified" past discrimination by the governmental body or those with whom it does business. In addition, the remedial measure had to be "narrowly tailored," limited in scope and duration, and subject to "waiver" in situations where "the particular MBE seeking a racial preference has [not] suffered from the effects of past discrimination by the city or prime contractors."[40] For the majority, racial preferences were a remedy of last resort, reserved for "extreme case[s]" of "systematic" discrimination or deliberate "patterns" of racial exclusion, after all "race neutral devices" are exhausted.

The record of past discrimination in *Croson* consisted mainly of statistical disparities in contract awards and minority trade membership based on general population figures, "conclusionary" statements by the plan's proponents, and "nationwide" factfinding by Congress relative to discrimination in the construction industry. Such "generalized" evidence of "societal discrimination," by Justice O'Connor's reckoning, was not sufficiently "specific" because it failed to reveal either the number of "qualified" MBE's in the relevant market or the "percentage of total city construction dollars" going to them.

Croson plainly suggested, however, that Congress has far more authority than the states and localities to enact MBE set-asides and other race-conscious remedies pursuant to its enforcement power under §5 of the Fourteenth Amendment as interpreted by the ruling a decade earlier in *Fullilove v. Klutznick*.[41] That authority, as recast by Justice O'Connor from the Court's

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40 488 F.2d at 508.

41 448 U.S. 448 (1980).

earlier §5 jurisprudence,[42] includes the quite expansive "power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." It was this principle coupled with Congress' spending power that formed the basis of the *Fullilove* decision to uphold the 1977 Public Works Employment Act, including a provision requiring that at least 10% of any grant thereunder be set aside for MBE's.[43] Although the 6-3 ruling in *Fullilove* yielded no majority opinion, it affirmed broad congressional power to find facts and employ race conscious remedies for past discrimination on a nationwide basis.

Chief Justice Burger in the main *Fullilove* opinion wrote that Congress need not "act in a wholly 'color-blind' fashion" when seeking to avoid discriminatory use of federal funds, and while racial classifications required close examination, Congress was entitled to "appropriate deference" as a "co-equal branch" with the courts in enforcing equal protection guarantees. The Chief Justice also found that the commerce clause and §5 of the Fourteenth Amendment supplied the Congress with coextensive power to reach the practices of both private contractors on federally funded projects and state and local governments, respectively.[44] By exercise of these powers, the Chief Justice said, "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct."[45]

Although *Fullilove* indicates that congressional race-conscious remedial action must be supported by adequate findings of discrimination, in contrast to *Croson*'s mandate upon the states and localities, this requirement appears to be minimal. First, Congress was not required to make findings of discrimination in any formal sense resembling those of a court or administrative agency. In reviewing the sufficiency of congressional factfinding, the Court looked beyond the legislative history of the set-aside provision to more than a decade of legislative hearings and reports, as well as submissions to Congress by the U.S.

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42 See *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)("Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.").

43 42 U.S.C. §6705(f)(2)(the included minorities were "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts").

44 Of Congress' "unique remedial powers" under § 5, the Burger opinion states:

> Here we deal. . .not with the limited remedial powers of a federal court, for example, but with broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.

448 U.S. at 483 (plurality opinion).

45 *Id.*, at 483-484.

Civil Rights Commissions and other outside agencies, pertaining to minority exclusion from public contracts on a nationwide basis.[46] Second, *Fullilove* rejected the requirement explicit in *Croson* of "specific" or "identified" findings that seem to limit remedial action to discrimination traceable to particular sources. Rather, the Chief Justice relied upon findings of effects from societal discrimination, including conclusions based solely on statistics that disproportionately few MBEs had obtained contracts before the set-aside. Nor did the Court demand that Congress act only to remedy federal government discrimination in disbursement of contract funds or, possibly as in *Croson*, only to remedy discrimination that is found to violate a federal statute or the Constitution.

In his *Fullilove* concurrence, Justice Powell relied on the legislative history noted above to find that "Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors."[47] He also found that the means chosen by Congress, particularly in light of the flexible waiver provisions, were "reasonably necessary" to address the problem identified. Justice Powell then presaged *Croson* by suggesting that other governmental entities might have to make a greater showing than Congress before undertaking race-conscious measures. "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body."

Metro Broadcasting Inc. built on *Fullilove* by effectively extending an intermediate standard of equal protection review to congressionally mandated affirmative action for racial minorities. The Court there held 5 to 4 that Congress may impose benign race-conscious measures that are substantially related to achieving important governmental objectives, even where there is no congressional purpose to compensate victims of past governmental or societal discrimination. Justice Brennan wrote for the majority that this deferential review standard derives from "Congress' institutional competence as the national legislature," and from its power under the Commerce and Spending Clauses, not simply from its remedial powers under §5 of the Fourteenth Amendment.

At issue in *Metro Broadcasting Inc.* were two Federal Communications Commission minority preference policies regarding broadcast licensing that had been adopted--and ratified by Congress--primarily to promote programming diversity rather than as a remedy for past discrimination. Justice Brennan noted, first, that broadcast diversity is an important governmental objective. The FCC's conclusion that there is a nexus between minority ownership and broadcast diversity was also supported, he found, by congressional findings and

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46 The legislative basis of the congressional factfinding behind the 10% set-aside in *Fullilove* is exhaustively surveyed in the Chief Justice's opinion in that case, 448 U.S. at 456-467, the separate concurrence of Justice Powell, *Id.*, at 505-506, and in Justice Marshall's *Croson* dissent.

47 *Id.*, at 503.

empirical evidence, and could be fairly inferred without racial or ethnic stereotyping.[48] Finally, Justice Brennan observed that the preferences had been adopted only after other race-neutral measures failed to enhance broadcast diversity, and did not unduly burden nonminorities. Although the specific details of the FCC minority preference programs were set by the agency, and not by Congress itself, the Court held that "when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are 'bound to approach our task with appropriate deference to the Congress.'"[49]

Generally speaking, therefore, the *Croson* decision mandated "strict judicial scrutiny" of state and local affirmative action programs, and implied the necessity for trial-like findings of "specific" and "deliberate" past discrimination affecting local contracting activities to support race-conscious relief. *Fullilove* and *Metro Broadcasting Inc.*, on the other hand, appear to permit Congress broader latitude to act on the basis of historical and nationwide data concerning past minority exclusion or other important governmental purposes. Similarly, *Croson* indicates that numerical affirmative action remedies are not an expedient for the elimination of "racial imbalance" or minority workforce underrepresentation, as revealed by general population or labor force statistics. The program must instead be "fine-tuned" as a response to disparities caused by discrimination between the level of minority participation in the affected activity as compared to the availability of "qualified" minorities in the area labor force. Congress, by contrast, would not seem inhibited by these same limitations under *Fullilove*.

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48 The Court looked beyond the immediate legislative history of the appropriation riders in question to various congressional documents dating back to 1969 for findings on which it could rely. 497 U.S. at 573-577. It also pointed to several bills that had apparently failed of enactment because of insufficient evidence to support the program diversity rationale. But several other instances of explicit congressional recognition of a nexus between minority ownership and viewpoint diversity were ultimately persuasive. *Id.* at 578-79. The Court noted, for example, Senator Ernest Holling's statement that a June, 1988 report by the Congressional Research Service "clearly demonstrates that minority ownership of broadcast stations does increase the diversity of viewpoints presented over the airwaves." (citing 134 Cong. Rec. 18982 (1988).

49 *Id.* at 563. In dissent, Justice O'Connor, joined by the Chief Justice and Justices Scalia and Kennedy, protested the majority's "repudiation" of *Croson*'s "affirmation that the Constitution's equal protection guarantees extend equally to all citizens." She argued that *Fullilove* was concerned with "Congress' power under §5 of the Fourteenth Amendment to remedy past discrimination in the states--a power not invoked here." Justice Kennedy, joined by Justice Scalia, regretted that "after a century. . .we interpret the Constitution to do no more than move us from 'separate but equal' to 'unequal but benign.'"

The *Adarand* Decision and Its Legal Implications

In *Adarand*, the Supreme Court will review an affirmative action program implemented by the Federal Highway Lands Program, a component of the Federal Highway Administration within DOT, under § 502 of the Small Business Act. As discussed earlier, that law establishes a government-wide goal of at least five percent participation by "socially and economically disadvantaged individuals" (DBEs) in all federal procurements as measured by the total value of all prime contract and subcontract awards. The overall annual goal for the government is set by the President with individual goals determined jointly by the head of each federal agency and the Office of Federal Procurement Policy so as to provide the "maximum practicable opportunity" for DBEs "to participate in the performance of contracts let by such agency."[60] Pursuant to § 502 the DOT in *Adarand* had developed a "race-conscious subcontracting compensation clause (SCC)" program. The SCC did not allocate or set-aside a specific percentage of subcontract awards for DBEs or require a commitment on the part of prime contractors to subcontract with minority firms. Rather, "incentive payments" varying from 1.5% to 2% of the contract amount were paid to prime contractors whose subcontracts with one or more qualified DBEs exceeded 10% of total contract value.

The SCC program was challenged by *Adarand*, a white-owned construction firm whose low bid on a subcontract for highway guard rails was rejected in favor of a higher bidding DBE. A federal district court rejected arguments that particularized findings of past discrimination and strict judicial scrutiny under *Croson* were required or that the program was fatally over- or under-inclusive. The existence of a waiver mechanism, an annual DBE certification process, and procedures for qualifying nonminority firms not presumptively included as disadvantaged assured a "narrowly tailored" program.

The Tenth Circuit appeals court affirmed. Like the trial court, the appellate tribunal opted for a "lenient standard resembling intermediate scrutiny" rather than the "strict" judicial review standard of *Croson* as appropriate for congressionally mandated affirmative action and held that *Fullilove* was controlling. The fact that the SCC program was "fashioned and specified by an agency and not by Congress" did not alter its view since the "benign race-conscious program" was consonant with the congressional directive of § 502. Specifically, it was Congress and not the agency that had mandated annual goals to assure "maximum practicable opportunity" for DBE participation in the procurement process and had established a rebuttable presumption that businesses owned by certain racial minorities are "socially and economically disadvantaged." Accordingly, no particularized findings of past discrimination were required to support the SCC program under *Fullilove*.

In addition, the appeals court found the program "narrowly tailored" to Congress' remedial purpose. First, since the "qualifying criteria. . .[are] not limited to members of racial minorities" and "minority businesses that do not

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60 15 U.S.C. § 644(g).

satisfy the economic criteria cannot qualify for DBE status," the program effectively avoided the dual constitutional vices of under- or over-inclusiveness.[51] Second, the program's 10% threshold was "an optional goal, not a set-aside" since it was "entirely at the discretion of the prime contractor" whether to accept or forego the monetary DBE subcontracting incentives.[52] Finally, in the court's view, the program was consistent with *Fullilove* as "'appropriately limited in. . .duration' because federal procurement and construction contracting practices are subject to regular 'reassessment and reevaluation by Congress.'"[53]

Adarand poses for the Court's reexamination a host of legal issues derived from, but only partially explored, in the *Fullilove/Croson/Metro Broadcasting* trilogy of decisions. The constitutional path charted by judicial determination of the *Adarand* appeal could dramatically influence affirmative action law and, perhaps more fundamentally, the role of Congress as civil rights enforcer. Inevitably, the Court may first be invited to revisit the basic dichotomy between congressional and state and local power to enact race-conscious remedies for "societal discrimination" seemingly etched into law by its earlier decisions. Significantly, the petitioners in *Adarand* argue that no such distinction was ever intended by a majority of Justices in the earlier decisions. Therefore, they contend that the same burden with respect to governmental fact-finding and remedial precision imposed by *Croson* upon the states and localities should likewise apply to federally mandated affirmative action efforts.[54] The Justice Department's brief, however, responds that under *Fullilove* and *Metro Broadcasting* "intermediate rather than strict scrutiny applies" to the DOT program and that "the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than the states and municipalities."[55]

If the Court directly confronts this issue, and resolves it in favor of the *Adarand* petitioners, the decision could have broad repercussions for federal affirmative action programs which confer preferences on minority or socially and economically disadvantaged businesses and institutions. In the post-*Croson* era, constitutional lawsuits have challenged the operation of race-conscious preferences, set-aside programs, or other "sheltered market" arrangements designed to increase minority participation in public contracting activities by state and local governments. While the lower courts remain divided, several challenges have succeeded and the state or local program has been found infirm

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51 *Id.* at 1547.

52 *Id.* at 1542 n. 9.

53 *Id.* at 1547 (quoting *Fullilove*, 448 U.S. at 489 (Opinion of Burger, C.J.)).

54 *Petition for writ of certiorari*, No. 93-1841, pp. 7 *et seq.* (filed 5-17-94).

55 *Brief for the Respondents in Opposition*, on petition for writ of certiorari No. 93-1841 (filed 8-4-94) (quoting *Milwaukee County Paver's Ass'n v. Fiedler*, 922 F.2d 419, 423-24 (7th Cir.), cert. denied, 500 U.S. 954 (1991).

under *Croson*. Almost universally cited by these courts has been reliance by the governmental unit on gross and nonspecific demographic statistics to prove past discrimination against minority entrepreneurs in the relevant labor market.[56] Other major faults have been failure to "narrowly tailor" the remedy, whether a minority participation goal or other form of racial preference, to any disparities revealed by statistics and anecdotal proof of discrimination;[57] the failure to properly limit the program in scope and duration;[58] or neglecting first to consider race-neutral alternatives, such as bonding and credit assistance programs, to ameliorate minority underutilization.[59]

Of course, other aspects of the DOT program may provide the High Court with alternative grounds for decision. Oral arguments in the case on January 17, 1994, for example, indicated that there may be procedural defects in the case that could preclude a broad ruling on the constitutional merits. Because the petitioner failed to challenge the bidding process administratively before filing suit, and did not demonstrate in the courts below whether the minority subcontractor in the case had been included in the "disadvantaged business" category because of race or for nonracial reasons, the Solicitor General argued that Adarand Constructors may lack legal standing to sue. Reportedly,

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56 *See e.g. O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420 (D.C.Cir. 1992) (D.C. set-aside of 35% of construction contracts for local MBEs disapproved because many nondiscriminatory reasons could explain disparity between percentages of MBEs participating in public construction contracts and overall percentages of MBEs); *Arrow Office Supply Co v. City of Detroit*, 826 F. Supp. 1072 (E.D. Mich. 1993)(neither "statistical" study comparing estimates of minority contractors with blacks in population, nor testimony revealing difficulties most MBEs face "as a result of their size" rather than "direct intentional invidious discrimination" would justify the city's sheltered market program); *Concrete General v. Washington Suburban Sanitary Commission*, 779 F. Supp. 370 (D. Md. 1991)(MBE participation goal of 25% improper because it focused on general population figures and substantially exceeded the percentage of available qualified MBEs). *Cf. Concrete Works of Colorado, Inc. v. City and County of Denver*, 1994 U.S. App. LEXIS 26848 (10th Cir. 1994)(disparity index based on "absolute" number of MBEs in the local market without regard to their size may overstate their underutilization as city contractors).

57 *E.g. Main Line Paving Co. v. Board of Education*, 725 F. Supp. 1349 (E.D. Pa. 1989)(evidentiary basis for the program was too general, since it related to race-neutral practices, and the remedy overbroad in that it did not provide for an individualized determination that those benefitting from the plan were victims of past discrimination). *But see also Associated General Contractors of California v. Coalition*, 950 F.2d 1401, 1416-18 (9th Cir. 1991)(use of a bid preference rather than a quota, the definition of beneficiaries on the basis of experience of prior bid discrimination, the ability of nonminority contractors to participate via joint venture option, and the limited geographical scope of the preference assured that the program was narrowly tailored).

58 *E.g. Associated General Contractors v. New Haven*, 791 F. Supp. 941, 948 (D. Conn. 1992)(failure to document discrimination against any "disadvantaged" business other than disadvantage based on race made program overinclusive and thus not appropriately tailored to its asserted remedial purpose).

59 *See e.g. Main Line Paving Co., supra* n. 51; *Contractors Association v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993)(city's use of such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts distinguished the program from that in *Croson*).

questioning by several Justices seemed to support the theory that the since the white contractor challenges the presumptive equation of race with economic disadvantage, it should be required to show that the presumption worked to its detriment and that no valid nonracial basis existed for the disadvantaged status of the minority subcontractor in the case.[60] A ruling by the Court that petitioner lacked standing would almost inevitably defer to another day any constitutional consideration of the affirmative action issue.

The Justice Department also argues that although the incentive program "employs race as a factor," it is neither a minority set-aside, as in *Croson*, nor a preference based on race. Rather, it focuses upon "disadvantage," a status defined by social and economic criteria not limited to members of racial minorities and from which nondisadvantaged minorities are excluded. Petitioner's reply brief responds that the statute is "race-based" since it presumes disadvantage "on the basis of race or ethnic status" and imposes on third parties the burden of challenging a minority group member's DBE status.[61] *Adarand*, therefore, could clarify whether all governmental use of racial criteria is subject to equivalent constitutional scrutiny or whether varying legal standards may pertain according to the nature of the racial classification in question. Considerable ambiguity in the caselaw persists on this point at present. For instance, while the decision in *Croson* specifically concerned the Richmond "30% quota," Justice O'Connor's opinion speaks without differentiation in terms of "racial classifications," "preferences," and "race-conscious" remedies, potentially affecting a broad array of state-sanctioned affirmative action. In certain circumstances however, the Court has approved of race or gender as a "plus" factor in job promotion[62] and academic admissions[63] decisions by state authorities provided that it was not the "sole" or "exclusive" factor considered. *Adarand* may provide important guidance on this matter.

Alternatively, the Court could strictly review the SCC program in *Adarand* on the rationale that it was a creature of the Executive branch, pursuant to legislative authorization, without direct congressional involvement or oversight. Such an approach might preserve a role for the Congress as co-equal enforcer of equal protection, consistent with *Fullilove* and *Metro Broadcasting*, while simultaneously requiring *Croson*-style rigor in the design and implementation of race-conscious remedies by federal agencies. It would be at odds, however, with court of appeals rulings which since *Croson* have uniformly rejected any requirement for additional factfinding at the state or local level to support

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60 *See* N.Y. Times, "Affirmative Action Challenge Seems to Perplex High Court," D20, col.7 (January 18, 1995).

61 *Reply to Opposition*, No. 93-1841, pp. 1-4 (filed 8-30-94).

62 *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

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

administrative implementation of federal contracting goals.[64] In effect, Congress rather than the Executive would assume active responsibility for determining the scope and details of administration for any federal program to promote minority opportunities in federal contracting and other areas.

Notwithstanding these possibilities, *Fullilove* and *Metro Broadcasting* could stand on precarious footing if the Court were to revisit these precedents in light of *Croson*. Since *Metro Broadcasting*, the author of that decision--Justice Brennan--has left the Court, to be replaced by Justice Souter, whose views on affirmative action are unknown. Justice Marshall, also an advocate of broad congressional authority to enact affirmative action remedies, has been replaced by Justice Thomas. *Lamprecht v. FCC*,[65] Justice Thomas' last decision on the D.C. Circuit Court of Appeals, held that the diversity rationale would not suffice to justify an FCC policy--identical to the one for minorities in *Metro Broadcasting*--that gave women a preference in obtaining broadcast licensing. Justice Thomas wrote that there was insufficient empirical evidence of a nexus between female-owned stations and discrete woman's programming to uphold the congressionally sanctioned policy.

Justice Thomas joins four other Justices who dissented from the ruling in *Metro Broadcasting*. Justice O'Connor--writing for herself, the Chief Justice, and Justices Scalia and Kennedy--conceded in that dissent that Congress possesses greater powers to enforce race-conscious remedies than the state and localities under §5 of the Fourteenth Amendment. But that section, in their view, only allowed Congress to move to remedy racial discrimination by the states. The policies at issue in *Metro Broadcasting*, Justice O'Connor reasoned, "concern only the administration of federal programs by federal officials" and were not intended as remedial measures. Accordingly, Justice O'Connor contended that they did not merit the relaxed review that the Court afforded the set-aside programs in *Fullilove*.[66] Justice Kennedy also expressed his misgivings for the *Fullilove* result in a concurring opinion in *Croson*.

> The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses

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64 *See, e.g., Harrison & Burrowes Bridge Contractors v. Cuomo*, 981 F.2d 50 (2d Cir. 1992); *Ellis v. Skinner*, 961 F.2d 912, 916 (10th Cir.), *cert. denied*, 113 S.Ct. 374 (1992); *Tennessee Asphalt v. Farris*, 942 F.2d 969 (6th Cir. 1991); *Milwaukee County Paver's Ass'n v. Fiedler*, 922 F.2d 419, 423-424 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991).

65 958 F.2d 382 (D.C.Cir. 1992).

66 497 U.S. at 603-04 (O'Connor, J., dissenting)("The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications.").

> a difficult proposition for me; but as it is not now before us, any reconsideration of that issue must wait some further case.[67]

Adarand may be that case.

It appears, therefore, that a five member majority of the U.S. Supreme Court may be ready to reexamine doctrines that have previously supported wide-ranging applications of congressionally enacted race- and gender-conscious remedies.[68] The Court in the past has been largely content to uncritically defer to congressional line drawing explicitly based on race or gender when legislating for "benign" purposes of remedying past societal discrimination or promoting diversity. A new consensus may now be forming on the Court to apply more "searching" scrutiny to the factual basis underlying the congressional judgment and to require greater legislative justification for any distinctions drawn. Most vulnerable, it appears, may be federal minority set-aside policies which, according to the O'Connor view, concern federal action rather than state action and are thus unsupported by Congress' §5 enforcement authority. At the very least, the federal government's burden of justification for race or gender-conscious policies of this nature may be more onerous than before.

AFFIRMATIVE ACTION IN EMPLOYMENT

The evolution of federal law and policy regarding affirmative action in employment may be traced to a series of executive orders dating to the 1960's which prohibit discrimination and require affirmative action by contractors with the federal government. The Office of Federal Contract Compliance Programs, an arm of the U.S. Department of Labor, currently enforces the E.O. 11246, as amended, by means of a regulatory program requiring larger federal contractors, those with procurement or construction contracts in excess of $50,000, to make a "good faith effort" to attain "goals and timetables" to remedy underutilization of minorities and women. The executive order program was upheld early on by the lower federal courts as a constitutionally valid governmental response to racial segregation in the construction trades and other affected industries.

Public and private employers with 15 or more employees are also subject to a comprehensive code of equal employment opportunity regulation under

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67 488 U.S. at 518.

68 Chief Judge Mikva, in his dissent from Justice Thomas' majority opinion in *Lamprecht*, 958 F.2d at 404, observed that:

> The Supreme Court, of course, may now decide to overrule *Metro Broadcasting* and to require strict scrutiny of Congress' affirmative action policies, as the four dissenters urged. But as appellate judges, our duty is to follow Supreme Court precedents, not to anticipate them. And it strikes me as impossible to reconcile the Supreme Court's decision in *Metro Broadcasting* with my colleagues decision today.

Title VII of the 1964 Civil Rights Act.[69] Except as may be imposed by court order to remedy "egregious" violations of the law, however, or by consent decree to settle pending claims, there is no general statutory obligation on employers to adopt affirmative action measures. But the EEOC has issued guidelines to protect employers and unions from charges of "reverse discrimination" when they voluntarily take action to correct the effects of past discrimination. Federal departments and agencies, by contrast, are required to periodically formulate affirmative plans for their employees[70] and a "minority recruitment program" to eliminate minority "underrepresentation" in specific federal job categories.[71]

A major aspect of the legal debate over affirmative action has concerned the appropriate role or purpose to be served by the remedy in employment discrimination litigation. One theory emphasizes compensation for actual victims of past discrimination, while another focuses more upon the elimination of barriers to equal opportunity for all members of a previously excluded class of individuals. In a series of cases during the 1980s the Justice Department argued, largely without success, that victim compensation was the only proper remedial objective and that class-based affirmative action remedies, which benefit women and minorities who are not themselves actual victims of an employer's past discrimination, are illegal. The employment cases to date appear largely to have repudiated that position. However, in *Croson*, Justice O'Connor implied that individual victimization may be the benchmark for any finely-tuned "waiver" procedure necessary for salvaging the Richmond set-aside and other affirmative action programs. This aspect of *Croson* may warrant further examination when the Court next reviews an employment case.

Basically, judicial precedents on affirmative action in employment have developed along two concurrent but not necessarily coterminous lines. One line of decision delineates the permissible scope of affirmative action imposed by judicial decree to remedy proven violations of Title VII or the Constitution. The

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69 42 U.S.C. §§ 2000e *et seq.*

70 Section 717 of 1972 Amendments to Title VII of the 1964 Civil Rights Act empowers the Equal Employment Opportunity Commission to enforce nondiscrimination policy in federal employment by "necessary and appropriate" rules, regulations, and orders and through "appropriate remedies, including reinstatement or hiring of employees, with or without backpay." 42 U.S.C. § 2000e-16(b). Each federal department and agency, in turn, is required to prepare annually a "national and regional equal employment opportunity plan" for submission to the EEOC as part of "an affirmative program of equal employment opportunity for all. . .employees and applicants for employment." 42 U.S.C. § 2000e-16(b)(1).

71 Section 717 was reinforced in 1978 when Congress enacted major federal civil service reforms including a mandate for immediate development of a "minority recruitment program" designed to eliminate "underrepresentation" of minority groups in specific federal job categories. 5 U.S.C. § 7201. The EEOC and Office of Personnel Management have issued rules to guide implementation and monitoring of minority recruitment programs by individual federal agencies. Among various other specified requirements, each agency plan "must include annual specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured." 5 C.F.R. § 720.205(b)(1991).

other involves the validity of voluntary affirmative action plans by public and private employers. Several basic principles emerge from this developing body of caselaw. A fundamental prerequisite to the adoption of minority employment goals or preferences is a remedial justification rooted in the employer's own past discrimination and its persistent workplace effects. Stricter probative standards mandated by the Constitution may bind public employers in this regard than pertain to private employers under Title VII. However, a "firm basis" as revealed by a "manifest imbalance," or "persistent" and "egregious" underrepresentation, of minorities or women in affected job categories has judicially been viewed an essential predicate to race preferential affirmative action. Second, beyond demonstrable past discrimination by the employer, all affirmative action plans are judged in terms of their adverse impact on identifiable nonminorities. Thus, those remedies, like the minority layoff provision in *Wygant*, which immediately effect the displacement of more senior nonminority employees, are most suspect and least likely to pass legal or constitutional muster. At the other end of the spectrum, hiring and promotional goals or preferences that do not "unnecessarily trammel" the "legitimate expectations" of nonminority candidates are more likely to win judicial acceptance. Finally, all "race-conscious" affirmative action remedies must be sufficiently flexible, of temporary duration, and "narrowly tailored" so as to avoid becoming rigid "quotas."

Court-Ordered Affirmative Action Remedies

Even before the Supreme Court had spoken, all eleven U.S. Circuit Courts of Appeals, in cases dating back to the very inception of the 1964 Civil Rights Act, had approved use of race or gender preference to remedy "historic," "egregious," or "longstanding" discrimination. This line of judicial authority was ratified by the Court's rulings in *Local 28, Sheetmetal Workers v. EEOC*[72] and *United States v. Paradise*.[73] The former involved contempt proceedings against a union with an established history of racial and ethnic discrimination for its willful violation of a judicially imposed 29% minority membership goal. To remedy years of union evasion, amounting to contempt of court, the Second Circuit had approved an order reinstating the minority membership goal and requiring that job referrals be made on the basis of one apprentice for every four journeymen. The Supreme Court affirmed, five to four.

Justice Brennan wrote for a plurality of four Justices that Title VII does not preclude race-conscious affirmative action as a "last resort" in cases of "persistent or egregious" discrimination, or to dissipate the "lingering effects of pervasive discrimination," but that, in most cases, only "make whole" relief for individual victims is required. The plurality also felt that by twice adjusting the union's deadline, and because of the district court's "otherwise flexible application of the membership goal," the remedy had been enforced as a

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72 *Supra* n. 16.

73 *Supra* n. 17.

"benchmark" of the union's compliance "rather than as a strict racial quota." Rounding out the five Justice majority for affirmance was Justice Powell who emphasized the history of "contemptuous racial discrimination" revealed by the record, and the temporary and flexible nature of the prescribed remedy. In separate dissents, Justices White and O'Connor found the referral quota excessive because economic conditions in the construction industry made compliance impracticable, while then-Chief Justice Burger and Rehnquist read Title VII to bar all judicially-ordered race-conscious relief benefitting nonvictims.

A parallel situation was presented by *United States v. Paradise*.[74] In 1972, to remedy nearly four decades of systematic exclusion of blacks from the ranks of the Alabama State troopers, the district court ordered a hiring quota and enjoined the state from discriminating in regard to promotions. Seven years later, a series of consent decrees calling for new nondiscriminatory promotion procedures was approved to rectify the total dearth of black troopers in upper ranks. In the interim, however, the court ordered a one-to-one racial quota for the rank of corporal and above, provided sufficient qualified blacks were available, until 25% of each rank was black. Only one round of promotions for corporal was made before the quota for that and the sergeant rank was suspended.

Justice Brennan, whose plurality opinion was again joined by Justices Marshall, Blackmun, and Powell, considered several factors in determining whether the plan violated the equal protection rights of white troopers: the necessity of the relief and the efficacy of alternative remedies, the plan's flexibility and duration, the relationship between the plan's numerical goals and the labor market, and the plan's impact on the rights of third parties. Significantly, the order did not require the promotion of anyone and could be waived in the absence of qualified minority candidates, as it already had been with respect to lieutenant and captain positions. It was also tied to the percentage of minorities in the area workforce (25%). Finally, because it did not bar white advancement, but merely postponed it, the plan did not impose unacceptable burdens on innocent third parties.

Justice Brennan therefore concluded that the promotion quota was "narrowly tailored" and justified by the government's "compelling" interest in eradicating the state's "pervasive, systematic, and obstinate exclusion" of blacks and its consistent history of resistance to the court's orders. Justice Stevens, who provided the fifth vote for the Court's judgment, stated in a separate opinion that the district court did not exceed the bounds of "reasonableness" in devising a remedy. Justice O'Connor, joined in dissent by Justice Scalia and the Chief Justice, found the plan "cannot survive strict scrutiny" because the one-to-one promotion quota is not sufficiently tied to the percentage of blacks eligible for promotion. Finally, Justice White, in a two sentence dissent, stated simply that the district court "exceeded its equitable powers."

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[74] *Supra* n. 17.

Voluntary Affirmative Action

The remedial justification for voluntary affirmative action in employment was fully explored in the Court's constitutional analysis in *Wygant.* The collective bargaining agreement between the school board and the teachers' union in that case provided a hiring preference for minority teachers coupled with layoff protection until the minority composition of the faculty mirrored that of the student body systemwide. Seniority was to govern layoff except that in no event were overall minority faculty percentages to be reduced. In the face of a constitutional challenge by ten laid-off white teachers, the Court voided the minority layoff provisions although no particular rationale commanded majority support.

Seven members of the *Wygant* Court agreed that some forms of voluntary affirmative action may be constitutionally justifiable on the part of a governmental entity itself guilty of past discrimination. The plurality opinion of Justice Powell applied his strict scrutiny test from *Bakke*: the "limited use of racial classification" must be justified by the "compelling" purpose of remedying "prior discrimination by the governmental unit involved," and "narrowly tailored" to that goal. Neither the board's asserted interest in the presence of minority teachers as critical "role models" or to ameliorate "societal discrimination" was sufficient, however, absent "convincing" evidence of the board's own past discrimination. Moreover, while innocent nonminorities could be made to share some of the burden, the remedy must not be too intrusive upon their rights. Because the minority layoff protection in *Wygant* "impose[d] the entire burden of achieving racial equality on particular individuals," innocent third parties were impacted too heavily, Justice Powell concluded. In this respect, he felt the layoff provision was distinguishable from preferential hiring decisions which "diffuse" the burden more generally. Reserving judgment on the hiring issue, Justice White concurred that the layoff remedy went too far because it displaced more senior white employees in favor of minorities who were not actual discrimination victims. In a separate concurrence, Justice O'Connor aligned herself with the Powell view that societal discrimination will not justify voluntary affirmative action remedies and that the layoff plan was infirm because overbroad and not "narrowly tailored" to the board's past discrimination.

The Justices sparred over the nature of the evidence that might support an informal conclusion of past governmental discrimination. The plurality opinion suggested "sufficient," "convincing," and "strong" evidence as benchmarks, while Justice O'Connor considered a "firm basis" acceptable. None of the Justices seemed to view "formal findings" of past governmental discrimination a constitutional prerequisite to voluntary affirmative action. Justice O'Connor and three of the dissenters (Marshall, J., joined by Brennan and Blackmun, JJ.) noted that such a requirement would chill voluntary efforts to end race discrimination and purge its effects. Only Justice Stevens, in a separate dissent, would have abandoned any requirement for showing past discrimination in favor of the educational interest in "an integrated faculty."

Significantly, *Wygant* was a constitutional case decided on Fourteenth Amendment equal protection principles. Less remedial justification may be required, however, for voluntary affirmative action plans adopted by public or private employers to comply with Title VII of the 1964 Civil Rights Act. The first such case to reach the High Court, *United Steelworkers v. Weber*,[75] upheld a voluntary affirmative action plan by a private employer, including a minority quota for a craft training program, to rectify "manifest racial imbalance in traditionally segregated job categories." The Court required no specific finding of past discrimination by the employer, deciding the case instead on the basis of the historically well established record of nationwide bias in trade union membership.

In 1974, the employer and union in *Weber* negotiated an affirmative action plan to increase the percentage of blacks in skilled craft positions from 2% to the level of their overall participation in the area workforce, or 39%. By reserving half of the company's craft training program slots for minorities, several white employees were passed over in favor of less senior blacks. There was no evidence that the underrepresentation of minorities in craft jobs was attributable to past discrimination by the employer. Nonetheless, relying on general judicial and research findings relative to nationwide patterns of minority exclusion from trade union membership, the Supreme Court ruled 5 to 2 that the "racial preferences" in the program were a lawful means to combat "manifest racial imbalance" in craft positions resulting from "old patterns of racial segregation and hierarchy."

Conceding that Title VII could literally be read to bar all race-conscious employment practices, the Court decided that the purpose of the Act, not its literal meaning, was controlling. The legislative history and context from which the Act arose, Justice Brennan wrote, compelled the conclusion that the primary purpose of Title VII was to "open employment opportunities for Negroes in occupations which have traditionally been closed to them." Accordingly, "[i]t would be ironic indeed" to read the statute to preclude "all voluntary, private, race conscious efforts" to abolish workplace segregation. Moreover, the specific plan in question, mandating a 1 to 1 racial ratio until a specific minority participation rate is achieved, was permissible affirmative action because it did "not unnecessarily trammel the interest of white employees." In this regard, the Court emphasized:

> The plan does not require the discharge of white workers and their replacement with new black hires. Nor does the plan create an absolute bar to advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate manifest racial imbalance. Preferential selection of craft trainees at the. . .plant will end as soon as the percentage of

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75 443 U.S. 193 (1979).

> black skilled craft workers in the. . .plant approximates the percentage of blacks in the local labor force.[76]

Weber, therefore, permits private employers to implement certain forms of temporary affirmative action to advance minority employment opportunities, even where such measures have an incidental adverse impact on white workers.

Johnson v. Transportation Agency[77] reviewed a voluntary affirmative action plan adopted by a public employer, the Transportation Agency of Santa Clara County, California. That plan authorized the agency to consider the gender of applicants as one factor for promotion to positions within traditionally segregated job classifications in which women had been underrepresented. Women were significantly underrepresented in the county's labor force as a whole and in five of seven job categories, including skilled crafts where all 238 employees were men. The plan's long range goal was proportional representation. However, because of the small number of positions and low turnover, actual implementation was based on short term goals which were adjusted annually and took account of qualified minority and female availability. No specific numerical goals or quotas were used.

The petitioner in *Johnson* was a male employee who had applied for promotion to the position of road dispatcher, only to be rejected in favor of a female competitor. Both the petitioner and the women who won the promotion were deemed well qualified for the position, although the petitioner had scored slightly higher in the first round interview. The appointing official for the agency indicated that in reaching the decision to promote the female candidate, he had considered the candidates' qualifications, backgrounds, test scores, and expertise as well as gender considerations.

The Supreme Court upheld the county's action, 6 to 3. Justice Brennan decided for the majority that Title VII was not coextensive with the Constitution and that, therefore, *Weber* not *Wygant* controlled. The noted disparities in female workforce participation satisfied the *Weber* requirement for a "manifest imbalance" since to require any additional showing could expose the employer to discrimination lawsuits and operate as a disincentive to voluntary compliance with the statute. The Court likened the county plan to the treatment of race as a "plus" factor in the "Harvard Plan" referenced approvingly by Justice Powell in *Bakke*. Because sex was but one factor in the decisionmaking process, no applicant was excluded from consideration on account of sex. In a caveat, however, the Court warned that "[i]f a plan failed to take distinctions in qualifications into account in providing for actual employment decisions, it would dictate mere blind hiring by the numbers," and would be invalid because "it would hold supervisors to 'achievement of a particular percentage of minority

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76 443 U.S. at 208-09.

77 480 U.S. 792 (1973).

employment or membership. . .regardless of circumstances such as economic conditions or the number of available qualified minority applicants. . .".[78]

Justice Stevens concurred that the plan was consistent with *Weber* and Justice O'Connor, in a separate concurrence, provided a sixth vote for the judgment. In her opinion, however, to support a voluntary affirmative action plan, there should be "a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action . . ." Equal Protection standards, not Title VII, should govern public employee cases, and she was critical of the majority for providing inadequate guidance as to the statistical imbalance standard. But because there were no women in skilled craft positions, and gender was only a "plus" factor, either standard was satisfied here.

Justice White, dissenting, would have overruled *Weber* as a "perversion" of Title VII, as would Justices Scalia and the Chief Justice joining in a separate dissent. The dissenters criticized the majority for using Title VII "to overcome the effect not of the employer's own discrimination, but of societal attitudes that have limited entry of certain races, or of a particular sex, into certain jobs." Noting the district court finding of no past discrimination by the county agency, they argued in light of *Sheetmetal Workers* that "there is no sensible basis for construing Title VII to permit employers to engage in race- or sex-conscious employment practices that courts would be forbidden from ordering them to engage in following a judicial finding of discrimination."

Recent Developments and Prospects

State and local programs mandating affirmative action in employment appeared to meet with greater judicial approval, at least initially, than public contracting preferences for minorities in the wake of the *Croson* decision. In part, this may be due to the fact that employment preferences are frequently, though not invariably, linked to settlements of individual or class discrimination lawsuits. While a formal record of past discrimination may not in all such cases have been developed, depending on the stage of the proceedings where agreement is reached, there is usually some allegation of misconduct by the public employer. In addition, there may be underlying judicial findings of discrimination, or federal district court involvement in fashioning or approving a consent decree, factors which have prompted deference by appellate courts in reviewing these affirmative action efforts.[79] The influence of *Croson* is evident,

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78 *Id.* at 636 (citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (O'Connor, J., concurring in part and dissenting in part).

79 *See e.g. Freeman v. City of Philadelphia*, 751 F. Supp. 509, 518 (E.D. Pa. 1990), *aff'd mem.*, 947 F.2d 935 (3d Cir. 1991)(holding that in the context of approval of a consent decree implementing a preferential hiring policy, the court did not require as strong a showing of statistical imbalance as would be needed to establish a *prima facie* case of discrimination); *Macklin v. City of Boston*, 969 F. 2d 1273 (1st Cir. 1992)(in reviewing a challenge to continued adherence to a 1974 consent decree requiring an eligibility preference for minority firefighters, the appeals

however, in several more recent decisions by lower federal courts which have strictly scrutinized affirmative action plans of public and private employers for adequate evidence of past discrimination and the requisite "narrow tailoring" of the remedy.

In *Branch v. Seibels*,[80] for example, the Eleventh Circuit rejected both long term and annual goals imposed by consent decree for the hiring of firefighters and police officers by the City of Birmingham, Alabama. The main faults in the city's affirmative action plan were that it had become a permanent alternative to the development of nondiscriminatory tests and other valid selection procedures, and rather than an end to discrimination, its long-term goals were "designed to create parity between the racial composition of the labor pool and the race of the employees in each job position." Annual hiring goals had arbitrarily been set at twenty-five to fifty percent for minorities and had been "mechanically" applied as "rigid quotas," said the court, without regard to "relative qualifications" of the candidates.[81] Similarly, an affirmative action promotional plan for the Maryland State Police entered with the consent of a federal district court was subjected to strict scrutiny equal protection review by the Fourth Circuit in *Maryland Troopers Ass'n v. Evans*[82] and found wanting. Specifically, goals linked to minority representation in the general population rather than the qualified labor pool were deemed deficient under *Croson* analysis as was the failure to first exhaust all race-neutral alternative means of

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court deferred to the district court's determination that, although a race-neutral exam was adopted in 1987 and 1989 and hiring of minorities was in greater proportion than their 1974 representation in the general population, continued affirmative action was necessary and decree was sufficiently tailored in that it provided only a limited advantage to only qualified minorities for a limited period of time, with little disturbance to the expectations of nonminorities). *But cf.*, *Crumpton v. Bridgeport Education Ass'n*, 993 F.2d 1023 (2d Cir. 1993)(refusing to equate parties stipulations as to existence of discrimination with judicial determination that such discrimination existed).

80 31 F.3d 1548 (11th Cir. 1994).

81 On remand, the district court was ordered to "re-write the decrees to relate the annual goals to the proportion of blacks in the relevant, objectively qualified labor pool" and "to make clear that the annual goals cannot last indefinitely." Further, the appeals court noted:

> Once a valid selection procedure is in place for a particular position, neither the City nor the Board may continue to certify, hire, or promote according to a race-conscious 'goal' absent proof of ongoing racial discrimination, or of lingering effects of past racial discrimination, with respect to that position. Under no circumstances may the City hire or promote, or the Board certify, candidates who are demonstrably less qualified than other candidates, based on the results of valid, job-related selection procedures, unless the district court finds that such appointments are necessary to cure employment discrimination by the City or Board.

82 993 F.2d 1072 (4th Cir. 1993).

increasing minority opportunity.[83] The Sixth Circuit also applied *Croson* to defeat a 50 percent minority goal for the rank of sergeant in the Detroit Police Department which had been in effect for nearly two decades since "[l]imiting the duration of a race-conscious remedy which clearly impacts adversely on [nonminorities] is a keystone of a narrowly tailored plan."[84] The failure to satisfy the court as to the cause of apparent statistical disparities with respect to minority employment,[85] the absence of a provision for waiver where qualified minority candidates were unavailable,[86] and the placing of undue burdens on nonminorities[87] are other factors that have prompted judicial invalidation of state and local affirmative action plans.

The *Croson* focus on past discrimination as justification for race-conscious affirmative action has left unanswered the issue of whether a state or locality is, under any circumstances, constitutionally permitted to pursue diversity as a social or educational value in the absence of remedial purpose. That issue is now on appeal to the U.S. Court of Appeals for the Third Circuit. *U.S. v. Board of Education of Piscataway Township*[88] questions whether an affirmative action policy adopted not as a remedy for past discrimination or to redress a "manifest" workforce imbalance, as in *Weber* and *Johnson*, but to promote a local school board's interest in faculty "diversity" is legal as applied to a white teacher who was laid off to save the position of an equally qualified minority colleague. Two teachers, one white and the other black, had been hired as business education teachers on the same day in 1980 and were tied as least tenured when a reduction of one teacher in the department was recommended some eight years later. Rather than a coin toss, which was the method previously used to resolve such dilemmas, the district affirmative action policy favoring retention of

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83 *See also Stuart v. Roach*, 951 F.2d 446, 454 (1st Cir. 1991)(finding minority promotion goals appropriately linked to pool of qualified minorities).But see *Peightal v. Metropolitan Dade County*, 815 F. Supp. 1454, 1457-58 (S.D.Fla. 1993)(finding program justified by significant statistical disparities between representation of various groups in unskilled entry-level firefighter positions and representation of those groups in general population).

84 *Detroit Police Officers Ass'n v. Young*, 989 F.2d 225, 228 (6th Cir. 1993). *See also Davis v. City & County of San Francisco*, 890 F.2d 1438, 1447 (9th Cir. 1989)(finding program was tailored to its authorized remedial purpose, but required addition of a sunset provision).

85 *In re Chicago*, 1994 U.S. Dist. LEXIS 11249 (N.D. Ill. 1994) ("Where, as here, the bare statistical imbalance could have been caused by a number of factors other than race, the City was not justified in its rush to link the disparities to discrimination.").

86 *North State Law Enforcement Officers Ass'n v. Charlotte-Mecklenburg Police Dept.*, 862 F. Supp. 1445 (W.D.N.C. 1994).

87 *Crumpton v. Bridgeport Education Ass'n*, 993 F.2d 1023, 1031 (2d Cir. 1993)(finding preferential lay-off policy too burdensome on nonminorities).

88 832 F. Supp. 836 (D.N.J. 1993).

minority candidates was invoked to break the tie.[89] At the time, 9.5 percent of the district's teachers were black as compared to 5.8 percent in the relevant county labor pool. Consequently, there was no underutilization of blacks in Piscataway's teaching staff, and the affirmative action policy was not intended as a remedy for prior minority exclusion. Nonetheless, because there was only one black teacher in the ten-member department, her retention was recommended in the interest of racial diversity.

Thereafter, the dismissed white teacher filed a complaint with the federal EEOC, alleging racial discrimination. The EEOC review led to a Justice Department suit, filed in 1992, alleging a violation of Title VII and the New Jersey Law Against Discrimination, an action which the aggrieved employee joined as intervenor. Ruling on summary judgment motions in September 1993, a federal district judge held that as "laudable" as the school board's aim in promoting racial diversity among faculty may be, laying off a white teacher in pursuit of that goal exceeded the bounds of the Supreme Court's affirmative action decisions in *Weber*, *Johnson*, and *Wygant*. Specifically, the school board's decision was found to contravene the two basic standards by which employer's affirmative action plans are judged. First, it was not implemented to remedy past discrimination against protected minority groups, or in response to a "manifest racial imbalance" in the workforce. Restraint was thus called for since "[i]t is sheer speculation as to whether the Court may one day extend its reading of Title VII to encompass a race conscious affirmative action plan in the absence of a manifest imbalance in the work force because of a desire to achieve faculty diversity."[90] Secondly, it "unnecessarily trammeled" the rights of nonminorities. As in *Wygant*, loss of a "legitimate and firmly rooted expectation in continued employment" distinguished the burden imposed on the laid off incumbent worker in this case from that imposed on nonminorities by the hiring or promotion preferences approved in *Weber* and *Johnson*. Finally, the plan was flawed by its indeterminate duration, and the board's failure to consider "alternative and less burdensome means to achieve diversity of its faculty."[91]

An interesting development occurred in the wake of the school board's appeal of the case to the Third Circuit. The U.S. Justice Department had first initiated civil action on behalf of the United States in 1992, during the Bush

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89 Pursuant to N.J.A.C. 6:4-1.3(a)-(b), in 1975 the Piscataway Township Board adopted an affirmative action program called "Affirmative Action Program to Eliminate Discrimination on the Basis of Sex, Race, Religion or National Origin." The program included the following in its statement of purpose: "...when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended."

90 *Id.* at 848.

91 After a trial before the judge and a jury on damages held in January of 1994, the plaintiff was awarded $98,000 in back pay, $10,000 in medical reimbursements, and nearly $25,000 in interest. The trial judge dismissed all punitive damages claims. A jury also awarded $10,000 in pain and humiliation damages under the New Jersey Law Against Discrimination. The judge handled part of the award because the plaintiff was not entitled to a jury trial on the federal claims at the time the suit was filed.

Administration, and successfully moved for summary judgment against the school board and in favor of the laid off white teacher in June 1993 after the Clinton Administration took office. Subsequently, however, the Department in August 1993 altered its position, seeking the court's permission to withdraw from the case and file an amicus brief on behalf of the school board. In filing its motion, the Department argued that racial preference to promote "faculty diversity" was amply justified "where two people are equal in seniority and qualifications," and that the district court had "announced an unduly narrow interpretation of the permissible bases for affirmative action under Title VII."[92] Answering the government's motion, counsel for the plaintiff below asserted that the Justice Department has no standing to seek reversal of its own prior victory, and that it has no authority to intervene on behalf of a defendant or appellant against an aggrieved civil rights claimant. On August 25, 1994 the federal appeals court issued an order allowing the Justice Department's Civil Rights Division to file its brief, but only "for the information of the Court," so that a three-judge panel can decide whether the government will be allowed to proceed.[93]

On its merits, the *Piscataway* case raises a variety of issues which, although not altogether unprecedented, have yet to be fully explored by the courts. *Wygant*, for example, disapproved of a race-based layoff procedure which disregarded relative seniority and rejected a societal discrimination or "role model" theory to justify voluntary affirmative action aimed at achieving faculty diversity. The affirmative action program in the *Piscataway* case appears equally without remedial objective since the minority composition of the school faculty overall exceeded that of the district population and may thus be subject to the same constitutional infirmity as *Wygant*. Distinguishing that earlier case, however, is the fact that the preference here was applied to select between two candidates who were judicially determined to be of equal qualification and seniority. Thus, while the burden of affirmative action falls on an identifiable "innocent" third party, as in *Wygant*, the displaced white worker in these circumstances may have less basis for arguing the loss of a "vested" or firmly established employment expectation. Moreover, the *Piscataway* policy, unlike *Wygant*, set no quotas and race, it could be argued, was not a trump card but only a factor to be considered after it is determined that the candidates are in all other respects equal. Five justices in *Wygant* even suggested that faculty diversity may be a permissible rationale for affirmative action, a view possibly inspired by Justice Powell's opinion regarding student diversity in *Regents of the University of California v. Bakke*.[94] Essentially, therefore, *Piscataway* asks whether employers may adopt affirmative action plans for any reason other than remedying their own past discrimination, an issue that may be critical to the future of such programs in academic and other employment settings. The Third

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92 O'Brien, T., *Former Ally Charges Ethical Breach; Behind Justice's Flip-Flop in the N.J. Bias Suit*, Legal Times, p. 2 (September 19, 1994).

93 *Id.*

94 438 U.S. 265 (1978),

Circuit has yet to rule in the *Piscataway* case but when it does, that appellate decision may become the next vehicle for Supreme Court review of affirmative action in employment.

AFFIRMATIVE ACTION IN EDUCATION

Missouri v. Jenkins: Achieving "Unitary Status" and the End Of Judicial Oversight of Local School District Desegregation Efforts

In addition to *Adarand*, the Court will be presented, in *Missouri v. Jenkins*, with yet another opportunity to clarify the question of when a local school district has sufficiently met its constitutional obligation to desegregate, so as to relieve itself from Federal judicial oversight. At issue before the Court will be the decision of the Court of Appeals for the Eighth Circuit, holding that the Kansas City, Missouri public school system had failed to achieve "unitary status", despite the system's successful implementation of various court ordered desegregation remedies.

Background: Chronology of the Litigation and Summary of the Arguments

The lower court's ruling in *Jenkins* is the most recent in ongoing litigation, between the Kansas City Metropolitan School District (KCMSD), the State of Missouri and African American children attending the district's schools, that dates back nearly 20 years. The case was initiated in 1977 when African American schoolchildren brought the action, alleging that the state operated a racially segregated school system, in violation of the Supreme Court's decision in *Brown* and had failed to take affirmative steps to eliminate the vestiges of discrimination caused by the operation of that system.[95] In addition, plaintiffs claimed that the state had actually helped to perpetuate the continued existence of segregated schools through discriminatory housing practices, discriminatory relocation of blacks displaced by urban development and support of racially identifiable interdistrict vocation and special education programs.[96] Plaintiffs alleged similar conduct on the part of KCMSD, contending that the school system had failed to adopt policies to effectively "change the segregative patterns that were developed or developing."[97] The district court held in favor of the plaintiffs, finding that the school district's decision, after *Brown*, to operate some completely segregated schools and some integrated ones was "ineffective in integrating its school system", and ordered the state and the KCMSD to

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95 *See Jenkins v. Missouri*, 593 F.Supp. 1485 (W.D. Mo. 1984).

96 *Id.* at 1488.

97 *Id.*

develop a plan "which would establish a unitary school system within the [school district]."[98]

The remediai plan subsequently ordered by the court required the state and KCMSD to implement programs that would improve student achievement and attract nonminority students back into its schools. Specifically, the plan included measures designed to upgrade the quality of educational curricula and library resources; reduce teaching load and class size and implement full day kindergarten, tutoring, early childhood development and summer school programs.[99] In addition, the state was to establish a voluntary interdistrict transfer program; a capital improvement program to refurbish the system's deteriorating facilities; and a magnet schools program. The court allocated the costs of the plan between the state and KCMSD, placing most of the financial burden on the state, and ordered an increase in the property tax levy within the school district to fund the local school district's portion of the costs.[100] Since its approval of the original plan, the district court has handed down subsequent orders modifying the plan's requirements and reallocating the costs of implementation between the state and the local school district.

Giving rise to the Supreme Court's pending examination of the litigation is a 1992 order by the district court, effectively denying the state's request that the school system be found "unitary", thereby releasing the system and the state from the court's oversight. In making this request, the state argued that through years of expenditures in compliance with the court's funding orders, it had fully implemented those aspects of the desegregation plan designed to increase student achievement, and as such the district should be found to be "unitary" with respect to these areas. The district court implicitly rejected the state's request, failing to make specific findings on the issue and ordering continued funding for the "quality education" programs. In addition, the court approved, over the state's objection[101], salary increases for school personnel, finding that the increases were a necessary component of the desegregation plan and served to improve the desegregative attractiveness of the school district.

The Court of Appeals for the Eighth Circuit affirmed the district court's order and rejected the state's argument that "unitary" status had been achieved solely by the implementation of the quality education programs.[102] The court

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98 *Id.* at 1506.

99 *See generally Jenkins v. Missouri*, 639 F.Supp. 19 (W.D. Mo. 1985).

100 The power of the court to effectively order such funding measures was ultimately upheld by the Supreme Court. *See Missouri v. Jenkins*, 495 U.S. 33 (1990).

101 Specifically, the state argued that low teacher salaries were unrelated to the prior constitutional violations committed by the state; and thus any increases in salaries were outside the scope of the court's authority to mandate.

102 *See Jenkins v. Missouri*, 11 F.3d 756, 765 (8th Cir. 1994)("... implementation of programs in and of itself is not sufficient.").

indicated that the success of the programs in attaining unitary status must be measured by the improvement in student achievement within the district as a result of the programs' implementation.[103] In addition, the court upheld the district court's order approving salary increases for teachers and staff, and its authority to make the order, concluding that the increases were a necessary part of the plan's implementation.[104]

On brief before the Supreme Court, the state essentially challenges the goals underlying the remedial plan and the authority of the district court to order a plan designed to achieve such goals. Specifically, the state argues that the authority of the Federal courts to remedy past segregation is limited to addressing those conditions that were actually caused by the state's past discriminatory conduct. The state maintains that as low student achievement and "white flight" were not caused by the segregated school system, the district court erred in characterizing these conditions as "vestiges" of the state's past discrimination, and exceeded its authority in ordering a remedial plan designed to remedy such conditions. In addition, the state asserts that, in concentrating on student achievement levels, the lower courts have "lost sight of the goal of eliminating one-race schools" and have failed to examine areas, previously identified by the Supreme Court as relevant criteria for determining whether a school district has become unitary. When examined under these factors--student assignment; racial makeup of faculty; racial makeup of noninstructional staff; equality in facilities; transportation; and extracurricular activities, the state maintains, the school district has achieved "unitary status" and should be released from Federal judicial oversight.

Conversely, representatives of the Jenkins class contend that, given recent evidence of the success of the quality education programs in attracting nonminorities back to the district, termination of this remedy would be premature at this time. In addition, the class asserts that the state has not satisfied the test set out in *Freeman v. Pitts* to determine whether portions of the desegregation plan may be terminated.[105] In seeking termination of the plan, the state failed to present any evidence that the quality education program had eliminated the vestiges of segregation to the extent practicable, maintaining only that the programs had been implemented. In addition, the class maintains

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103 *Id.* at 766.

104 *Id.* at 766-769. *See also Jenkins v. Missouri*, 13 F.3d 1170 (8th Cir. 1993)(Affirming lower court approval of salary increases for three additional school years.).

105 In *Freeman v. Pitts*, the Supreme Court ruled that a district court may relinquish supervision of a school district in incremental stages, before full compliance has been achieved in every area of school operations and decline to order further remedial measures in those areas in which the district has achieved "unitary" status. In making this determination, district courts are required under *Freeman* to assess the extent to which there has been "full and satisfactory compliance" with the desegregation order in those areas where supervision is to be withdrawn"; whether retention of control over such areas is necessary or practicable to achieve compliance in other areas; and whether the school district has demonstrated a "good faith" commitment to the whole of the decree and to those statutory and constitutional provisions that were the predicate for judicial intervention. *See generally* 112 S. Ct. 1430 (1992).

that relinquishment of control over the quality education programs would undermine the overall effectiveness of the entire remedial program and its goal of achieving a desegregated school system. Moreover the class contends that the state has failed to demonstrate the "good faith commitment" required by *Freeman*, citing instances in which the state refused to implement portions of the plan. Finally, the class contends that the remedial measures ordered by the district court were permissible under previous Supreme Court precedent.

Brief Overview of the Supreme Court's School Desegregation Jurisprudence

The Supreme Court's upcoming opinion in the *Jenkins* case will be the latest in a long line of rulings regarding school desegregation that dates back to its 1954 decision in *Brown v. Board of Education*. In *Brown*, the Court held that segregated school systems inherently violated the equal protection guarantees of the Fourteenth Amendment and ordered that states act to dismantle their dual educational systems "with all deliberate speed."[106] The Court also delegated the responsibility of supervising local school districts in their compliance with *Brown* to the Federal district courts and authorized the lower courts to fashion measures designed to remedy the constitutional violations.[107]

After a decade of relative inaction by local school boards in desegregating their schools and attempts by local officials to avoid the mandate established in *Brown*, the Court saw fit to revisit the issue in *Green v. County School Board*[108] and provide stronger, more specific guidance to local officials regarding their constitutional duty to desegregate the schools. At issue in *Green*, was the Kent County, Virginia School Board's adoption of a "freedom of choice" plan, under which children within the district could choose the school that they wished to attend. The Court invalidated the plan, finding it an "[in]sufficient step to effectuate a transition to unitary system."[109] In striking down the plan, the Court directed that local officials come forward with a plan that "promises realistically to work...*now*" and imposed an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[110] Moreover, the Court outlined six factors to be considered in determining the existence of a dual

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106 *See* 347 U.S. 483 (1954); *see also Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955).

107 *Id.*

108 391 U.S. 430 (1968).

109 *Id.* 441-442.

110 *Id.* at 437-438.

school system--student assignment; faculty; staff; transportation; extracurricular activities; and facilities.[111]

After two major decisions, subsequent to *Green*, outlining the permissible scope of desegregation remedies[112], the Court began to focus its attention on narrowing the scope of desegregation remedies and limiting the authority of the district courts to fashion remedial measures. Most notably, in *Milliken v. Bradley*, the Court overturned a court ordered desegregation plan which encompassed adjacent suburban school districts as well as the inner city district found to be segregated.[113] There the district court, after concluding that an intradistrict desegregation plan would be ineffective, ordered a plan requiring busing children between the majority white suburban school districts and the inner city district--comprised mostly of African American children. In overturning the order, the Supreme Court reiterated the principle announced in an earlier decision, that the scope of the remedy is limited to the nature and extent of the constitutional violation. On this note, the Court established a test to determine when an interdistrict desegregation remedy may be permissible, which involved examination of whether the constitutional violation of one district has a "significant segregative effect" in another district, and whether the discriminatory acts of state and local officials were a "substantial cause of interdistrict segregation."[114] Applying this standard, the Court concluded that the interdistrict remedy was not appropriate in this case because the "disparate treatment of white and [African American] students had occurred within the [inner city] school system, and not elsewhere..."[115]

Most recently, the Court has shifted its focus from limiting the scope of a desegregation order to determining when such orders should be lifted entirely. In *Board of Education of Oklahoma City v. Dowell*, the Court, for the first time announced standards to guide district courts in their assessment of whether supervision and control of a school system should be returned to local officials.[116] In overturning a ruling by the court of appeals that a desegregation decree remains in effect until the school district can show "grievous wrong evoked by new and unforeseen conditions", the Court held that the district court should address itself to whether the school board had "complied in good faith" with desegregation decree since its inception, and whether the "vestiges of past *de jure* segregation had been eliminated to the

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111 *Id.* at 435.

112 *See Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971); *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

113 418 U.S. 717 (1974).

114 *Id.* at 744-745.

115 *Id.* at 746.

116 *See* 498 U.S. 237.

extent practicable."[117] The Court further narrowed its focus on the termination of judicial supervision in *Freeman v. Pitts*, where it held that district courts have the authority to relinquish supervision and control of a school district in incremental stages before full compliance with the desegregation order has been achieved.[118]

Implications

Against the backdrop of the Court's most recent pronouncements regarding school desegregation, the upcoming decision in *Missouri v. Jenkins* provides the Court with another opportunity to clarify issues regarding the scope of judicial authority to fashion remedial measures and the relinquishment of such authority, that have been left unresolved by the Court's previous opinions. Specifically, the Court could, for the first time, delineate precise standards for determining what constitutes a "vestige" of past discrimination. In its previous opinions, the Court has alluded to this term as the target at which a school district's remedial efforts should be directed. While its previous decisions generally indicate that the term is meant to denote a present condition which was, in some way, caused by the prior discriminatory conduct[119], the Court has failed to give any definitive guidance as to the degree of causation that must be present in order for a "vestige" to be identified. In arguing that present day student achievement levels and "white flight" are not causally linked to the school system's prior discriminatory actions, the state places this issue squarely before the Court. Also related to this issue will be the Court's treatment of whether salary increases for school personnel are a remedy that's sufficiently tied to the state's past discriminatory conduct.

In addition, *Missouri v. Jenkins* could provide further clarification to the lower courts as to when the "vestiges" of discrimination have been sufficiently eliminated. Specifically important will be the Court's handling of the state's argument that it has fulfilled its constitutional obligation by fully implementing the programs required under the remedial order and that any racial imbalance currently within the school district is attributable to factors (*i.e.*, demographic shifts) beyond the state's control. In *Dowell*, the Court instructed the lower courts to examine whether the vestiges of discrimination had been eliminated "to the extent practicable" in determining whether judicial control over the district should be relinquished. Moreover, in a concurrence with the majority in *Freeman*, Justice Scalia specifically addressed the relationship between present racial imbalance in schools and demographic shifts within the school district, calling for the Court's recognition that due to "a multitude of private factors... the percentage of the current makeup of school systems attributable

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117 *Id.* at 249-250.

118 112 S. Ct. 1430 (1992); *see also* n. 13, *supra*.

119 *See e.g. Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977); *Pasadena Board of Education v. Spangler*, 427 U.S. 424 (1976).

to the prior, government-enforced discrimination has diminished with each passing year, to the point where it cannot realistically be assumed to be a factor."[120] Adoption of this view by a majority of the Court and a determination that the state's implementation of the programs is sufficient, could result in the release from judicial control of a number of school districts which continue to suffer racially imbalanced student populations despite the implementation of court ordered remedial measures.

Minority Scholarships and the Constitution: An Issue of Emerging Significance

Although not before the Supreme Court this term, a recent court of appeals ruling could mark the reemergence of the constitutional validity of minority based scholarships as a significant issue in future public policy and judicial discourse.[121] In *Podbersky v. Kirwan*, the court of appeals for the Fourth Circuit invalidated a university sponsored minority scholarship program, concluding that the program violated the equal protection clause of the Fourteenth Amendment.[122]

At issue in the case was the University of Maryland's Benjamin Banneker Scholarship, a merit based award limited exclusively to African American students. The validity of the program was challenged by a Hispanic student at the university who applied for and was denied an award under the program, despite meeting all of the academic and other necessary requirements. The district court upheld the program, finding the use of a race exclusive scholarship justified as a remedy for past discrimination by the university.[123]

In striking down the program, the court of appeals applied the most exacting level of analytical scrutiny under which the university was required to show a "strong basis in evidence for its conclusion that remedial action [is] necessary" and that the measure was "narrowly tailored to meet the remedial goal." Moreover, in justifying the program as "necessary", the university had to demonstrate the existence of "presents effects" of its past discriminatory conduct which warranted the use of the race-conscious remedy. The university attempted to meet this standard, arguing that the use of minority based

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120 Freeman, *supra* at 1453.

121 The statutory and constitutional validity of these programs came into question initially in December of 1990 in a letter issued by the Department of Education's Office of Civil Rights (OCR), which interpreted Title VI and its regulations to generally prohibit the funding or administration of race-exclusive scholarships by Department of Education assistance recipients unless mandated by a court or administrative order, corrective action plan, or settlement agreement. In 1994, OCR rescinded its earlier policy statement, announcing that such scholarships would be deemed permissible by DOE.

122 *See* 38 F.3d 147 (4th Cir. 1994).

123 764 F.Supp. 364 (D. Md. 1991).

scholarships was necessary to remedy a number of such present effects, including the university's poor reputation within the African-American community; underrepresentation of African-Americans in the student population; low retention and graduation rates among African-American students at the university; and perceived hostility toward African-American students on campus.

With regard to the university's poor reputation among African-Americans and the racially hostile campus environment, the court found these asserted "effects" "[in]sufficient, standing alone, to justify the single-race Banneker program."[124] In addition, the court found that the lower court erred in failing to determine the relevant pool of potential applicants, which was necessary to assess the extent to which African-American students were underrepresented at the university. Moreover, the court noted that there was a genuine factual dispute as to whether low African-American retention and graduation rates were attributable to the university's past discrimination, which should have been resolved prior to the district court's ruling.

In addition to rejecting the university's justifications for the program, the court concluded that, even assuming African-American underrepresentation and low retention and graduation rates, the program was not sufficiently "tailored" to remedying these conditions. The court noted that the program was improperly targeted to attracting high achieving African-American students, where "high achievers" were not the group against which the university had discriminated in the past.[125] In addition, the court noted that the scholarships were available to non-residents of Maryland, although the purported goal of the program was to increase the number of qualified African-American Maryland residents attending the university.[126] Moreover, the court concluded that the lack of evidence necessary to adequately determine the extent of disparities in African-American representation at the university and whether such disparities are tied to the university's past discrimination could allow the program to "remain in force indefinitely based on arbitrary statistics unrelated to constitutionally permissible purposes."[127]

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124 38 F.3d at 154. The court noted that the university's poor reputation in the African-American community was attributed, primarily to knowledge of the university's past discrimination. Mere knowledge of this fact, according to the court, is not the type of "present effect of past discrimination" needed to justify the use of race conscious remedial measure by the university. *Id.* In addition, the court found that the hostility toward African-American students on the university campus was more directly attributable to present societal discrimination, which is an "[in]sufficient ground for employing a race-conscious remedy at the University of Maryland." *Id.* at 154-55.

125 *Id.* at 158.

126 *Id.* at 158-159.

127 *Id.* at 160.

Although the minority scholarship issue has received significant attention in the political and public policy arenas, *Podberesky* represents the sole judicial pronouncement specifically addressing the constitutional validity of these programs. While the line of reasoning employed in the decision is fairly reflective of the analysis generally utilized in examining the validity of race-based remedial measures, the court's opinion appears to vary in one significant respect from the traditional equal protection analysis. As outlined in the discussion of *Wygant* and *Croson* above, the Supreme Court has generally required a showing of "specific" or "identified" instances of past discriminatory conduct on the part of the governmental entity involved in order to justify the use of a race-based remedial measure. In requiring that such entities additionally demonstrate the existence of "present effects of past discrimination", *Podberesky* represents the potential introduction of yet another analytical hurdle to be overcome by state and local governmental entities in defending the validity of their remedial programs. As such, the decision could have implications which extend beyond the minority scholarship debate and could very well be the subject of Supreme Court review in an upcoming term.

RACIAL GERRYMANDERING, THE VOTING RIGHTS ACT, AND THE CONSTITUTION

The Supreme Court's 1993 ruling in *Shaw v. Reno*[128] sparked a new wave of constitutional challenges to race-conscious governmental decisionmaking in regard to creation of majority-minority voting districts to comply with the Voting Rights Act. Under § 5 of Act, states and political subdivisions with low voter registration or participation rates, and with voting "tests or devices" in effect as of certain dates, are required to "preclear" any proposed new voting "practices or procedures," including redistricting plans, with the Attorney General or obtain judicial approval for the change from the District Court of the District of Columbia.[129] In 1982, Congress altered the statutory standard for determining compliance with the Act, as set forth in § 2, from a test based on discriminatory "intent" to an inquiry into the "effect" of any challenged practice or procedure.[130] The Supreme Court in *Thornburg v. Gingles* found vote dilution, or the impairment of the "ability of a protected class to elect its candidate of choice on an equal basis with other voters," to be a prohibited effect

[128] 113 S. Ct. 2816 (1993).

[129] 42 U.S.C. § 1973b-c.

[130] The Voting rights Act provides that a violation of § 2 occurs if, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by. . .[the Act] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

under § 2.[131] Thus, states covered by § 5 of the Voting Rights Act, including North Carolina, Louisiana, Georgia, and Texas, among others, are required to preclear any change in voting procedures by meeting both a standard of "non-retrogression"[132] and satisfying the *Thornburg* vote dilution test. However, compliance with the Voting Rights Act does not insulate voting procedures from constitutional challenge under the Fourteenth Amendment, as arose in *Shaw v. Reno*.

Following the 1990 census, numerous majority-minority districts were created by state legislatures to satisfy §2 requirements by enhancing minority group representation in federal, state, and local legislative bodies.[133] *Shaw* was a suit by five white voters challenging one of these newly created districts, the North Carolina twelfth Congressional District, as an unconstitutional gerrymander due to its irregular shape and the concentration of a majority of minority voters within its boundaries. Despite the fact that the redistricting plan had been preapproved under the Voting Rights Act, the Supreme Court in *Shaw* applied strict judicial scrutiny and required the State to demonstrate that the plan was narrowly tailored and necessary to achieve a compelling state interest under traditional Equal Protection doctrine.

Justice O'Connor carefully limited the Court's holding to redistricting plans which "although race neutral, are, on their face, unexplanable on grounds other than race."[134] The claim put forth by petitioners in *Shaw* was, according to the majority, analytically distinct from prior "vote dilution" decisions approving the use of "sound districting principles"--e.g. compactness, contiguity, respect for political subdivisions--to "afford fair representation" to racial minorities. The

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[131] 478 U.S. 30, 50-51 (1986). *Thornburg*, which concerned multimember districts, identified three "threshold conditions" for establishing a vote dilution claim: 1) that "[the minority group] is sufficiently large and geographically compact to constitute a majority in a single member district"; 2) "that [the minority group] is politically cohesive"; and 3) "that the white majority votes sufficiently as a bloc to enable it. . .usually to defeat the minority's preferred candidate." If the plaintiffs in a vote dilution suit establish these conditions, the court then considers other factors relevant to determining whether, "under the totality of circumstances," minorities have been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973b. These secondary factors can include a history of discriminatory voting practices, racially polarized voting, the relative presence of minorities in elected posts, and evidence of discrimination against minorities in other aspects of society that might hinder their ability to participate in the electoral process. 478 U.S. at 36-37. The *Gingles* holding has since been extended to single-member districts. *Growe v. Emison*, 113 S. Ct. 1075, 1091 (1993); *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993).

[132] *Beer v. United States*, 425 U.S. 130, 141 (1976)(a state may not gain preclearance under § 5 if the change in voting procedure will result in "a retrogression in the position of racial minorities with respect to their effective exercise" of the right to vote).

[133] For a complete judicial history of the legal controversy surrounding majority-minority congressional districts, both before and after the Supreme Court ruling in Shaw v. Reno, see "Majority-minority Congressional Districts: Court Challenges," ALD General Distribution Memorandum by Thomas M. Durbin (September 23, 1994).

[134] *Id.* at 2825.

North Carolina redistricting scheme was "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that separation lacked sufficient justification."[135] Therefore, according to Justice O'Connor, a racial classification such as the State's plan, which is ostensibly neutral but is an obvious pretext for racial discrimination, demands strict scrutiny. On this basis, the Court concluded that the case should be remanded to the district court to allow the State to answer the allegation of racial gerrymandering by proving that the plan is narrowly tailored to further a compelling state interest.

The *Shaw* ruling is significant for both its impact on voting rights litigation and Equal Protection jurisprudence. Nonetheless, it leaves several unanswered questions in its wake that the Court may address this term when it reviews other congressional redistricting cases from Louisiana and Georgia. First, Justice O'Connor conceded in *Shaw* that the Court has never held race-conscious decisionmaking impermissible in all circumstances. But the decision failed to define criteria for determining when a state redistricting plan is so "bizarre" or extremely irregular on its face as to be constitutionally suspect. Second, *Shaw* raises without resolving the issue of whether compliance with the Voting Rights Act vote dilution prohibition may be a compelling state interest. When the case was remanded to the three-judge district court in North Carolina, the federal panel concluded that the threshold for strict judicial scrutiny of race as a factor was reached but that the redistricting plan was justified by the state's compelling interest in complying Voting Rights Act.[136] By contrast, the three-judge court in *Johnson v. Miller*, now pending Supreme Court review, could find no adequate nonracial rationale for the creation of the Georgia Eleventh Congressional District, since there was no sufficiently large and compact minority population in southern-central Georgia to warrant creation of a majority-minority district in that area, and held the redistricting plan unnecessary for Voting Rights Act compliance. Since the district court in *Hays v. Louisiana* found that State's Z-shaped 4th Congressional District lacked the "narrow tailoring" necessary to withstand constitutional scrutiny, it simply assumed, without deciding, that the State's interest in complying with the Voting Rights Act was "compelling." Accordingly, the Court's review of the Georgia and Louisiana cases[137] this term may clarify important constitutional issues concerning congressional redistricting and the federal Voting Rights Act.

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135 *Id.* at 2832.

136 *Shaw v. Hunt*, No. 92-202-CIV-5-BR (E.D.N.C. 8-1-94).

137 *See* n. 3, 4 *supra*.

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February 17, 1995

TO : Honorable Robert Dole

FROM : American Law Division

SUBJECT : Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals or Other Preference Based on Race, Gender, or Ethnicity

This is in response to your request, by letter dated December 22, 1994, for "a comprehensive list of every federal statute, regulation, program, and executive order that grants a preference to individuals on the basis of race, sex, national origin, or ethnic background. Preferences include, but are not limited to, timetables, goals, set-asides, and quotas."

To compile the list of federal legal authorities contained in this memorandum, several searches on LEXIS/NEXIS and WESTLAW legal databases were undertaken utilizing a variety of search strategies which incorporated legal terminology most frequently associated with federal affirmative action and minority set-aside programs. This yielded citations to several hundred statutory and regulatory programs which we then examined individually to determine whether they appeared to be of the nature described in your inquiry. The compilation of laws included in this memorandum reflects our efforts to be as "comprehensive" as possible, in accordance with your instructions. Consequently, we have included any statute, regulation, or executive order uncovered by our research which appears, in any manner, to prefer or consider race, gender, or ethnicity as factors in federal employment or the allocation of federal contracts or grants to individuals or institutions.[1] Several laws and regulations directed to "socially and economically disadvantaged" individuals and

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1 As per discussions with your staff, however, we have not included federal civil rights statutes, such as Title VI of the 1964 Civil Rights Act and related laws, that place nondiscrimination requirements upon recipients of federal financial assistance without mandating racial, ethnic, or gender preferences *per se*. Nor are regulations of the various federal departments or agencies under Title VI included for the similar reason that, although they almost uniformly authorize "affirmative action" by recipients to "overcome the effects of prior discrimination" or otherwise, they do not explicitly define the obligation in terms of "goals" or "set-asides," or other forms of preference for minorities or women. *See e.g.* 15 C.F.R. 15.3(b)(6)(1994)(Department of Agriculture Title VI regulations). Also beyond the scope of this study are the remedy provisions in federal laws like Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e-5(g)), or the Fair Housing Act, 42 U.S.C. § 3613, which authorize "affirmative" relief by the courts in discrimination actions, and have been the basis for judicial preference orders in certain circumstances, but do not explicitly direct the imposition of "timetables, goals, set-asides, and quotas" on their face.

regulations directed to "socially and economically disadvantaged" individuals and institutions are included because, as explained *infra*, that term has been defined administratively and by statute to presumptively apply to specific racial and ethnic minorities. As a background for understanding operation of the numerous listed federal laws and regulations, more extensive discussion is devoted at various points to the development of major "affirmative action" programs in federal grant, contract, and employment law.

FEDERAL GRANT AND PROCUREMENT LAW

Federal efforts to increase minority and female participation in contracting, federally assisted programs, and employment have been a major aspect of civil rights enforcement for more than three decades. Congress and the Executive Branch have crafted a wide range of federal laws and regulations authorizing, either directly or by judicial or administrative interpretation, race or gender "conscious" strategies in relation to jobs, housing, education, voting rights, and governmental contracting. The historical model for federal laws and regulations establishing minority participation "goals" may be found in Executive Orders which since the early 1960's have imposed affirmative minority hiring and employment requirements on federally financed construction projects and in connection with other large federal contracts. Presently, Executive Order 11246 as administered by the Office of Federal Contract Compliance Programs (OFCCP) requires that all employers with federal contracts in excess of $50,000.00 must file written affirmative action plans with the government. These are to include minority and female hiring goals and timetables to which the contractor must commit its "good faith" efforts. Similar affirmative action measures relating to federal government employment were enacted as part of the Equal Employment Opportunity Act Amendment of 1972[2] and the 1978 Civil Service Reform Act.[3]

Affirmative action for minority entrepreneurs soon became a focus of efforts by the Small Business Administration (SBA) and other federal agencies to assist "socially and economically disadvantaged" small businesses under a variety of federal programs. Increasingly, an "affirmative action" model, in the form of participation "goals" or "set-asides" for members of racial or ethnic minorities, and businesses owned or controlled by these or other "disadvantaged" persons, found legislative expression in a wide range of federal programs.

The Small Business Act, as amended, provides the statutory prototype for a host of federal programs to increase minority and female participation as contractors or subcontractors on federally funded projects. First, the "Minority Small Business and Capital Ownership Development," or § 8(a) program

set-asides, and quotas" on their face.

[2] 42 U.S.C. § 2000e-16(b).

[3] 5 U.S.C. § 7201.

authorizes the Small Business Administration (SBA) to enter into all kinds of construction, supply, and service contracts with other federal departments and agencies. The SBA acts as a prime contractor and then "subcontracts" the performance of these contracts to small business concerns owned and controlled by "socially and economically disadvantaged" individuals, Indian Tribes or Hawaiian Native Organizations.[4]

Applicants for § 8(a) certification must demonstrate "socially disadvantaged" status or that they "have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities."[5] The Small Business Administration "presumes," absent contrary evidence, that small businesses owned and operated by members of certain groups--including Blacks, Hispanics, Native Americans, and Asian Pacific Americans--are socially disadvantaged.[6] Any individual not a member of one of these groups must "establish his/her individual social disadvantage on the basis of clear and convincing evidence" in order to qualify for § 8(a) certification. The § 8(a) applicant must, in addition, show that "economic disadvantage" has diminished its capital and credit opportunities, thereby limiting its ability to compete with other firms in the open market.[7]

The "Minority Small Business Subcontracting Program" authorized by § 8(d) of the Small Business Act codified the presumption of disadvantaged status for minority group members that applied by SBA regulation under the § 8(a) program.[8] Prime contractors on major federal contracts are obliged by § 8(d) to maximize minority participation and to negotiate a "subcontracting plan" with the procuring agency which includes "percentage goals" for utilization of small socially and economically disadvantaged firms. To implement this policy, a clause required for inclusion in each such prime contract states that "[t]he contractors shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to § 8(a). . ." Accordingly, SBA has discretion in designating a firm or individual as socially and

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4. 15 U.S.C. § 637(a).

5. 15 U.S.C. § 637(a)(5).

6. 13 CFR § 124.105(b).

7. The statute, 15 U.S.C. § 637(a)(6)(A), defines economic disadvantage in terms of:

> socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market.

8. 15 U.S.C. § 637(d). *See also* 13 CFR § 124.106.

economically disadvantaged for purposes of both the § 8(a) and § 8(d) programs in conformity with specified criteria.[9]

These obligations, first codified in 1978 as an amendment to the SBA, were augmented a decade later by the Business Opportunity Development Reform Act of 1988.[10] Congress there directed the President to set annual, government-wide procurement goals of at least 20% for small businesses and 5% for disadvantaged businesses, as defined by the SBA. Simultaneously, federal agencies were required to continue to adopt their own goals, compatible with the government-wide goals, in an effort to create "maximum practicable opportunity" for small disadvantaged businesses to sell their goods and services to the government. The goals may be waived where not practicable due to unavailability of disadvantaged business enterprises (DBEs) in the relevant area and other factors.[11] While the statutory definition of DBE includes a racial component, in terms of presumptive eligibility, it is not restricted to racial minorities but also includes persons subjected to "ethnic prejudice or cultural bias."[12] It also excludes businesses owned or controlled by persons who, regardless of race, are "not truly socially and/or economically disadvantaged."[13] Federal Acquisition Act amendments adopted in 1994 amended the 5% minority procurement goal, and the minority subcontracting requirements in § 8(d), to specifically include "small business concerns owned and controlled by women" in addition to "socially and economically disadvantaged individuals."[14]

In addition, Congress has frequently adopted "set-asides" or other forms of statutory preference for "socially and economically disadvantaged" firms and individuals, following the definitions of the Small Business Act, or by designating minority groups and women as part of specific grant or contract authorization programs. Thus, targeted funding, in various forms, and minority or disadvantaged business set-asides or preferences have been included in major authorization or appropriation measures for agriculture, communications, defense, education, public works, transportation, foreign relations, energy and water development, banking, scientific research and space exploration, and other

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9 15 U.S.C. § 637(d). Criteria set forth in the regulations permit an administrative determination of socially disadvantaged status to be predicated on "clear and convincing evidence" that an applicant has "personally suffered" disadvantage of a "chronic and substantial" nature as the result of any of a variety of causes, including "long term residence in an environment isolated from the mainstream of American society," with a negative impact "on his or her entry into the business world."13 C.F.R. § 124.105(c).

10 P.L. 100-656, § 502, 102 Stat. 3887, codified at 15 U.S.C. § 644(g)(1).

11 *See e.g.* 49 C.F.R. §§ 23.64(e), 23.65 (setting forth waiver criteria for the Department of Transportation.

12 15 U.S.C. § 637(a)(5).

13 *See* 49 C.F.R. Pt. 23, Subpt. D, App. C.

14 P.L. 103-355, 108 Stat. 3243, 3374, § 7106 (1994).

purposes. Other federal laws appear to authorize some consideration of race or gender to enhance the participation of minorities and women in federal programs or employment but without directly mandating preferential goals or set-asides.

The following statutes, regulations, and executive orders governing federal contracts and grant programs are, to the extent possible, grouped according to agency and subject matter.

Federal Acquisitions Regulations--General

48 C.F.R. § 19.001(b) (1994): "Individuals who certify that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans) are to be considered socially and economically disadvantaged" for purposes of "Socioeconomic Programs" under the Federal Acquisitions Regulation (FAR).

48 C.F.R. § 19.704 (1994): FAR requirement that "[s]eparate percentage goals for using small business concerns and small disadvantaged business concerns as subcontractors" be included in small disadvantaged business subcontracting plans.

48 C.F.R. § 19.706(c)(2) (1994): FAR subcontracting assistance program states that "[v]arious approaches may be used in the development of small and small disadvantaged business concerns subcontracting incentives. They can take many forms, from a fully qualified schedule of payments based on actual subcontract achievement to an award fee approach employing subjective evaluation criteria. . .The incentive should not reward the contractor for results other than those that are attributable to the contractor's efforts under the incentive subcontracting program." See also § 19.705-1 (monetary incentives for exceeding goals).

48 C.F.R. §§ 52.219-8, 52.219-9 (1994): Prescribe clauses for inclusion in federal prime and subcontract which require, inter alia, "[g]oal, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns and small disadvantaged business concerns as subcontractors."

Agriculture

7 U.S.C.S. § 3154(c): The Secretary of Agriculture is authorized "to set aside a portion of funds" appropriated for certain research on the production and marketing of alcohols and industrial hydrocarbons for grants to colleges and universities to achieve "the objective of full participation of minority groups."

7 C.F.R. § 225.6(g)(xi) (1994): Food service management companies participating in the Summer Food Service Program must submit with appropriate state agency a registration which is to include "a statement as to

whether the organization is a minority business enterprise" managed and controlled by "Blacks, Hispanics, American Indians, Alaskan Natives, Oriental and Aleuts. . ."

7 C.F.R. § 246.13(g) (1994): Financial management system maintained by state agencies participating in Special Supplemental Food Program for Women, Infants and Children are "encouraged" to use minority- and women-owned banks.

7 C.F.R. § 272.4(b)(1994): Bilingual program information and certification, and interpreters must be provided in certain low income areas with specified percentages of non-English speaking minority households under Food Stamp and Food Distribution Program.

7 C.F.R. § 1940.968(k)(3)(1994): States participating in certain rural economic development programs are "encouraged to use minority banks (a bank which is owned by at least 50 percent minority group members) for the deposit and disbursement of funds."

7 C.F.R. § 1942.17(p)(3)(iii) 1994): Applicants for certain FmHA community facilities loans are "encouraged to use minority banks (a bank which is owned by at least 50 percent minority group members) for the deposit and disbursement of funds."

7 C.F.R. § 1942.472(c) (1994): Grantees of certain rural housing and community development technical assistance and training grants are "encouraged to use minority banks (a bank which is owned by at least 50 percent minority group members) for the deposit and disbursement of funds."

7 C.F.R. § 1944.526(a)(2)(i)(D) (1994): Preapplication process for Technical and Supervisory Assistance Grant program considers in determining applicant's eligibility "the estimated number of low income and low income minority families the applicant will assist in obtaining affordable adequate housing."

7 C.F.R. § 1944.671(b) (1994): Equal Opportunity and outreach requirements applicable to FmHA Housing Preservation Grants program state that "[a]s a measure of compliance, the percentage of the individuals served by the HPG grantee should be in proportion to the percentages of the population of the service area by race/national origin."

7 C.F.R. §§ 3015.13, 3016.21(h) (1994): "Consistent with the national goal of expanding opportunities for minority business enterprises, recipients and subrecipients" of federal financial assistance administered by the Department of Agriculture "are encouraged to use minority and women-owned banks. Upon request, awarding agencies will furnish a listing of minority and women-owned banks to recipients."

7 C.F.R. 3051 APPENDIX A (1994): OMB Circular A-133, Audits of Institutions of Higher Education and Other Nonprofit Institutions. "11. Small

and Minority Audit Firms. Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this circular." See also OMB Circular A-128 (.19)(Uniform Audit Requirements for State and Local Governments), 29 C.F.R. Part 96 APPENDIX A (1994).

7 C.F.R. §§ 3403.1, 3403.2 (1994): USDA regulations implementing small business innovation grants program which as one of its goals is to "foster and encourage minority and disadvantaged in technological innovation." For purposes of this program "minority and disadvantaged individual is defined as a member of any of the following groups: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, or Subcontinent Asian Americans."

48 C.F.R. §§ 419.201-72(a), 419.202-71(a) (1994): The Department of Agriculture small disadvantaged business regulations state that "[t]he Department is required. . .to establish fiscal year goals for the procurement preference programs" and mandate "[establishing aggressive minority and women-owned business goals based on the annual review of advance acquisition plans."

48 C.F.R. § 422.804-2 (1994): Affirmative action program provision relating to the Department of Agriculture which states that "each contracting office awarding nonexempt construction contracts maintains a current listing of covered geographical areas subject to affirmative action requirements specifying goals for minorities and women in covered construction."

48 C.F.R. § 452.215-71 (1994): Department of Agriculture instructions for the preparation of technical and cost or pricing proposals state that the contract offeror "[i]ndicate what positive efforts your company will take to implement the concepts of equal employment under the proposed contract" and state the extent of minority enterprise participation "goals the contractor has set in the past five (5) years and his actual performance against these goals."

Banking

12 U.S.C.S. § 1441a(r-w): Provides for various incentives, including "preference points" on proposals and minority capital assistance programs, to preserve and expand bank ownership by minorities and women; authorizes establishment of Resolution Trust Corporation guidelines to achieve parity in distribution of RTC contracts, and "reasonable goals" for subcontracting, to minority and women-owned businesses and firms; and provides a "[m]inority preference in acquisition of institutions in predominantly minority neighborhoods."[15]

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[15] As amended by §3(a) of the Resolution Trust Completion Act, P.L. 103-204, 107 Stat. 2369, 2375 (1993).

12 U.S.C.S. § 1823(f)(12): Authorizes Federal Deposit Insurance Corporation (FDIC) approval of minority-controlled bank acquisitions by minority-controlled holding companies without regard to asset size.

12 U.S.C.S. § 2219c: Requires that "all institutions of the Farm Credit System with more than 20 employees shall establish and maintain an affirmative action program plan that applies the affirmative action standards otherwise applied to contractors of the Federal Government."

12 U.S.C.S. § 2907: Any donation or sale on favorable terms of bank branch in minority neighborhood to minority or women-owned depository institution shall be a factor in determining the seller or donor institution's compliance with the Community Reinvestment Act.

12 C.F.R. § 4.63 (1994): Establishes Contracting Outreach Program for the Office of Comptroller of the Currency to "ensure that minority and women-owned businesses have the opportunity to participate, to the maximum extent possible, in contracts awarded by the OCC." "Minority means any African American, Native American. . ., Hispanic American, Asian-Pacific American, or Subcontinent-Asian American."

12 C.F.R. Part 361, §§ 361.2, 361.10 (1994): Federal Deposit Insurance Corporation "Minority and Women Outreach Program" states "policy of the FDIC that minorities and women and entities owned by minorities and women shall have maximum practicable opportunity to participate in [FDIC] contracts" and requires prime contractors "to carry out the FDIC minority and women-owned business contracting policy in the awarding of subcontracts to the fullest extent, consistent with the efficient performance of the awarded contract."
For this purpose "minority" means "any Black American, Native American Indian, Hispanic American, or Asian American."

12 C.F.R. §§ 517.5, 517.7 (1994): The Minority, Women, and Individuals with Disabilities Outreach Program of the Office of Thrift Supervision (OTS) defines "[o]utreach activities" to include "identification and registration of minority-, women-owned (small and large) businesses" and "[m]onitoring proposed purchases to assure that OTS contracting staff understand and actively promote the outreach program." Contract award guidelines state that "[t]he OTS Outreach Program Advocate shall work to facilitate the maximum participation of minority and women-owned. . .businesses. . .in the OTS procurement of goods and services."

12 C.F.R. Part 1507 (1994): Minority and Women Contracting Outreach Program of the Thrift Depositor Protection Oversight Board requires the Board's staff to formulate guidelines providing opportunities, "to the maximum extent possible, for the inclusion of minorities and women," and entities owned by them, in the performance of Board contracts; to undertake specified outreach activities; and to report periodically on minority and women-owned business participation in the contracting process, and as subcontractors on Board

contracts. "Minority" means "Black American, Native American, Hispanic American, or Asian American."

12 C.F.R. Part 1617 (1994): Minority and Women Outreach and Contracting Program of the Resolution Trust Corporation (RTC) describes a variety of outreach activities (§ 1617.11); provides procedures for certification of minority and women-owned businesses (§ 1617.13); provides "incentives" and "bonus considerations" to RTC prime contractors "who demonstrate[] a commitment to subcontract at least 25 percent or more of the work" to minority or women-owned firms (§ 1617.30); and "reserves the right to award a contract directly to a MWOB either by technical competition or by con-competitive award." "Technical and cost bonus points" may be awarded to contractors with an "eligible subcontracting plan" for women and minorities (§ 1617.60). A special outreach program is provided to promote participation of minority and women-owned law firms in RTC legal services contracting (§ 1617.90).

13 C.F.R. §§ 317.19(b), 317.35 (1994): "No grant shall be made. . .for any project" under the Local Public Works Capital Development and Investment Program "unless at least 10 percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises." All applications for assistance must contain certification to that effect. "Minority group member means a citizen of the United States who is Negro, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut." (13 C.F.R. 317.2).

Commerce

Executive Order 11625 (1971): Directs the Secretary of Commerce "[w]ith the participation of other Federal departments and agencies. . .[t]o develop comprehensive plans and specific program goals for the minority enterprise program; establish regular performance monitoring and reporting systems to assure that goals are being achieved; and evaluate the impact of Federal support in achieving the objectives established by the order." *See also* Executive Order 12138 (Women-owned Business Enterprise Program).

15 C.F.R. § 24.21(h) (1994): Grantees and subgrantees of certain grants and cooperative agreements to state and local government "are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members)."

15 C.F.R. § 917.11(d) (1994): A "factor considered" in the approval of proposals under the Sea Grant Matched Funding Program "will be the potential of the proposed program to stimulate interest in marine related careers among those individuals, for example, minorities, women, and the handicapped whose previous background or training might not have generated such an interest."

15 C.F.R. § 2301.3 (1994): The National Telecommunications and Information Administration of the Department of Commerce, in administering the Public Telecommunications Facilities Program, "will give special

consideration to applications that foster ownership and control of, operation of, and participation in public telecommunication entities by minorities and women."

48 C.F.R. § 1319.7003(a) (1994): Directs contracting officers of the Commerce Department to "provide assistance to prime contractors to identify potential women-owned small businesses. Such assistance is intended to aid prime contractors in placing a fair proportion of subcontracts with women-owned businesses."

Communications

47 U.S.C.S. § 309(j)(4)(D): In radio licensing proceedings, the Federal Communications Commission is directed to prescribe regulations to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures."

47 C.F.R. § 73.3555(d)(2)(ii)(1994): Federal Communication Commission (FCC) multiple ownership rules provide exemption for "minority-controlled" broadcast facilities from certain restrictions on the granting or transfer of commercial TV broadcast stations which result in an aggregate national audience exceeding twenty-five percent. "*Minority* means Black, Hispanic, American Indian, Alaska Native, Asian and Pacific Islander." (*italics* in original).

47 C.F.R. § 76.977(a),(b),(e) (1994): Minority and educational programming used in lieu of deregulated commercial leased access capacity. "A cable operator required by this section to designate channel capacity for commercial use pursuant to 47 U.S.C. 532 may use any such channel capacity for the provision of programming from a qualified minority programming source. . .whether or not such source is affiliated with cable operator." "Qualified minority programming source" means a source "that devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned." "Minority" includes "Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders."

68 F.C.C. 2d 381, 411-412 (1978). FCC policy awards a quality enhancement credit for minority ownership and participation in station management in the comparative licensing process. When faced with mutually exclusive applications for the same broadcast channel, the FCC initiates a proceeding to compare the merits of the competing applicants based on specific factors including: diversification of control of mass media communications, full time participation in station management by owners, proposed program service, past broadcast record, efficient use of frequency, and character of the applicant. Under the FCC's preference policy, ownership and active participation in station

management by members of a minority group are considered a plus to be weighed in with the other comparative factors.

68 F.C.C. 2d 983 (1978): FCC "Distress Sale" Policy. Under this policy, existing licensees in jeopardy of having their licenses revoked or whose licenses have been designated for a renewal hearing are given the option of selling the license to a minority-owned or controlled firm for up to seventy-five percent of fair market value. The minority-assignee must meet the basic qualifications necessary to hold a license under FCC regulations and must be approved by the FCC before the transfer is consummated.

Defense

10 U.S.C.S. § 2196(j)(8): Selection criteria for manufacturing engineering grant program established by the Secretary of Defense require proposal by applicant "to achieve a significant level of participation by women, members of minority groups, and individuals with disabilities through active recruitment of students from among such persons."

10 U.S.C.S. § 2323: Establishes a goal of awarding five percent of the total value of Department of Defense procurement, research and development, military construction, and operation and maintenance contracts to "socially and economically disadvantaged individuals," historically black colleges and universities, and minority institutions in each of the fiscal years from 1987 to 2000. This requirement was extended to contracting activities of the Coast Guard and the National Aeronautics and Space Administration by § 7105 of the Federal Acquisition Act of 1994, P.L. 103-355, 108 Stat. 3243, 3369 (1994) which also added a requirement that "[t]o the extent practicable," the head of each of these agencies is to "maximize the number of minority small business concerns, historically Black colleges and universities, and minority institutions participating in the program."

P.L. 103-335, 108 Stat. 2259, 2652, § 8127(a)(1994): "In entering into contracts with private entities to carry out environmental restoration and remediation of Kaho'olawe Island, Hawaii, and the waters surrounding that island, the Secretary of Navy shall, to the maximum extent practicable, give a preference to small business concerns and small disadvantaged business concerns located in the State of Hawaii. In giving the preference, the Secretary shall give especial preference to businesses owned by Native Hawaiians."

32 C.F.R. § 33.21(h) (1994): Department of Defense (DOD) Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments "encourage" DOD grantees and subgrantees to use minority banks at least 50% owned by minority group members.

48 C.F.R. § 205.207(d)(iv) (1994): States that "[f]or acquisition being considered for historically black college and university and minority institution

set-aside," the proposed contract "is being considered as a 100 percent set-aside for historically black colleges and universities (HBCUs) and minority institutions (MIs), as defined by the clause at §252.226-7000 of the Defense Acquisition Regulation Supplement."

48 C.F.R. Part 219, § 219.000 (1994): DOD regulation which implements "goal" in 10 U.S.C. 2323 to "[a]ward five percent of contract and subcontract dollars to small disadvantaged business (SDB) concerns, historically black colleges and universities (HBCUs), and minority institutions (MIs)." DOD adopts the Small Business Act definition of "disadvantaged" individuals which presumptively includes designated racial and ethnic minorities. *See* 48 C.F.R. § 252.219-7000; 13 C.F.R. Part 124, § 124.106(b). Specific requirements include data collection and reporting (§ 219.202-5); eligibility criteria for program participation (§ 219.703); subcontracting plan goals for SDB concerns and institutions (§ 219.704); reviewing the subcontracting plan (§ 219.705-4); solicitation provisions and contract clauses (§ 219.708); and evaluation preference for small disadvantaged business concerns ("by adding a factor of ten percent to the price of all offers")(§ 219.7002). See also 48 C.F.R. § 226.7000 (implements the historically black college and university and minority institution provisions of 10 U.S.C. § 2323; § 252.219-7005) (small business and small disadvantaged business subcontracting plan on DOD contracts); § 252.219.7005 (incentive for subcontracting with small businesses, small disadvantaged businesses, historically black colleges and universities, and minority institutions); § 252.219-7006 (notice of evaluation preference for small disadvantaged business concerns); and §252.226-7000 (notice of historically black college or university and minority institution set-aside).

48 C.F.R. Chapter 2 APPENDIX I (1994): Pilot Mentor-Protege Program is to "provide incentives to major DOD contractors, performing under at least one active approved subcontracting plan negotiated with DOD or other Federal agencies, to assist small disadvantaged businesses (SDBs) in enhancing their capabilities to satisfy DoD and other contract and subcontract requirements."

Education

20 U.S.C.S. § 1047: Authorizes grants and contracts by the Department of Education (ED) with "historically black colleges and universit[ies]" and other institutions of higher education serving a "high percentage of minority students" for the purpose of strengthening their library and information science programs, and establishing fellowships and traineeships for that purpose.[16]

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[16] Opinions may reasonably differ as to whether federal programs that exclusively aid "historically black colleges and universities" or other minority institutions are a form of racial "preference." Without expressing any view on that policy issue, however, such programs are included here only because they employ racial and ethnic criteria or classification as the basis for distribution of federal benefits and, accordingly, at least arguably fall within the ambit of your inquiry.

20 U.S.C.S. § 1063b: Authorizes ED grants to specified postgraduate institutions "determined by the Secretary [of Education] to be making substantial contributions to the legal, medical, dental, veterinary, or other graduate education opportunities for Black Americans."

20 U.S.C.S. § 1069f(c): Reservation of 25% of the excess of certain educational appropriations for allocation "among eligible institutions at which at least 60 percent of the students are African Americans, Hispanic Americans, Native Americans, Asian Americans, Native Americans, Native Hawaiians, or Pacific Islanders, or any combination thereof."

20 U.S.C.S. § 1070a-41: "Priority" in selection for Model Program Community Partnership and Counseling Grants given to program proposals "directed at areas which have a high proportion of minority, limited English proficiency, economically disadvantaged, disabled, nontraditional, or at-risk students. . ."

20 U.S.C.S. § 1112d(d): "Special consideration" to be given "historically Black colleges and universities" and to institutions having at least 50% minority enrollment in making grants for teacher training and placement.

20 U.S.C.S. § 1132b-2: In awarding facilities improvement grants, the ED Secretary or each State higher education agency "shall give priority to institutions of higher education that serve large numbers or percentages of minority or disadvantaged students."

20 U.S.C.S. § 1134e: In making grants for post-graduate study, the ED Secretary shall "consider the need to prepare a larger number of women and individuals from minority groups, especially from among such groups which have been traditionally underrepresented in professional and academic careers," and shall accord a "priority" for awards to "individuals from minority groups and women" pursuing study in specified professional and career fields.

20 U.S.C.S. § 1134s: The ED Secretary "shall carry out a program to assist minority, low-income, or educationally disadvantaged college students" to pursue a degree and career in law through an annual grant or contract.

20 U.S.C.S. §§ 1135c, 1135d: The ED Secretary shall "carry out a program of making grants to institutions of higher education that are designed to provide and improve support programs for minority students enrolled in science and engineering programs as institutions with a significant minority enrollment (at least 10 percent)." Eligibility for such grants is limited to "minority institutions" (minority enrollment in excess of 50%) or other public or private nonprofit institutions with at least 10 percent minority enrollment.

20 U.S.C.S. § 1409(j)(2): The ED Secretary "shall develop a plan for providing outreach services" to historically Black colleges and universities, other higher educational institutions with at least 25% minority student enrollment, and "underrepresented populations" in order to "increase the participation of

such entities" in competitions for certain grants, contracts, and cooperative agreements.

20 U.S.C.S. § 1431(a)(3): "Priority consideration" for fellowships and traineeships in special education and related services shall be given to "individuals from disadvantaged backgrounds, including minority and individuals with disabilities who are underrepresented in the teaching profession or in the specialization in which they are being trained."

20 U.S.C.S. § 2986(b): A portion of state allotment of critical skills improvement funds to be distributed for various purposes, including "recruitment or retraining of minority teachers to become mathematics and science teachers."

20 U.S.C.S. § 3156(a): Program to assist local educational agencies "which have significant percentages of minority students" to conduct "alternative curriculum" schools which "reflect a minority composition of at least 50 percent" and contribute to school desegregation efforts.

20 U.S.C.S. § 3916: Fifteen percent of National Science Foundation funds available for science and engineering education is to be allocated to faculty exchange and other programs involving higher educational institutions with "an enrollment which includes a substantial percentage of students who are members of a minority group."

20 U.S.C.S. § 5205(d): No less than 10 percent of Eisenhower Exchange Fellowship Program funds "shall be available only for participation by individuals who are representative of United States minority populations."

20 U.S.C.S. § 6031(c)(5): ED "shall establish and maintain initiatives and programs to increase the participation" of "researchers who are women, African-American, Hispanic, American Indian and Alaskan Native, or other ethnic minorities" in the activities of various authorized educational institutes.

42 U.S.C.S. § 292g(d)(3): For a three-year period beginning on October 13, 1992, historically black colleges and universities are exempted from provision rendering certain institutions ineligible for student loan program based on high loan default rate.

42 U.S.C.S. § 293a: "Special consideration" in scholarship grant program to be given "health profession schools that have enrollments of underrepresented minorities above the national average for health profession schools."

42 U.S.C.S. § 293b(3): Institutional eligibility for faculty fellowship program based on "ability to. . .identify, recruit and select individuals from underrepresented minorities in the health profession" with potential for teaching and educational administration.

42 U.S.C.S. § 1862d: At least 12 percent of amounts appropriated for the Academic Research Facilities Modernization Program shall be reserved for historically Black colleges and universities and other institutions which enroll a substantial percentage of Black American, Hispanic American, or Native American students.

34 C.F.R. § 74.12 (1994): Department of Education (ED) Uniform Administrative Requirements for Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations "encourage" ED grantees and subgrantees to use minority-owned banks. See also 34 C.F.R. § 80.21(h) (1994).

34 C.F.R. § 318.11(a)(15), (16) (1994): Includes "[t]raining minorities and individuals with disabilities" and "minority institutions" among several optional funding priorities under special education training program.

34 C.F.R. § 461.33(a)(2)(ii) (1994): "[P]articular emphasis" placed on training "minority" adult educators under one aspect of adult education demonstration grant program.

34 C.F.R. Part 607, § 607.2(b) (1994): An institution of higher education is eligible to receive a grant under the Strengthening Institutions Program even if it does not satisfy certain other generally applicable state authorization or accreditation requirements if its student enrollment consists of specified percentages of designated minority groups.

34 C.F.R. Parts 608, 609 (1994): "The Strengthening Historically Black Colleges and Universities Program [HBCU] provides grants to Historically Black Colleges and Universities to assist these institutions in establishing and strengthening their physical plants, academic resources and student services so that they may continue to participate in fulfilling the goal of equality of educational opportunity."(§ 608.1).

34 C.F.R. § 637.1 (1994): "The Minority Science Improvement Program is designed to effect long-range improvement in science education at predominantly minority institutions and to increase the flow of underrepresented ethnic minorities, particularly minority women, into scientific careers."

34 C.F.R. § 641.1 (1994): "The Faculty Development Fellowship Program provides grants to institutions of higher education, consortia of institutions, and consortia of institutions and nonprofit organizations to fund fellowships for individuals from underrepresented minority groups to enter or continue in the higher education professorate."

Energy

42 U.S.C.S. § 7141: The Secretary of Energy "may provide financial assistance in the form of loans to any minority business enterprise under such rules as he shall prescribe to assist such enterprises in participating fully in

research, development, demonstration, and contract activities of the Department to the extent he considers appropriate."

42 U.S.C.S. § 13556: Provides that "[t]o the extent practicable, the head of each agency shall provide that the obligation of not less than 10 percent of the total combined amounts obligated for contracts and subcontracts by each agency" under the Energy Policy Act of 1992 "shall be expended with" socially and economically disadvantaged small businesses, historically Black colleges or universities, or college and universities with more than 20 percent Hispanic or Native American enrollment.

P.L. 103-160, 107 Stat. 1547, 1956, § 3159 (1993): Provides, as a "goal," that 5 percent of the combined total of funds obligated by the Department of Energy for purposes of carrying out national security programs for fiscal years 1994 through 2000 be allocated to contracts and subcontracts with socially and economically disadvantaged small businesses, historically black colleges and universities, and minority institutions.

10 C.F.R. § 600.3 (1994): "Socially and economically disadvantaged" firm or individual, for purposes of Department of Energy (DOE) financial assistance rules, is defined to include "Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and other specified minorities, or any other individual found to be disadvantaged by the Small Business Administration under § 8(a) of the Small Business Act."

10 C.F.R. 799.2, 799.7 (1994): A requirement of DOE loan guarantee program for waste projects that "the borrower agree to take positive efforts to maximize the utilization of small and disadvantaged business concerns in connection with the project. . ." For this purpose, "[d]isadvantaged business concern means a concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals" as defined by the Small Business Act.

10 C.F.R. Part 800, § 800.003 (1994): Under DOE regulations setting forth policies and procedures for the award and administration of loans to minority small business enterprises, "[a]n individual who is a citizen of the United States and who is a Negro, Puerto Rican, American Indian, Eskimo, Oriental, or Aleut, or is a Spanish speaking individual of Spanish descent, is a member of a 'minority'. . ."

10 C.F.R. § 1040.101(b)(1),(2) (1994): Under DOE regulations prohibiting discrimination in federally assisted programs, the agency is to select recipients for compliance reviews based, among other factors, on "[t]he relative disparity between the percentage of minorities, women, or handicapped persons, in the relevant labor market, and the percentage of minorities, women, or handicapped persons, employed by the recipient" or "in the population receiving program benefits."

Environment

P.L. 101-549, 104 Stat. 2399, 2708, § 1001 (1990): "In providing for any research relating to the requirements of the amendments made by the Clean Air Act Amendments of 1990 which uses funds of the Environmental Protection Agency, the Administrator of the Environmental Protection Agency shall, to the extent practicable, require that not less than 10 percent of total Federal funding for such research will be made available to disadvantaged business concerns," defined to mean any concern with 51% of the stock owned by Black Americans, Hispanic Americans, Native Americans, Asian Americans, Women or Disabled Americans.

40 C.F.R. § 33.240 (1994): Environmental Protection Agency (EPA) procurement requirements provide that "[i]t is EPA policy to award a fair share of subagreements to small, minority, and women's businesses. The recipient must take affirmative steps to assure that small, minority, and women's businesses are used when possible as sources of supplies, construction, and services."

40 C.F.R. § 35.936-7 (1994): Grantees of EPA state and local assistance grants "shall make positive efforts to use small business and minority owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for subagreements to be performed using Federal grant funds." See also 40 C.F.R. Part 35 APPENDIX C-1 (14.)(consulting engineering agreement).

40 C.F.R. § 35.3145(d) (1994): State Water Pollution Control Revolving Fund requirement "for the participation of minority and women owned businesses (MBE/WBEs) will apply to assistance in an amount equaling the grant. To attain compliance with MBE/WBE requirements, the [regional administrator] will negotiate an overall 'fair share' objective with the State for MBE\WBE participation on these SRF funded activities. A fair share objective should be based on the amount of the capitalization grant award or other State established goals." See also 40 C.F.R. § 35.4066(g) (1994)(grants for technical assistance).

40 C.F.R. § 35.6580 (1994): Recipients under Cooperative Agreements and Superfund State Contracts for Superfund Response Actions "must comply with six steps. . .to insure that MBEs, WBEs, and small businesses are used whenever possible as sources of supplies, construction, and services," including establishment of "an annual 'fair share' objective for MBE and WBE use."

General Services Administration

41 C.F.R. §§ 105-71.121(j), 105-72.302(j) (1994): General Services Administration (GSA) Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments "encourage" recipients to use minority-owned and women-owned banks.

41 C.F.R. § 105-72.504(b) (1994):[17] All recipients of GSA grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations are to establish written procurement procedures to provide for "positive efforts. . .to utilize small businesses, minority-owned businesses, and women's business enterprises, whenever possible" and to ensure that such businesses "are utilized to the fullest extent practicable."

48 C.F.R. § 552.219-9 (1994): Small business subcontracting plan prescribed for General Service Administration contracts requires "[g]oals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns, small disadvantaged business concerns and, if an individual contract is involved, women-owned small business concerns as subcontractors."

Health and Human Services

42 U.S.C.S. § 3027: State plans for grant program on aging "shall provide assurances that special efforts will be made to provide technical assistance to minority providers of services."

42 U.S.C.S. § 3035d: Provides that the Assistant HHS Secretary "shall carry out, directly or through grants or contracts, special training programs and technical assistance designed to improve services to minorities" under the Older Americans Act.

42 C.F.R. § 52c.2 (1994): Minority Biomedical Research Support Program makes grants to higher educational institutions with 50 percent or other "significant proportion" of ethnic minority enrollment.

42 C.F.R. § 62.57(h) (1994): Among factors considered in making certain State loan repayment grants to State applicants is "[t]he extent to which special consideration will be extended to medically underserved areas with large minority populations."

42 C.F.R. § 64a.105(d)(2) (1994): "Preferred service" for purposes of obligated service requirement for mental health traineeships includes service in any public or private nonprofit entity serving 50 percent or more specified racial or ethnic minorities.

45 C.F.R §§ 74.12(h), 92.21(h), 602.21(h) (1994): Department of Health and Human Services (HHS) general administration requirements "encourage" grantees and subgrantees to use minority banks at least 50% owned by minority group members. Similar provisions may be found at 45 C.F.R. §§ 1050.13, 1157.21, 1174.21, 1183.21, and 1234.21.

45 C.F.R. § 1010.30-2(c)(1),(2) (1994): Civil rights program requirements of Community Service Act grantees provide that the Office of Human Rights

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17 59 Fed. Reg. 47279 (September 15, 1994).

will consider when selecting for compliance reviews "[t]he relative disparities between the percentage of eligible minority or female populations, if appropriate, receiving program benefits and the percentage of eligible minorities or females, if appropriate, in the eligible population."

48 C.F.R. § 319.705-4(d)(i)(ii) (1994): HHS small disadvantaged business subcontracting regulation require contracting officer to insure that "[s]ubcontracting goals for small and small disadvantaged business concerns are specifically set forth in each contract or modification over the statutory thresholds. . ." See also §§ 319.705-6, 319.706.

Housing and Urban Development

24 C.F.R. § 84.22(j):[18] All recipients of Department of Housing and Urban Development (HUD) grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations "shall be encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members)." Same provisions apply to use of lump-sum grants under this program, 24 C.F.R. § 84.82(c)(2), a related HUD state and local grant and cooperative agreement program, 24 C.F.R. § 85.21(h) (1994), and comprehensive planning assistance grants at 24 C.F.R. § 600.410(k)(2) (1994).

24 C.F.R. § 84.44(b): All recipients of HUD grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations are to establish written procurement procedures to provide for "positive efforts . . .to utilize small businesses, minority-owned businesses, and women's business enterprises, whenever possible" and to ensure that such businesses "are utilized to the fullest extent practicable." Same provisions apply to procurement standards used by recipients for the procurement of supplies, equipment, real property and other services with federal funds. 24 C.F.R. § 84.84(e)(2)(i).

24 CFR APPENDIX A and B to SUBTITLE A § 425(a)(8) (1994): Rating factors for award of certain HUD Public and Indian Housing Home Ownership funds to accord maximum 10 points for "[t]he extent to which the applicant demonstrates a firm commitment to promoting the use of minority business enterprises and women-owned businesses, especially resident-owned businesses". . ."but may not include awarding contracts solely or in part on the basis of race or gender."

24 C.F.R. § 572.320(e) (1994): HUD will assign points in rating applications for certain single-family home ownership grants based on "[t]he extent to which the applicant demonstrates a firm commitment to promoting the use of minority business enterprises and women-owned businesses". . ."but may not include awarding contracts solely or in part on the basis of race or gender."

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[18] The provisions listed in 24 C.F.R. Part 84 are not yet codified by may be found at 59 Fed. Reg. 47010 et seq. (September 13, 1994).

24 C.F.R. §§ 850.33(o), .35(b), .399b)(9) (1994): Applications for Section 8 Housing Assistance Programs and Section 202 Direct Loan Program must include a "description of minority and women representation in the ownership of the project" and "a minority and women-owned business development plan which shall contain specific and measurable goals and an affirmative strategy to promote awareness and participation of such businesses in the contracting and procurement activities generated by the project." In addition "[m]ore favorable consideration will be given to projects with the higher percentage of minority or women representation in the ownership of the project."

24 C.F.R. § 968.110(b) (1994): Public housing modernization program requirements include: "the [public housing authority] shall take every action to meet Departmental goals for awarding modernization contracts to minority business enterprises. The PHA shall take appropriate affirmative action to assist women's business enterprises."

24 C.F.R. § 968.320(d)(7)(vii): Public Housing Modernization program includes requirement of comprehensive plan certifying that "[t]he PHA has adopted the goal of awarding a specified percentage of the dollar value of the total of the modernization contracts, to be awarded during subsequent FFYs, to minority business enterprises and will take appropriate affirmative action to assist resident-controlled and women's business enterprises. . ."

48 C.F.R. § 2419.901 (1994): Department of Housing and Urban Development (HUD) Office of Socially Disadvantaged Business Utilization is responsible for "Department-wide goals" for contract awards "to women-owned businesses" and monitoring and reporting with respect thereto.

48 C.F.R. § 2426.101 (1994): States the policy of the Department of Housing and Urban Development "to foster and promote Minority Business Enterprise (MBE) participation in its procurement program, to the extent permitted by law and consistent with its primary mission." For this purpose, "minority" is defined as "Black Americans, Hispanic Americans, Hispanic Americans, Native Americans, Asian Pacific Islanders and Asian Indian American, and Hasidic Jewish Americans." *See also* 48 C.F.R. § 2452.219-70 (Small Business and Small Disadvantaged Business Subcontracting Plan to include percentage goals).

Interior

25 C.F.R. § 276.3(c) 1994): Uniform administrative requirements for grants by the Bureau of Indian Affairs "encourage" grantees to use minority banks.

43 C.F.R §§ 12.61(h), 12.922(j) (1994): Department of Interior Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments "encourage" grantees and subgrantees to use minority banks at least 50% owned by minority group members.

43 C.F.R. § 12.944(b) (1994): Department of Interior procurement requirements provide that "[i]t is EPA policy to award a fair share of subagreements to small, minority, and women's businesses. The recipient must take affirmative steps to assure that small, minority, and women's businesses are used when possible as sources of supplies, construction, and services."

43 C.F.R. § 27.6 (1944): Affirmative action plan requirements for recipient of financial assistance from the Department of Interior include "specific goals and specific timetables to which its efforts will be directed, to correct all deficiencies and thus to increase materially the participation of minorities and women in all aspects of its operation."

48 C.F.R. § 1419.901 (1994): Department of Interior socioeconomic program regulations state that "[a]nnual goals for contract awards to women-owned businesses shall be established as prescribed in 1419.202-70."

Justice

P.L. 103-322, 108 Stat. 1796, 1860, § 31001 (1994): Not less than 10 percent of the amount paid from the Local Government Fiscal Assistance Fund created by the Violent Crime Control Act shall be expended on contracts or subcontracts with socially and economically disadvantaged and women-owned small businesses, historically Black colleges and universities, and higher educational institutions with more than 40 percent Hispanic student enrollment.

28 C.F.R. § O.18a (1994): Provides that Director of the Office of Small and Disadvantaged Business Utilization within the Department of Justice shall "[e]stablish Department goals for the participation by small businesses, including small businesses owned and controlled by socially and economically disadvantaged individuals, in Department procurement contracts."

28 C.F.R. § 42.206 (c)(1) (1994): Recipients of Criminal Justice Improvement Act funds shall be selected for post-award compliance reviews in part on the basis of "[t]he relative disparity between the percentage of minorities, or women, in the relevant labor market, and the percentage of minorities, or women, employed by the recipient."

28 C.F.R. § 66.21(h) (1994): Uniform requirements by the Justice Department for administration of state and local grants and cooperative agreements "encourage" grantees and subgrantees to use minority banks at least 50 percent owned by minority groups.

Labor

29 U.S.C.S. § 718b(b): Directs the Commissioner of the Rehabilitation Services Administration to develop an "outreach" policy for "recruitment of minorities into the field of vocational rehabilitation, counseling and related

disciplines" and for "financially assisting Historically Black Colleges and Universities, Hispanic-serving institutions of higher education, and other institutions of higher education whose minority enrollment is at least 50 percent."

29 U.S.C.S. § 771a: Authorizes grants for personnel projects relating to training, traineeships and related activities to historically Black colleges and universities and other higher educational institutions with at least 50% minority student enrollment.

20 C.F.R. § 627.430(g) (1994): Recipients and subrecipients of Job Training Partnership Act funds are "encouraged to use minority-owned banks (a bank which is owned at least 50 percent by minority group members)."

20 C.F.R. § 653.111 (a), (b)(3) (1994): State agencies participating in the administration of Services for Migrant and Seasonal Farmworkers, under the United States Employment Service, are to develop affirmative action plans which contain "a comparison between the characteristics of the staff and the workforce and determine if the composition of the local office staff(s) is representative of the racial and ethnic characteristics of the workforce in the local office service area(s)." "On a statewide basis, staff representative of the racial and ethnic characteristics in the workforce shall be distributed in substantially the same proportion among (1) all 'job groups'. . .and (2) all offices in the plan(s)."

29 C.F.R. §§ 89.52(d), 89.72(d), 95.22(j), 97.21(h), 1470.21(h) (1994): Administrative requirements for Department of Labor (DOL) Project Grants to State and Local Governments, higher educational institutions, and other programs, "encourage" grantees to use minority banks.

29 C.F.R. § 95.44(b) (1994):[19] All recipients of DOL grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations are to establish written procurement procedures to provide for "positive efforts. . .to utilize small businesses, minority-owned businesses, and women's business enterprises, whenever possible" and to ensure that such businesses "are utilized to the fullest extent practicable."

48 C.F.R. Part 2919, § 1919.202-70 (1994): Small disadvantaged business program regulations of the Department of Labor require "Heads of Contracting Activities [to] develop annual goals for each category of small business and small disadvantaged business utilization programs, which shall include projected acquisition awards to small businesses, minority businesses, 8(a) concerns, women-owned businesses, and HBCU."

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19 59 Fed. Reg. 38281 (July 27, 1994).

National Aeronautics and Space Administration

42 U.S.C.S. § 2473b: NASA Administrator is required to annually establish a goal of at least eight percent of the total value of prime and subcontracts awarded in support of authorized programs to be made to small disadvantaged businesses, as defined by § 8(a) of the Small Business Act, "including Historically Black Colleges and Universities and minority educational institutions. . ."

48 C.F.R. § 1819.705-4 (1994): Small disadvantaged business subcontracting regulation of the National Aeronautics and Space Administration (NASA) states that "NASA contracting officers may accept as an element of a subcontracting plan the prime contractor's intention to use total small business, small disadvantaged business, women-owned business, historically black college and university, or minority educational institution set-asides in awarding subcontracts so long as such set-asides are competitive and awards are made at reasonable prices." See also § 1819.7003 (agency goal of awarding 8 percent of total value of prime and subcontracts to "small disadvantaged business concerns, Historically Black Colleges and Universities, and minority educational institutions. . ."); and § 1815.219-76 (prescribed clause for NASA contracts incorporating 8 percent goal for "small business concerns or other organizations owned or controlled by socially and economically disadvantaged individuals (including women), Historically Black Colleges and Universities, and minority educational institutions").

Small Business

41 U.S.C.S. § 417a: "Each Federal agency shall report to the Office of Federal Procurement Policy the number of small businesses owned and controlled by women and the number of small business concerns owned and controlled by socially and economically disadvantaged businesses, by gender, that are first time recipients of contracts from such agency."

13 C.F.R. § 115.30(c) (1994): The Small Business Administration (SBA) Surety Bond Guarantee program indemnifies sureties for 90 percent of losses incurred on certain bonds "issued on behalf of a small concern owned and controlled by socially and economically disadvantaged individuals," including "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, and other minorities or any other individual found to be disadvantaged by SBA. . ."

13 C.F.R. 125.4 (1994): Small Business Administration requirement "[t]hat separate goals for the participation by small business concerns and small disadvantaged business in Government procurement contracts and subcontracts thereunder shall be established annually by the head of each Federal agency following consultation with the SBA, and that the Administrator of the Office of Federal Procurement Policy shall establish the goal whenever there is disagreement between a Federal agency head and the SBA. . ."

13 C.F.R. § 143.21(h) (1994): Grantees and subgrantees under SBA program of grants and cooperative agreements with state and local governments are "encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members)."

State Department and Foreign Affairs

22 U.S.C.S. § 4852(d): Not less than 10 percent of the amount appropriated for diplomatic construction or designed projects each fiscal year shall be allocated to the extent practicable for contracts with American minority contractors.

22 U.S.C.S. § 4864(e): Not less than 10 percent of the amount of funds obligated for local guard contracts for Foreign Service buildings shall be allocated to the extent practicable for contracts with minority small business contractors.

P.L. 103-306, 108 Stat. 1608, § 555 (1994): Provides for a 10 percent set-aside of the aggregate amount of certain appropriations to the Agency for International Development--the Development Assistance Fund, Population, Development Assistance, and the Development Fund for Africa--for socially and economically disadvantaged U.S. businesses and private voluntary organizations, historically black colleges and universities, and higher educational institutions with more than 40 percent Hispanic student enrollment.

Government procurement agreements. The United States has entered into procurement obligations under the North American Free Trade Agreement (NAFTA) (Chapter Ten) and the Uruguay Round Agreement on Government Procurement under which the United States agrees, among other things, to accord national treatment to products, services, and suppliers of other parties with respect to government contracts entered into by named agencies above certain threshold amounts. In both the NAFTA and the Uruguay Round Agreement (as well as in earlier trade agreements), the United States has taken a reservation stating that agreement obligations will not apply to set asides on behalf of small and minority businesses (NAFTA, Chapter 10, Annex 1001.2b, General Notes, Schedule of the United States, Note 1; Uruguay Round Agreement on Government Procurement, Annex of the United States, General Note 1).

22 C.F.R. § 145.44(b) (1994): All recipients of Department of State grants and cooperative agreements awarded to institutions of higher education and other non-profit organizations are to establish written procurement procedures to provide for "positive efforts. . .to utilize small businesses, minority-owned businesses, and women's business enterprises, whenever possible" and to ensure that such businesses "are utilized to the fullest extent practicable." Same provisions apply pursuant to uniform administrative requirements prescribed by 22 C.F.R. 518.44(b) (1994).

48 C.F.R. § 652.219-70 (1994): Clause in Department of State contracts requiring disadvantaged and minority subcontracting goals. *See also* 48 C.F.R. §§ 619.201(b), 619.708-70.

48 C.F.R. § 706.302-71 (1994): Agency for International Development (AID) requirement that "[e]xcept to the extent otherwise determined by the Administrator, not less than ten percent of amounts made available for development assistance and for assistance for famine recovery and development in Africa shall be used only for activities of disadvantaged enterprises." "Disadvantaged enterprise" means concerns owned and controlled by "socially and economically disadvantaged individuals," as defined by FAR (48 C.F.R. § 19001(b)[20] to be members of designated racial and ethnic minority groups, "Historically Black Colleges and Universities," and "colleges and universities having a student body in which more than 40 percent of the students are Hispanic American." 48 C.F.R. § 726.101(b).

48 C.F.R. Part 419 (1994): Socioeconomic Program policies of AID state that "[w]here practicable and desirable, small business and minority goals will be established " for procuring activities (§ 719.270(e)); and mandates that the AID Office of Small Disadvantaged Business develop "a plan of operation designed to increase the share of contracts awarded to small business concerns, including small minority business enterprises" (§ 719.271-2(6)). Disadvantaged enterprises include socially and economically disadvantaged concern, historically black colleges and universities, and higher educational institutions with more than 40 percent Hispanic student enrollments (§§ 726.201, 752.226-1,2).

Transportation

49 U.S.C.S. § 47107(e)(1): Requires federally aided airport operators to insure "to the maximum extent practicable" that at least 10% of contracts for consumer services to the public be placed with "small business concerns owned and controlled by a socially and economically disadvantaged individual. . ." The statute incorporates the Small Business Act definition of that term "except that women are presumed to be socially and economically disadvantaged." (49 U.S.C.A. § 47113(a)(2)).

P.L. 102-240, 105 Stat. 1914, 1919, § 1003(b) (1991): "Except to the extent that the Secretary [of Transportation] determines otherwise, not less than 10 percent of the amounts authorized to be appropriated" under various Titles of the Intermodal Surface Transportation Act of 1991 "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals;" the statute incorporates the SBA presumption in favor of racial minorities (15 C.F.R. § 637(d) and further provides that "women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection."

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20 *Supra* p. 5.

49 C.F.R. Part 23, subpart C (1994): Minority-business enterprise program requirements for recipients and applicants under Department of Transportation financial assistance programs. DOT approved MBE affirmative action programs are to include recipient's "overall goals and a description of the methodology to be used in establishing them" (§ 23.43) and separate "contract goals for firms owned and controlled by minorities and firms owned and controlled by women, respectively" (§ 23.45). Rules for counting MBE participation toward meeting applicable goals (§ 23.47). The regulations further provide that a prime contractor unable to satisfy a particular contract's minority goal may nevertheless be awarded the contract if its "best efforts" were made to achieve the goal (§§ 23.45(g)(2)(ii), 23.45(h)). Several elements are considered in determining whether a prime contractor failing to meet its goal in fact made a good faith effort to comply (§ 23.45, app. A).

49 C.F.R. Part 23, subpart D (1994). Implementation of §105(f) of the Surface Transportation Assistance Act of 1982. DOT regulations establish a rebuttable presumption that women, Black-Americans, Hispanics, Native Americans, Asian-Pacific Americans, Asian-Americans and those individually certified under § 8(a) of the Small Business Act are socially and economically disadvantaged (§ 23.62). Recipients of surface transportation funds must establish overall goal for disadvantaged business participation on funded projects (§ 23.64) and, absent a waiver by the DOT Secretary, must insure that at least ten percent of monies expended on federally assisted projects go to such enterprises (§§ 23.61(a), 23.63). "If a recipient fails to meet an approved goal, it shall have the opportunity to explain to the Administrator of the concerned Department element why the goal could not be achieved and why meeting the goal was beyond the recipient's control," failing which the recipient is subject to "appropriate remedial sanction" (§ 23.68).

49 C.F.R. § 23.95 *et seq.* (1994): Minority business enterprise participation standards under § 511(A)(17) of the Airport and Airway Improvement Act of 1982 provide that sponsors of airport improvement projects "shall establish an overall goal for the participation of DBE's" as concessionaires and "[t]o the extent practicable, shall seek to obtain DBE participation in all types of concession activities." "Where not prohibited by state or local law and determined. . .to be necessary to meet DBE goals, procedures to implement DBE set-asides shall be established. The DBE plan shall specify the concessions to be set-aside." The term "disadvantaged business" means a small business concern owned and controlled by "socially and economically disadvantaged individuals," defined as "women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities or individuals found to be disadvantaged" by the SBA, and the regulation incorporates a "rebuttable presumption" that certain designated racial and ethnic groups are socially and economically disadvantaged. *See* 49 C.F.R. §§ 23.89, 23.62.

49 C.F.R. § 265.13 (1994): Federal Railroad Administration regulations barring discrimination in federally assisted programs require "where there are deficiencies based on past practices, and with respect to future plans for hiring

and promoting employees or awarding contracts, the development of specific goals and timetables for the prompt achievement and maintenance of full opportunities for minority persons and MBEs with respect to programs, projects and activities subject to this subpart.

Veterans Affairs

38 C.F.R. § 43.21(h) (1994): Department of Veterans Affairs Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments "encourage" grantees and subgrantees to use minority banks at least 50% owned by minority group members.

48 C.F.R. § 819.202-5(c) (1994): Department of Veterans Affairs regulations require "all acquisition activities [to] submit information and procurement preference goals" for "minority direct business awards," "women-owned business awards," and "[s]ubcontracts to be awarded to small disadvantaged business concerns."

Other

36 C.F.R. Part 906 (1994): Affirmative action policy and procedures, including goals and timetables for women and minorities, "to assure full minority participation in activities and benefits that result from implementation of the Pennsylvania Avenue Plan--1974."

36 C.F.R. § 1207.21(h) (1994): National Archives and Records Administration Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments "encourage" grantees and subgrantees to use minority banks at least 50% owned by minority group members.

44 C.F.R §§ 13.21(h) (1994): Federal Emergency Management Agency Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments "encourage" grantees and subgrantees to use minority banks at least 50% owned by minority group members.

EQUAL EMPLOYMENT OPPORTUNITY LAWS

The evolution of federal law and policy regarding affirmative action in employment may be traced to a series of executive orders dating to the 1960's which prohibit discrimination and require affirmative action by contractors with the federal government. The Office of Federal Contract Compliance Programs, an arm of the U.S. Department of Labor, currently enforces the E.O. 11246, as amended, by means of a regulatory program requiring larger federal contractors, those with procurement or construction contracts in excess of $50,000, to make a "good faith effort" to attain "goals and timetables" to remedy underutilization of minorities and women. Another early Executive Order, No. 11478, was a precursor to the 1964 Civil Rights Act and mandates affirmative action hiring and employment policies by all federal executive department and agencies.

Public and private employers with 15 or more employees are also subject to a comprehensive code of equal employment opportunity regulation under Title VII of the 1964 Civil Rights Act.[21] Except as may be imposed by court order to remedy "egregious" violations of the law, or by consent decree to settle pending claims, however, there is no general statutory obligation on employers to adopt affirmative action measures. But the EEOC has issued guidelines to protect employers and unions from charges of "reverse discrimination" when they voluntarily take action to correct the effects of past discrimination.[22] Federal departments and agencies, by contrast, are required to periodically formulate affirmative action plans for their employees and a "minority recruitment program" to eliminate minority "underrepresentation" in specific federal job categories.

Section 717 of 1972 Amendments to Title VII of the 1964 Civil Rights Act empowers the Equal Employment Opportunity Commission to enforce nondiscrimination policy in federal employment by "necessary and appropriate" rules, regulations, and orders and through "appropriate remedies, including reinstatement or hiring of employees, with or without backpay."[23] Each federal department and agency, in turn, is required to prepare annually a "national and regional equal employment opportunity plan" for submission to the EEOC as part of "an affirmative program of equal employment opportunity for all. . .employees and applicants for employment."[24]

Section 717 was reinforced in 1978 when Congress enacted major federal civil service reforms including a mandate for immediate development of a "minority recruitment program" designed to eliminate "underrepresentation" of minority groups in specific federal job categories.[25] The EEOC and Office of Personnel Management have issued rules to guide implementation and monitoring of minority recruitment programs by individual federal agencies. Among various other specified requirements, each agency plan "must include annual specific determinations of underrepresentation for each group and must

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21 42 U.S.C. §§ 2000e *et seq.*

22 29 C.F.R. Part 1608 (the guidelines state the EEOC's position that when employers voluntarily undertake in good faith to remedy past discrimination by race- or gender-conscious affirmative action means, the agency will not find them liable for reverse discrimination).

23 42 U.S.C. § 2000e-16(b).

24 42 U.S.C. § 2000e-16(b)(1).

25 5 U.S.C. § 7201.

be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured."[26]

In addition, the following statutes and regulations relate to employment policies of the federal government or under federal grant and assistance programs:

5 U.S.C.S. § 4313(5): Performance appraisal in the Senior Executive Services to take account of individuals' "meeting affirmative action goals, achievement of equal employment opportunity requirements, and compliance with merit principles. . ."[27]

5 U.S.C.S. § 7201: Establishes a "Minority Recruitment Program" for the Executive Branch and directs each Executive agency, "to the maximum extent possible," to "conduct a continuing program for the recruitment of members of minorities for positions in the agency. . .in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service, with special efforts directed at recruiting in minority communities, in educational institutions, and from other sources from which minorities can be recruited."

22 U.S.C.S. § 4141(b): Establishes the Foreign Service Internship Program "to promote the Foreign Service as a viable and rewarding career opportunity for qualified individuals who reflect the cultural and ethnic diversity of the United States. . ."

29 U.S.C.S. § 1781(a): "A contractor subject to the affirmative action obligations of Executive Order 11246. . .may establish or participate in training programs pursuant to this section. . .which are designed to assist such contractors in meeting the affirmative action obligations of such Executive Order."

42 U.S.C.S. § 282(h): The Secretary of HHS, and the National Institutes of Health, "shall, in conducting and supporting programs for research, research training, recruitment, and other activities, provide for an increase in the number of women and individuals from disadvantaged backgrounds (including racial and ethnic minorities) in the fields of biomedical and behavioral research."

45 U.S.C.S. §§ 797b, 907, 1004: First right to hire of certain previously separated or furloughed railroad employees subject to exceptions for vacancies covered by "(1) an affirmative action plan, or a hiring plan designed to eliminate discrimination, that is required by Federal or State statute, regulation, or Executive order, or by the order of a Federal court or agency, or (2) a permissible voluntary affirmative action plan."

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26 5 C.F.R. § 720.205(b)(1991).

27 As amended by P.L. 103-424, 108 Stat. 4361, § 6 (1994).

Executive Order 11246: Prohibits employment discrimination because of race, color, religion, sex, or national origin by nonexempt federal government contractors and requires inclusion of an affirmative action clause in all covered federal contracts for procurement of goods and services. Pursuant to Labor Department regulations, larger federal contractors are required to adopt goals and timetables to correct "underutilization" of minorities and women. See 41 C.F.R. Part 60 (discussed *infra*).

Executive Order 11478: States the policy of the United States government "to provide equal opportunity in Federal employment for all persons, to prohibit discrimination because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive agency and department."

Federal Regulations

5 C.F.R. Parts 729, 720 APP. (1994): Affirmative Employment Programs of the Office of Personnel Management and Guidelines for Development of A "Minority Recruitment Program" to Implement 5 U.S.C. § 7201.

14 C.F.R. § 152.407, .409, .411 (1994): All grantees, sponsors, or planning agencies, with 50 or more aviation employees who participate in projects which receive federal airport aid funds are required to maintain "affirmative action" plans containing "goal and timetables" derived from "[a] comparison. . .of the percent of minorities and women in the employer's present aviation workforce. . .with the percent of minorities and women. . .in the total workforce" in the SMSA or surrounding area.

23 C.F.R. § 230.111 (1994): On-the-job training program rules for federally assisted highway construction projects provide that "[t]he Washington Headquarters shall establish and publish annually suggested minimum training goals. . .based on the Federal-aid apportioned amounts and the minority population. A State will have achieved its goal if the total number of training slot. . .equals or exceeds the State's suggested minimum annual goal."

23 C.F.R. Part 230 APP. A (1994): State Highway Agency Equal Employment Opportunity Programs. Affirmative action plans are to set "specific, measurable, attainable hiring and promotion goals, with target dates, in each area of underutilization" of women and minorities.

29 C.F.R. §§ 30.3-30.8 (1994): Affirmative action requirements of the Department of Labor (DOL) for registered state apprenticeship programs include "goals and timetable for women and minorities." "Compliance with these requirements shall be determined by whether the sponsor has met its goals within its timetables, or failing that, whether it had made good faith efforts to meet its goals and timetables."

32 C.F.R. Part 191, § 191.5(a)(8) (1994): DOD Civilian Equal Employment Opportunity Program establishes affirmative action guidelines and procedures for all DOD components and directs the Assistant Secretary of Defense to "[e]nsure that realistic goals that provide for significant continuing increases in the percentages of minorities, women, and people with disabilities in entry, middle, and higher grade positions in all organizations and occupations are set and accomplished until the overall DOD objective is met and sustained."

34 C.F.R. Part 100 APPENDIX VII.C. (1994): Department of Education guidelines for eliminating discrimination in vocational education programs provide that "[w]henever the Office for Civil Rights finds that in light of the representation of protected groups in the relevant labor market there is a significant underrepresentation or overrepresentation of protected group persons on the staff of a vocational education school or program, it will presume that the disproportion results from unlawful discrimination. This presumption can be overcome by proof that qualified persons of the particular race, color, national origin or sex, or that qualified handicapped persons are not in fact available in the relevant labor market."

40 C.F.R Part 8 (1994): Environmental Protection Agency (EPA) equal employment opportunity and affirmative action compliance requirements issued pursuant to E.O. 11246 as applied to EPA contracts and EPA assisted construction contracts.

41 C.F.R. Part 60 (1994): Sets forth the body of administrative rules issued by the Office of Federal Contract Compliance Programs within the Department of Labor to enforce the affirmative action requirements of E.O. 11246 on federal procurement and construction contractors. All contractors and subcontractors with federal contracts in excess of $10,000 are prohibited by the Executive Order from discriminating and required to take affirmative action in the employer of minority groups and women. Federal contractors and subcontractors with 50 or more employees and government contracts of $50,000 or more must develop written affirmative action compliance programs for each of their facilities. OFCCP rules direct these larger contractors to conduct a "utilization analysis" of all major job classifications and explain any underutilization of minorities and women by job category when compared with the availability of qualified members of these groups in the relevant labor area. Based on this analysis, the contractor's affirmative action plan must set forth appropriate goals and timetables to which the contractor must direct its "good faith efforts" to correct deficiencies. In addition, OFCCP has established nationwide hiring goals of 6.9 percent for women in construction, and regional and local goals for minorities in construction, which are set out in an appendix to the agency's affirmative action in construction regulations. 41 C.F.R. 60-4.

48 C.F.R. 22.804 (1994): Affirmative action program under Federal Acquisition Regulations requires written affirmative action plans of federal nonconstruction prime and subcontractors with 50 or more employees that comply with DOL regulations to assure equal opportunity in employment to minorities and women.

48 C.F.R. 52.222-23, 52.222-27 (1994): Prescribes clause for inclusion of federal contracts that requires "[g]oals for minority and female participation, expressed in percentage terms for the Contractor's aggregate workforce in each trade on all construction work in the covered area" and "to make a good faith effort to achieve each goal under the plan in each trade in which it has employees."

48 C.F.R. 922.804-2 (1984): Department of Energy regulations implementing the affirmative action plan requirements of E.O. 11246.

It is hoped that this is of assistance to you.

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