

ESSAYS

The Origins of Affirmative Action*

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INTRODUCTION

The modern debate over affirmative action has occupied us for almost twenty years without resolution or clarification of the underlying issues that divide us.¹ Except to deny review of numerous employment cases, the United States Supreme Court did not enter this debate until *DeFunis v. Odegaard*.² Justice Douglas' dissent in *DeFunis* spawned a host of commentary, and the debate raged on until *Regents of the University of California v. Bakke*.³ *Bakke* added fuel to the fire and inundated us with the heat of advocacy — pro and con — but neither enlightenment nor resolution has emerged from the controversy.⁴

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¹ I date the beginning controversy to the Nixon Administration's 1969 Revised Philadelphia Plan. The Affirmative Action Plan was challenged in both the courts and the Congress without success. *See, e.g.*, *Associated Gen. Contractors, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973); *Southern Ill. Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); *see also* Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341; Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972) [hereafter Comment, *The Philadelphia Plan*].

² 416 U.S. 312 (1974) (a law school admissions case that the Supreme Court accepted for review, then dismissed as moot).

³ 438 U.S. 265 (1978).

⁴ *See* Hill, *Race and Ethnicity in Organized Labor: The Historical Sources of Resistance to Affirmative Action*, 12 J. INTERGROUP REL. 5 (1984). Professor Hill lists

some of the vast body of views pro and con:

The organized opponents of affirmative action are responsible for a vast body of material in every conceivable form and much too numerous for inclusive listing here. Nathan Glazer's *Affirmative Discrimination: Ethnic Inequality and Public Policy* (New York, 1975), gathers all the arguments and is representative of the polemic against affirmative action. For a reasoned criticism that places the issue in a historical context, see Alexander Saxton, Nathan Glazer, Daniel Moynihan and the Cult of Ethnicity, *Amerasia Journal*, Vol. 4, No. 2, 1977, pp. 141-50. Typical of the sharp attacks on affirmative action is the statement of Morris B. Abram who was appointed vice-chairman of the U.S. Commission on Civil Rights by President Reagan. See, *Consultations on the Affirmative Action Statement of the U.S. Commission on Civil Rights*, Vol. 1, February 10 and March 10-11, 1981, Washington, D.C., pp. 25-29, also Miro Todorovich and Howard Glickstein, "Affirmative Action: Two Views," *Civil Rights*, A Staff Report of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, Washington, D.C., 1976, pp. 69-90. The United Federation of Teachers in New York City and its parent organization, the American Federation of Teachers (AFL-CIO), have been among the most active opponents of affirmative action. Albert Shanker, president of both the New York Local and the international union, has since 1972 repeatedly attacked equal opportunity programs requiring hiring goals in his weekly column which appears each Sunday as a paid advertisement of the United Federation of Teachers in Section 4 of the *New York Times*. See for example: "A Quarrel with Quotas," July 16, 1972; "How Order Number 4 Promotes Employment Quotas," March 18, 1973; "The Quota Principle: Dangerous Arithmetic . . .," Dec. 9, 1973; "Preferential Treatment v. Constitutional Rights," May 13, 1973; "The Quota Mentality v. the 14th Amendment," October 20, 1974; "Strong Voices Against Ethnic Hiring," January 12, 1975, and many others later. *Commentary*, published by the American Jewish Committee, has for more than a decade maintained a continuing attack upon affirmative action. The volume for one year, 1972, contains the following: Earl Raab, "Quotas by Any Other Name," January; Paul Seabury, "HEW & the Universities," February; "The Pottinger Papers: An Exchange on Affirmative Action," May; Elliott Abrams, "The Quota Commission," October; Paul Seabury, "The Idea of Merit," December. For a statement of the labor union position, see George Meany, "Labor and the Philadelphia Plan," a pamphlet based on an address by AFL-CIO President George Meany to the National Press Club, January 12, 1970, published by the AFL-CIO, Washington, D.C., n.d., unpagged. There is also a multitude of resolutions and statements denouncing "quotas" and "reverse discrimination" in the convention proceedings of many labor organizations and the AFL-CIO, together with frequent material in the trade union press. Among these are *Statement by AFL-CIO Executive Council on Seniority and Layoffs*, Washington, D.C., May 6, 1975; *Statement by AFL-CIO Executive Council on Title VII and the Seniority System*; Chicago, Illinois, July 30-31, 1975. See also, "Last Hired, First Fired: Layoffs and Civil

The debate seems never ending.⁵ The latest attack on affirmative action programs comes in a recent book, *Out of Order: Affirmative Action and the Crisis of Doctrinaire Liberalism*,⁶ written by Nicholas Capaldi. *Out of Order* is dedicated to Sidney Hook, a leading opponent of affirmative action programs, and acknowledges a whole panoply of personalities who have opposed affirmative action.⁷ *Out of Order* contains 18 pages in favor of, and 210 pages against affirmative action.

What has this to do with an essay entitled *The Origins of Affirmative Action*? It illustrates the difficulty in identifying the roots of the concept when so little agreement on its content exists. Frequently, the opponents' target is much broader than any definition of "affirmative action." For example, Capaldi purports to show that "affirmative action was the inevitable consequence of the social philosophy known as doctrinaire liberalism, that doctrinaire liberalism is the entrenched philosophy of academic social science, and that affirmative action very nearly destroyed the university as a viable independent institution — and it would have if that policy had remained unchecked."⁸ Capaldi adds that "state activism in general and affirmative action in particular will lead to fascism."⁹

Morris Abram, a former commissioner of the United States Commission on Civil Rights, argues that:

The civil rights movement has turned away from its original principled campaign for equal justice under law to engage in an open contest for social and economic benefits conferred on the basis of race or other classifications previously thought to be invidious. . . . The civil rights movement, by my lights, should turn its attention back to first principles — the zealous regard for equal opportunity and the promotion of color-blind law and social policy — and away from color-conscious remedies that abandon principle and lead us further from a society free of the bane of racial

Rights," A Report of the United States Commission on Civil Rights, Washington, D.C., February 1977. For an example of the attacks upon affirmative action from influential supporters of Reagan administration policies see, Allen P. Sindler, "Equal Opportunity — On the Policy and Politics of Compensatory Minority Preferences," American Enterprise Institute for Public Policy Research, Washington, D.C., 1983.

Id. at 49 n.120.

⁵ See, e.g., Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986); Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986).

⁶ N. CAPALDI, *OUT OF ORDER: AFFIRMATIVE ACTION AND THE CRISIS OF DOCTRINAIRE LIBERALISM* (1985).

⁷ *Id.* at ix.

⁸ *Id.* at 2.

⁹ *Id.* at 5 (emphasis added).

discrimination.¹⁰

Professor Randall Kennedy, an advocate of affirmative action, provides a definition as well as an admonition:

Affirmative action refers to policies that provide preferences based explicitly on membership in a designated group. Affirmative action policies vary widely, ranging from “soft” forms that might include special recruitment efforts to “hard” forms that might include reserving a specific number of openings exclusively for members of the preferred group.

“Affirmative action,” “preferential treatment,” and “affirmative discrimination” are used as synonyms. At the level of semantics, “affirmative action” avoids the problem of preference that is inescapable if one uses the term “preferential treatment.” It also avoids the problem of discrimination made salient by the term “affirmative discrimination.” On all too many occasions, however, proponents of affirmative action have hurt their own cause by evading the difficulties posed and costs incurred by the policy they advance. These difficulties and costs will not disappear behind euphemistic terminology. To properly convince the public that these costs are worth shouldering, proponents of affirmative action will have to grapple straightforwardly with them — a process which involves, at the least, conceding their existence.¹¹

After nearly two decades of debate, the “scholarly community” is still mired in its ideological and philosophical dialogue. On the one hand, Professor Kennedy does provide us with a meaningful focus. He notes that:

[o]pponents of affirmative action maintain that commitment to a nonracist social environment requires strict color-blindness in decisionmaking as both a strategy and a goal. In their view, “one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one’s own life — or in the life or practices of one’s government — the differential treatment of other human beings by race.”¹²

On the other hand, proponents of affirmative action insist that only *malignant* racial distinctions should be prohibited; they favor benign distinctions that favor blacks. They argue that “in order to get beyond racism, we must first take race into account” and that “to treat some persons equally, we must treat them differently.”¹³

Professor Herbert Hill has asserted that “[a] broader historical perspective reveals that the attack against affirmative action constitutes the

¹⁰ Abram, *supra* note 5, at 1312.

¹¹ Kennedy, *supra* note 5, at 1327 n.1.

¹² *Id.* at 1327-28 (citing Van Alstyne, *Rites of Passage: Race, The Supreme Court and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979) (emphasis in original)).

¹³ *Id.* (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring and dissenting)).

latest in a continuing series of efforts to perpetuate the privileged position of whites in American society. . . . As the gains of the 1960's are eroded, the nation has become even more mean-spirited and mendacious."¹⁴

However, the positions that Abrams and Capaldi represent deny any mean-spirited motives. Professor Kennedy observed that both proponents and opponents of affirmative action have one thing in common: a desire to get beyond racism. They differ only over whether affirmative action is an appropriate means to reach the desired end.

At the risk of sounding "anti-intellectual," the search for origins or solutions to affirmative action problems does not lie in discourse on doctrinaire liberalism or conservatism. Abstract theories of political or economic social scientists rarely, if ever, guide the hands of practical leaders in search of workable solutions to real and immediate problems. In addition, history does not sustain the position that this country has been concerned with color blindness. In fact, from our nation's inception it has acted in a very color conscious fashion. In most instances that color consciousness was used for malignant purposes. In a few situations, racial classifications were used to benefit the classified race. It is only recently that such benign programs have been artfully attacked as "reverse discrimination" and labeled undesirable, illegal, and unconstitutional.

With all due respect to the intellectuals, it is Congress' role to determine the rights, pains, and privileges distributed among us. Other instruments of our governments — federal, state, and local — also make these determinations. As history attests, these determinations have proven to be both good and bad. Much good has been discarded and bad retained, and vice versa. This Essay suggests that the legal and constitutional origins of affirmative action are readily discoverable by an honest reading of the legislative history of the fourteenth amendment and the Reconstruction Era civil rights legislation. It further suggests that no credible argument can be made that our Constitution requires, or ever did require, color blindness. Our government has endorsed or encouraged various "remedial" programs, and it is from those programs that we must abstract the functional definition of affirmative action.

¹⁴ Hill, *supra* note 4, at 41.

I. THE ORIGINS OF AFFIRMATIVE ACTION

A. *The Dim Dark Past*

To shed light on the origins of affirmative action, it is necessary to note briefly the historical contexts that support this nation's effort, spasmodic as it has been, to ameliorate a pervasive condition of inequality affecting all aspects of the lives of its most numerous minority. For a well-documented statement of the status of black people in America until 1857, one need only read Chief Justice Taney's opinion in *Dred Scott v. Sandford*.¹⁵ As irrefutable constitutional history, *Dred Scott* lays to rest any argument that the Constitution is color-blind. It is beyond peradventure that the founding fathers, from the Declaration of Independence to the signing of the Articles of Confederation, made clear that their brave statement "all men are created equal" did not include blacks. As Chief Justice Taney observed, "there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed."¹⁶ Moreover, the Court's decision included blacks in both slave and nonslave states and established that all of these documents were color conscious to the detriment of the black people in America.¹⁷

It took both a civil war and constitutional amendments to alter the conditions documented in *Dred Scott*. President Lincoln issued the Emancipation Proclamation in his capacity as commander in chief of the armed services. However, it liberated slaves only in areas the Confederacy controlled. It was the thirteenth amendment, which declared slavery abolished, that extended the Emancipation Proclamation to all the states. However, this constitutional declaration of freedom did not provide blacks protection in their effort to use their newly won

¹⁵ 60 U.S. (19 How.) 393 (1857).

¹⁶ *Id.* at 405.

¹⁷ *Id.* at 411. The Court stated that

the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; . . . the legislation of the different states, before, about the time, and since the constitution was adopted; . . . the legislation of Congress from the time of its adoption to a recent period; and . . . the constant and uniform action of the Executive Department, all concurring together and leading to the same result.

Id.; see also D. BELL, RACE, RACISM AND AMERICAN LAW § 1.7, at 20-24 (2d ed. 1980).

freedom.¹⁸

B. *The "Genesis" of Affirmative Action*¹⁹

Previously I have defined affirmative action as "public or private actions or programs which provide or seek to provide opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups."²⁰ This broad formulation permits me to focus attention on the period from the closing days of the Civil War until the end of the civilian reconstruction.²¹

There is no dearth of research and writing on the fourteenth amendment to the Constitution.²² While the scholarship includes vigorous debate and disagreement over the scope of the fourteenth amendment,

the one point on which historians of the Fourteenth Amendment agree, and, indeed, which the evidence places beyond cavil, is that [it] was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills, particularly the latter, beyond doubt. . . . The doubt related to the capacity of the Thirteenth Amendment to sustain this far-reaching legislative program.²³

During the Reconstruction Era, Congress adopted a series of social welfare laws that expressly delineated the racial groups entitled to participate in the benefits of each program. These race-specific measures were adopted over the objection of critics who opposed special assistance to a specific racial group. The most far reaching program was the 1866 Freedmen's Bureau Act, which was enacted less than a month after Congress approved the fourteenth amendment.²⁴ The evidence

¹⁸ See Dillard, *The Emancipation Proclamation in the Perspective of Time*, 23 LAW IN TRANSITION 95-100 (1963) (quoted and excerpted in D. BELL, *supra* note 17, § 1.2, at 4 n.1).

¹⁹ The substance of these and the following sections are taken from two previous articles: Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901 (1985) [hereafter Jones, *Affirmative Action*]; Jones, "Reverse Discrimination" in *Employment: Judicial Treatment of Affirmative Action Programs in the United States*, 25 HOW. L.J. 217 (1982).

²⁰ Jones, *Affirmative Action*, *supra* note 19, at 903.

²¹ A comprehensive treatment of this is found in Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). The article is revised from the author's brief for the NAACP Legal Defense and Education Fund, Inc., as amicus curiae, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

²² See, e.g., J. BAER, *EQUALITY UNDER THE CONSTITUTION* (1983).

²³ *Id.* at 75 (quoting J. TENBROEK, *EQUAL UNDER LAW* 201 (rev. ed. 1965)).

²⁴ Jones, *Affirmative Action*, *supra* note 19, at 904.

overwhelmingly indicates that the major reason for enacting the fourteenth amendment was to provide a clear constitutional basis for such race conscious programs.²⁵

What is striking about the Reconstruction Era legislation is the range and diversity of the measures that provided race conscious relief. In 1866 Congress authorized the Bureau of Refugees, Freedmen and Abandoned Lands, popularly known as the Freedmen's Bureau, to provide land and buildings and to spend designated funds for the "education of the freed people."²⁶ However, the Bureau could not provide any aid to refugees or other whites. The law also conveyed some disputed lands to heads of families of the African race and authorized the sale of some 38,000 acres to black families who had previously occupied land under General Sherman's authority.

In 1867 Congress made special provisions for disposing of claims for "pay, bounty, prize money or other moneys due . . . colored soldiers, sailors or marines, or their legal representatives."²⁷ Congress also awarded federal charters to organizations established to support aged or destitute colored women and children. These organizations served as a bank for persons previously held in slavery or their dependents. An additional purpose was to educate and improve the moral and intellectual condition of the colored youth of the nation (these youths were also provided assistance in the form of funds and land grants). Express appropriations were made for the relief of freedmen or destitute colored people in the District of Columbia and for the establishment of a hospital for freedmen in the District. No comparable federal programs existed — or were established — for whites.²⁸

Clearly, one of the primary purposes for enacting the fourteenth amendment was to ensure that these race conscious remedies were constitutional. While some of these benefits were for specific, individual types of claims,²⁹ most of the legislation was not restricted to victims of specific acts of discrimination. Congress conclusively presumed that all members of the group had been harmed and were in need of assistance. Particularly pertinent is the legislation to educate and improve the

²⁵ *Id.* For an extended discussion of the Freedmen's Bureau legislation, see Schnapper, *supra* note 21, at 780-83.

²⁶ The foregoing is a paraphrase of materials taken from the Brief of the NAACP Legal Defense and Education Fund, Inc., as amicus curiae, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). The exact quote is reprinted in Jones, *Affirmative Action*, *supra* note 19, at 904.

²⁷ Jones, *Affirmative Action*, *supra* note 19, at 904.

²⁸ *Id.*

²⁹ See *supra* text accompanying notes 26-27.

moral and intellectual condition of the colored youth of the nation. Although the fourteenth amendment, by its terms, applies only to the states, it is beyond doubt that one basis for its enactment was to provide constitutional authority for the series of Freedmen's Bureau Acts, which involved expenditure of funds primarily for the benefit of minorities.

It was not until the 1950s that the Court recognized that the federal government's conduct that violated the fourteenth amendment also violated the fifth amendment's due process standard.³⁰ Previously, the fifth amendment had been applied, or misapplied, to protect property rights and the right to contract against the federal government's legislative efforts.³¹ However, the twentieth century application of the fifth amendment's equal protection component to federal government efforts to prohibit invidious discrimination should not be used to strike down efforts to achieve an objective of the fourteenth amendment. To use it for such a purpose would be a perverse utilization of the reverse incorporation of the fourteenth amendment's equal protection standard in the fifth amendment.

In 1875 Congress passed a new Civil Rights Act.³² The Act declared that:

All persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.³³

This was the first public accommodations act, which the Supreme

³⁰ See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975); *Bolling v. Sharpe*, 347 U.S. 497 (1954); see also Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977); Schnapper, *supra* note 21, at 787. Schnapper notes that the reverse incorporation of the fourteenth amendment equal protection standard was accomplished in the 1950s. *Id.* at 787 n.181.

³¹ See *Adair v. United States*, 208 U.S. 161 (1908); *cf.* *Coppage v. Kansas*, 236 U.S. 1 (1915); *Lochner v. New York*, 198 U.S. 45 (1905). *But see* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857) (suggesting in dicta that a congressional statute that deprived a slaveholder of property when he took a slave into a territory of the United States would not be consistent with the due process clause of the fifth amendment); see also Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 460, 475-79 (1911).

³² Civil Rights Acts, ch. 114, §§ 3-5, 18 Stat. 336, 337 (1875).

³³ *Id.* at 336.

Court promptly declared unconstitutional.³⁴ The Court contended that neither the fourteenth amendment nor the thirteenth amendment provided Congress with power to enact such legislation. The Court held that neither amendment guarded against private wrongs. Rather, state law alone must provide redress for such wrongs.³⁵

By 1896, with the Court's decision in *Plessy v. Ferguson*,³⁶ the first reconstruction was officially over. *Plessy* validated the odious concept of "separate but equal." Although it was a transportation case, by extrapolation it provided the basis for widespread segregation on the basis of race.³⁷

C. Affirmative Action and the New Deal

By the advent of the New Deal, segregation was a firmly entrenched institution in the United States. However, the awesome economic problems of the 1930s resulted in some antecedents of modern affirmative action. The principle of equal job opportunity first appeared in the Unemployment Relief Act of 1933.³⁸ As part of the New Deal effort to address massive unemployment and other problems of the sick economy, the Act provided: "[I]n employing citizens for the purposes of this Act no discrimination shall be made on account of race, color, or creed[.]"³⁹ Much of the New Deal legislation contains similar nondiscrimination provisions related to employment and training. Legislative efforts at equality included the Civilian Conservation Corps,⁴⁰ Civilian Pilot Training,⁴¹ the National Youth Administration,⁴² and nurses training.⁴³ These programs were color conscious. They provided for "separate but equal" benefits. From 1896 to 1954 and beyond, laws mandated a "separate but equal" society for blacks. Affirmative action is a modern effort to ensure that the end of segregation is not *also* the demise of participation by blacks in the bounties of the country.

³⁴ The Civil Rights Cases, 109 U.S. 3, 25 (1883).

³⁵ *Id.* at 11, 25.

³⁶ 163 U.S. 537 (1896).

³⁷ See Franklin, *A History of Racial Segregation in the United States*, 304 ANNALS 1, 6-8 (1956).

³⁸ Ch. 17, § 1, 48 Stat. 22, 23 (1933).

³⁹ *Id.*

⁴⁰ Civilian Conservation Corps Act, ch. 383, § 8, 50 Stat. 319, 320 (1937).

⁴¹ Civilian Pilot Training Act, ch. 244, § 2, 53 Stat. 855, 856 (1939).

⁴² National Youth Administration Appropriation Act, ch. 428, § 20, 54 Stat. 580, 583 (1940).

⁴³ Nurses Training Act, ch. 126, § 1, 57 Stat. 153 (1943).

Although the National Industrial Recovery Act of 1933⁴⁴ did not contain employment discrimination prohibitions, its regulations, issued by the Roosevelt administration, prohibited such discrimination.⁴⁵ Administrative action also barred employment discrimination in construction projects under the public low rent housing and defense housing programs.⁴⁶ The government also took action to prohibit discrimination in connection with other public works programs undertaken to absorb the unemployed poor. More specifically, the Public Works Administration⁴⁷ mandated the use of quotas in employment as early as 1934. As late as 1958 the Public Housing Administration still had a quota apparatus in effect.⁴⁸

II. AFFIRMATIVE ACTION IN EMPLOYMENT — THE GENESIS OF THE CURRENT DEBATE

To this point we have traced the “roots” of affirmative action from our early Constitution to the New Deal Era. As we exit the New Deal Era, we concentrate more specifically on the employment aspects of affirmative action. It is the employment arena that has occupied center stage in the modern debate on affirmative action, although affirmative action is not unconnected from school desegregation efforts. Some marginal effort has been undertaken with regard to contracting and subcontracting and to a lesser extent attention has been directed to housing discrimination. However, the primary thrust and parry in affirmative action has been in the employment arena.

A. *Early Executive Order Programs and Affirmative Action*

Although less creative than those who insist that the fourteenth amendment mandates a color-blind Constitution, the first executive order interdicting employment discrimination, which President Roosevelt

⁴⁴ Ch. 90, 48 Stat. 195 (1933).

⁴⁵ 44 C.F.R. § 265.33 (1938); *see also* UNITED STATES COMMISSION ON CIVIL RIGHTS, BOOK NO. 3, EMPLOYMENT 8 (1961).

⁴⁶ 24 C.F.R. § 603.6 (1938) (prohibiting discrimination under the United States Housing Act of 1937, ch. 896, 50 Stat. 888 (codified as amended in scattered sections of 42 U.S.C.)); *see also* Act of June 28, 1940, ch. 440, § 201, 54 Stat. 681, 682 (current version at 42 U.S.C. § 1501 (1982)).

⁴⁷ The Public Works Administration (PWA) was created by Title II of the National Industrial Recovery Act, ch. 90, 48 Stat. 195, 200 (1933).

⁴⁸ For discussion of quotas under the PWA, *see* Kruman, *Quotas for Blacks: The Public Works Administration and the Black Construction Worker*, 16 LAB. HIST. 37 (1975); *see also* UNITED STATES COMMISSION ON CIVIL RIGHTS, BOOK NO. 3, EMPLOYMENT 8, 89-91 (1961).

issued in 1941, authorized affirmative action. The Roosevelt order declared that it was "[t]he policy of the United States that there shall be no discrimination in employment . . . because of race, creed, color or national origin."⁴⁹ It further declared that employers and labor organizations must "provide for the *full and equitable participation* of all workers in defense industries without discrimination."⁵⁰ The President asserted that full manpower (human resource) utilization was the national goal and the exclusion of blacks was a major barrier to the achievement of this goal.

The term "full and equitable participation in employment" could have been authorization for affirmative action had the Roosevelt program lasted long enough for such a creative interpretation to emerge. In addition, if more sophisticated monitoring of the early antidiscrimination programs were devised to demonstrate their fecklessness, the obvious next step would have emerged much earlier. Between 1941 and 1961 the presiding presence in civil rights was the ugly face of overt, crude, and intentional discrimination. The first priorities of the earlier programs were to address these more obvious and demeaning conditions. From 1941 to 1961 successive presidents maintained some type of employment discrimination program. For example, during World War II and the Korean conflict, special efforts were made to recruit minorities into various military programs. While World War II was fought as a segregated endeavor, special recruitment efforts were directed to attract blacks into the navy, the air force, and segregated units of the army. At least with regard to better educated blacks, the armed services competed to attract them to their programs. Such specialized recruitment is a form of affirmative action.

B. *The Eisenhower/Nixon-Kennedy-Nixon Connection*

It would, I believe, come as a shock to former President Nixon and his Secretary of Labor George Schultz, now President Reagan's Secretary of State, to discover that they are "doctrinaire liberals."⁵¹ However, to describe President Kennedy's overall posture as "liberal" would be to stretch that term. Without further attempt to deal with the assertion that affirmative action was the inevitable consequence of "doctrinaire liberalism,"⁵² I suggest that affirmative action in employment, as

⁴⁹ Exec. Order No. 8802, 3 C.F.R. 957 (1938-43 comp.).

⁵⁰ *Id.* (emphasis added).

⁵¹ This refers to a Capaldi assertion in OUT OF ORDER. See *supra* note 6.

⁵² N. CAPALDI, *supra* note 6, at 2.

instituted by executive orders, has its genesis in conservatism.⁵³

Although I cannot document a direct causal link between the final report of the Committee on Government Contracts to President Eisenhower⁵⁴ and the use of the term "affirmative action" in Executive Order 10,925,⁵⁵ the Committee's report, chaired by then Vice President Nixon, concluded that:

(1) Overt discrimination in the sense that an employer actually refuses to hire solely because of race, religion, color or national origin is not as prevalent as is generally believed. To a greater degree, *the indifference of employers to establishing a positive policy* of non-discrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality.

The direct result of such indifference is that schools, training institutions, recruitment and referral sources follow the pattern set by industry. Employment sources do not normally supply job applicants regardless of race, color, religion or national origin *unless asked to do so by employers*. Schools and other training sources frequently cannot fill non-discriminatory job orders from employers because training may take from one to six years or more.

. . . (2) There is no justification for discrimination in employment because of race, color, religion or national origin in work performed by contractors paid by the federal funds . . .⁵⁶

President Johnson credits Abe Fortas, then a Washington lawyer, for drafting Executive Order 10,925.⁵⁷ The implications of Nixon's report strongly suggest that it is the conceptual precursor of what is now referred to as institutional racism or sexism — patterns of past discrimination built into institutional systems so they are re-created without the necessity of malice.

Whether or not Abe Fortas was reacting specifically to these conclusions when he wrote Executive Order 10,925,⁵⁸ the requirement of affirmative action in that executive order is responsive to the problems Nixon's report identified.

Prior executive order programs had interdicted intentional race and

⁵³ It is increasingly difficult to give any real content to the liberal/conservative dichotomy. I mean to suggest here, however, that until very recently, at least, Mr. Nixon was considered to have impeccable conservative credentials.

⁵⁴ President's Committee on Government Contracts, *Pattern for Progress: Final Report to President Eisenhower* (1960); see also 42 U.S.C. § 2000e (1982).

⁵⁵ 3 C.F.R. 448, 450 (1959-63 comp.).

⁵⁶ President's Committee on Government Contracts, *supra* note 54, at 14 (emphasis in original).

⁵⁷ Transcript of Plans for Progress Celebration (1962) (on file at U.S. Dep't of Labor).

⁵⁸ 3 C.F.R. 339 (1964-65 comp.), reprinted in 42 U.S.C. § 2000e (1982).

color discrimination, but, as Nixon's report emphasizes, indifference is hardly responsive to prohibitions that speak to intentional, malicious misconduct. Executive Order 10,925 not only prohibited the traditional forms of discrimination, but required that contractors pledge to take affirmative action to ensure that applicants would be employed and treated during employment without regard to race, color, religion, or national origin. The Executive Order also gave the President's Committee the power to adopt rules and regulations and issue orders it deemed necessary and appropriate to achieve the purposes of the Order. This generous grant of power is not unlike that power Congress traditionally gives to administrative bodies and courts to achieve broad objectives.

The original rules and regulations for Executive Order 10,925 were issued on June 9, 1961. Notice was published in the *Federal Register*,⁵⁹ and interested persons were given an opportunity to submit written and oral data, views, and arguments concerning the proposal. Thereafter, the first set of rules and regulations was promulgated.

The affirmative action commitment in Executive Order 10,925 received little attention in the early days of the Kennedy Administration. Despite Nixon's characterization regarding the primary problem of employer indifference, discrimination in 1961 was overt. In the first week of the new Committee's existence, the NAACP announced its intentions to file a complaint against a contract granted to the Lockheed Corporation on April 7, 1961. A statement by Lockheed and the government promised far-reaching reforms and became the prototype for the future "Plans for Progress" program.⁶⁰

The first years of the Executive Order program focused on the complaint process and voluntary accommodations. The Plans for Progress program became the instrument for affirmative action. Most large corporations consulted with Committee representatives to develop individual plans. These plans committed the companies to antidiscrimination in all phases of their personnel policies, with special emphasis on training and education programs. Companies affirmed their intentions to take positive action to recruit minority group applicants for employment, training, and promotion; promised dissemination of the companies' equal opportunity policies to company personnel, recruitment sources, and minority groups; detailed how those pledges were to be implemented; and stated that progress reports would be filed at regular

⁵⁹ 26 Fed. Reg. 5184 (1961) (a proposed rule-making).

⁶⁰ See M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION* 109-10 (1966).

intervals with the President's Committee.⁶¹

In periods ranging from six months to two years, Plans for Progress companies increased the percentage of blacks among their total work force from 5.1% to 5.7%. Although this rise was less than one percent, it more than doubled black representation at those companies.⁶²

While most of these affirmative action undertakings were "voluntary," they were stimulated by the complaint and enforcement process. In a sense the policies represented a "remedy" in settlement of, or in avoidance of, more aggressive enforcement actions. This aspect of the executive order commitment — to take affirmative action to ensure that applicants are employed and then treated without regard to race, color, creed, or national origin — which includes hiring, training, promotion, and other terms and conditions of employment, was clearly recognized as part of the contractual obligation enforceable by federal actions.⁶³

III. THE CIVIL RIGHTS ACT OF 1964

The passage of Title VII of the Civil Rights Act of 1964,⁶⁴ rather than diminishing the significance of the Executive Order Program, appreciably strengthened it.

The record-keeping and report-filing provisions of Title VII, by excepting those who file under the federal contractor program, plainly contemplate that program's continuance. Equally explicit is section 716(c)'s inclusion of those responsible for the program among the various agency representatives who are to be invited to a conference "for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective." Finally, Senators Clark and Case informed their colleagues that "Title VII, in its present form, has no effect on the responsibilities of the committee or on the authority possessed by the President or Federal agencies under existing law to deal with racial discrimination in the areas of Federal Government employment and Federal contracts."⁶⁵

From a technical point of view, overt congressional recognition and ratification of the President's Executive Order Program diminished the need to continue the President's Committee format with its interagency

⁶¹ *Id.* at 116-17.

⁶² Out of the 341,734 vacancies at "Plans for Progress" companies, blacks filled 40,938 of them. *Id.* at 140.

⁶³ *Id.* at 142.

⁶⁴ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000b (1982)).

⁶⁵ M. SOVERN, *supra* note 60, at 98-99 (quoting 110 CONG. REC. 2574-75 (1964)).

component.⁶⁶

In 1965 President Johnson issued a series of orders, including Executive Order 11,246.⁶⁷ In addition to incorporating the substantive aspects of the Kennedy orders, Executive Order 11,246 substantially changed the organizational structure of the program. It delegated full authority to the Secretary of Labor to administer the provisions of the Executive Order relating to nondiscrimination in employment by government contractors and subcontractors. The Secretary established the Office of Federal Contract Compliance (OFCC) to operate this new power and subdelegated all authority except that for promulgating general rules to the OFCC.⁶⁸ Under this new structure the program emphasis shifted gradually from voluntarism to enforcement,⁶⁹ and the development of the affirmative action obligation emerged as an explicit requirement. The separate Plans for Progress program receded in importance and ultimately ceased to exist.⁷⁰ In 1969 the Plans for Progress program was merged with the National Alliance of Business. Its goal was to provide large numbers of full-time jobs for disadvantaged and unemployed persons including minorities.⁷¹

Title VII, in establishing the Equal Employment Opportunity Commission, did not take the traditional form of a commission. While it has the general trappings of such a quasi-legislative, administrative, judicial body, it lacked power to enforce its own statute. The commissioners could investigate and, if probable cause was found, could advocate conciliation, but they had no power to compel. Instead, the power to compel was given to plaintiffs or "private attorneys general" and, to some extent, to the Justice Department in "pattern or practice" cases.

In addition, legal actions that involve enforcement of Title VII proceeded in the federal district courts, which have limited judicial review of final agency action. However, the law provides federal courts with ex-

⁶⁶ Independent Offices Appropriation Act of 1944, Title II, § 213, 58 Stat. 387 (1944), codified as amended at 31 U.S.C. § 696 (1958); Title II, § 214, 59 Stat. 134 (1945), codified as amended at 31 U.S.C. § 691 (1958).

⁶⁷ 3 C.F.R. 339 (1964-65 comp.).

⁶⁸ *Id.*

⁶⁹ See Jones, *Federal Contract Compliance in Phase II — The Dawning of the Age of Enforcement of Equal Opportunity Obligations*, 4 GA. L. REV. 756 (1970).

⁷⁰ See R. NATHAN, *JOBS AND CIVIL RIGHTS — THE ROLE OF THE FEDERAL GOVERNMENT IN PROMOTING EQUAL OPPORTUNITY IN EMPLOYMENT AND TRAINING* 101-07 (1969) (prepared for the United States Commission on Civil Rights by the Brookings Institution, Washington, D.C.).

⁷¹ See FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT, A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 163 n.218 (1970) [hereafter FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT].

pansive power to issue orders once unlawful employment practices are established. Section 706(g) of the original statute provided the court with authority to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate."⁷² In section 706(h), Congress also provided that the limitations imposed by the Norris-La Guardia Act on federal courts sitting in equity were not to be read into Title VII.⁷³

In section 707, the pattern or practice provision, Congress provided that the attorney general could bring an action "requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to ensure the full enjoyment of the rights herein described."⁷⁴

Neither the language that grants courts the power to issue injunctions or order affirmative action nor the language that describes the scope of the attorney general's authority to request relief is limited to providing relief to identified victims of discrimination. These provisions of the statute become the basis for a different type of affirmative action from those connected with the President's Executive Order Programs.

IV. AFFIRMATIVE ACTION EMERGES FROM THE SHADOWS⁷⁵

The Department of Labor's issuance of the Revised Philadelphia Plan⁷⁶ precipitated the full-scale debate over quotas/goals and timetables, and catapulted affirmative action into the center stage of the equal employment arena. From the beginning, OFCC handled construction contracts differently from supply contracts and was frustrated in its efforts to develop a method to promote minority employment in that in-

⁷² Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 261 (1964).

⁷³ Section 706(h) provides: "[t]he provisions of the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (29 U.S.C. §§ 101-115), shall not apply with respect to civil actions brought under this section." *Id.*, § 706(h), 78 Stat. 241, 261 (1964).

⁷⁴ *Id.* § 707(a)(3), 78 Stat. 241, 261-62 (1964).

⁷⁵ Jones, *The Transformation of Fair Employment Practices Policies*, in *FEDERAL POLICIES AND WORKERS STATUS SINCE THE THIRTIES* 159 (J. Goldberg ed. 1976).

⁷⁶ The Comptroller General rejected the original version of the plan, finding it incompatible with the competitive bidding requirements of 23 U.S.C. § 112 (1964). Thus, the version ultimately upheld in *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) became known as the "Revised" Philadelphia Plan. See Jones, *Affirmative Action*, *supra* note 19, at 910 n.71.

dustry. Periodic compliance reviews or employment reports, of limited effectiveness in nonconstruction employment, were ill-suited for the construction industry. Thus, OFCC developed special area plans to grapple with this problem. Between 1966 and 1967 plans were developed in four cities: St. Louis, San Francisco, Cleveland, and Philadelphia.⁷⁷ In 1968 the Comptroller General determined that the Philadelphia Plan, which like earlier plans required that affirmative action requirements be determined after bids were made, violated competitive bidding principles.⁷⁸ The Comptroller General also raised the issue of the compatibility of goals and timetables with Title VII.

Interestingly, the Philadelphia Plan, which precipitated the flap over goals or quotas, was issued during the Nixon Administration. Although the program's goal was to revitalize the construction industry program, its most significant by-product was that it provided the fundamental underpinnings that made it possible to articulate standards for affirmative action programs applicable to nonconstruction employers. As previously noted, governmental imposition of quotas or goals as a condition for construction contracts was not novel.⁷⁹ However, in reconstructing the Philadelphia Plan, the Department of Labor did not proceed with this prior history in mind. Those earlier programs were never challenged and no court decisions were available from which to abstract much guidance.

The Department of Labor utilized the rule-making process to establish the nature of the problem in the Philadelphia area, and the statistical basis upon which "reasonable" goals and timetables could be prescribed for those employers subject to the plan. The hearings established three characteristics prevalent in the Philadelphia construction industry: first, the exclusion of nonwhites from the construction unions in the area; second, a continuing need for skilled construction workers brought about by attrition and the creation of new jobs that were not being filled by existing union apprenticeship programs; and finally, the availability in the Philadelphia area of minority employees with sufficient skills to participate in the construction industry. The

⁷⁷ See FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT, *supra* note 71, at 166-72. For a full discussion of this program, see Jones, *supra* note 1; Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L.Q. 84 (1970); Comment, *The Philadelphia Plan*, *supra* note 1.

⁷⁸ 48 Comp. Gen. 326 (1968); see also 47 Comp. Gen. 666 (1968) (an earlier opinion in which the Comptroller General had held that there appeared to be a technical defect in bid specifications which included no statement of minimum standards of affirmative action required).

⁷⁹ See Kruman, *supra* note 48, at 48-49.

revised plan's goals, projected over a four year period, were very modest. If fully achieved, no more than half of the projected job openings would be filled by the new minority recruits. Even total compliance would have resulted in a lower percentage of black workers on a construction project than the percentage of black construction workers in the labor market.

A factor entirely ignored by opponents of affirmative action was that the government program's maximum requirement was a *good faith effort to achieve the goals*. While the plan prohibited employers from engaging in overt discrimination, it did not establish quotas. Further, the plan did not require employers to hire unqualified employees or to discriminate against nonminorities. Borrowing from concepts in our National Labor Relations Law, the plan simply required *good faith effort*. Good faith effort is a modification of the good faith bargaining concept. It is a *process*, not a result. At most, an employer's failure to meet the goals and timetables precipitated an investigation into efforts utilized to achieve those goals. The employer established presumptive compliance with the executive order by meeting the goals and timetables and, unless specific complaints of discrimination were lodged, satisfied its obligations as a federal contractor.⁸⁰

The Philadelphia Plan was immediately challenged in federal courts on several grounds: as a violation of Title VII, as exceeding the Secretary of Labor's authority under the executive order, as a violation of the National Labor Relations Act, as a violation of the fifth and fourteenth amendments of the Constitution, and as exceeding the authority of the President under the Constitution.⁸¹ The Third Circuit rejected all these claims, thus establishing judicial authority for the legality of the President's Executive Order Program, including the use of goals and timetables.⁸²

Subsequent challenges to goals and timetables in the construction industry have been unsuccessful.⁸³ The Supreme Court has declined to review any of these cases, although several have been cited with approval in some Supreme Court opinions.⁸⁴

⁸⁰ For a fuller discussion, see Jones, *Affirmative Action*, *supra* note 19, at 919-22.

⁸¹ See *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 165 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

⁸² *Id.* at 166-77.

⁸³ See, e.g., *Rosetti Contracting Co. v. Romney*, 485 F.2d 752 (D.C. Cir. 1973); *Southern Ill. Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Joyce v. McCrane*, 320 F. Supp. 1284 (D.N.J. 1970); *Weiner v. Cuyahoga Community College Dist.*, 19 Ohio St. 2d 35, 249 N.E. 907, *cert. denied*, 396 U.S. 1044 (1970).

⁸⁴ See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 301-02 (1978).

Once the Department of Labor succeeded in defending the use of goals and timetables against legal attack, it moved to include these requirements in the affirmative action obligations of nonconstruction contractors. It issued Order No. 4,⁸⁵ which, among other things, required both utilization analysis and goals and timetables when affected class members were determined to be underutilized. The Department's confidence was no doubt increased as a result of the congressional hearings over the Philadelphia Plan and the failed attempts to prohibit the Department of Labor's enforcement of any such requirements.⁸⁶

Congressional action in 1972 provides even stronger support for the continued existence of affirmative action programs under the Executive Order. Not only did Congress reject crippling amendments to the president's existing program, but it enacted law that gave affirmative action obligations statutory status. As amended in 1972, section 718 of the Civil Rights Act of 1964 provided that no agency or officer acting under any equal employment opportunity law or order could terminate or suspend a government contract with an employer who had an affirmative action plan previously accepted by the government without first according the employer a hearing and adjudication under the Administrative Procedure Act.⁸⁷ Curiously, a proviso in this law excepted employers who substantially deviated from previously agreed to affirmative action plans.⁸⁸

Various aspects of the Executive Order Program have been challenged in a series of cases involving nonconstruction employers. The most important case involving challenges to affirmative action, including goals and timetables, was *Legal Aid Society of Alameda County v. Brennan*.⁸⁹ The court's opinion, which has a substantial discussion of Revised Order No. 4, concluded that Congress ratified the essential features of the Affirmative Action Program reflected in the revised order when it adopted the Equal Employment Opportunity Act of 1972.⁹⁰

⁸⁵ 41 C.F.R. §§ 60-62 (1971).

⁸⁶ See *Hearings on the Philadelphia Plan and S. 931 Before the Subcommittee on Separation of Powers, Senate Committee on Judiciary*, 91st Cong., 1st Sess. 255 (1969); see also 115 CONG. REC. 40,749, 40,906 (1969). For a full discussion of this congressional activity, see Comment, *The Philadelphia Plan*, *supra* note 1.

⁸⁷ Civil Rights Act of 1964, Pub. L. No. 92-261, 86 Stat. 103-13 (codified as amended at 42 U.S.C. § 2000e (1982)).

⁸⁸ *Id.*

⁸⁹ 608 F.2d 1319 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1981); see also *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459 (5th Cir. 1977), *vacated and remanded on other grounds*, 436 U.S. 942 (1978).

⁹⁰ See *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319 (9th Cir. 1979).

V. AFFIRMATIVE ACTION IN EMPLOYMENT — THE CURRENT LEGAL STATUS

What frequently frustrates clarity in the modern debate is the failure by many to recognize, or the intentional refusal by some to clarify, that affirmative action in employment includes not one, but two situations. As the First Circuit Court of Appeals pointed out in *Associated General Contractors of Massachusetts, Inc. v. Altshuler*,⁹¹ the goals and timetables aspects of affirmative action have been constitutionally tested and upheld in *two contexts*.⁹² The first context involves a court-directed order or remedy after an adjudication of the issue of discrimination or after the parties consent to a decree.⁹³ The second context involves *programs* that an appropriate public authority has legislatively or administratively determined necessary.⁹⁴

⁹¹ 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). The court observed the numerous cases in which courts have ordered remedy, stating:

The first is where courts have ordered, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), remedial action for past discrimination. In fulfilling their "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past . . .", *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965), courts have ordered unions to grant immediate membership to a number of minority applicants, *United States v. Wood, Wire, and Metal Lathers International Union, Local No. 46*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973); to begin an affirmative action minority recruitment program, *United States v. Sheet Metal Workers International Ass'n, Local No. 36*, 416 F.2d 123 (8th Cir. 1969); to match normal referrals with minority referrals until a specific objective has been obtained, *Heat and Frost Workers, Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); or to take on a certain number of minority apprentices for each class of workers, *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971). Courts have also ordered employers to hire minority employees up to thirty per cent of the total work force, *Stamps v. Detroit Edison*, 365 F. Supp. 87 (E.D. Mich. 1973); to hire one minority worker every time two white workers were hired, up to a certain number, *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950, 92 S. Ct. 2045, 32 L. Ed. 2d 338 (1972); and in our own *Castro v. Beecher*, 459 F.2d 725 (1972), we order that black and Spanish-speaking applicants for police positions, who had failed to measure up to a constitutionally impermissible set of hiring standards, be given priority in future hiring.

Id. at 16-17.

⁹² *Id.*

⁹³ *Id.* at 16.

⁹⁴ *Id.* at 17.

Among the cases cited in *Associated General Contractors* as illustrations of affirmative action as remedy under Title VII were the first two litigated court of appeals cases. In both *International Association of Heat & Frost Workers Local 53 v. Vogler*⁹⁵ and *United States v. Sheet Metal Workers International Association*⁹⁶ the issue was whether or not Title VII empowered courts to require numerical hiring. In *Local 53 v. Vogler* the court rejected claims that it lacked power to grant such relief in the form of specific mandates of one-to-one referrals.⁹⁷ The Supreme Court also recognized that courts have such authority under Title VII in *Bakke*.⁹⁸ In addition, the Court recently re-affirmed the existence of specific authority under Title VII to grant such relief in *Local 28 of the Sheet Metal Workers' International Association v. EEOC*.⁹⁹

This type of affirmative action probably has its roots in equity, which was originally a separate body of law administered in England by the Court of Chancery. The Chancellors were committed to achieving equity, a higher justice than available under rigid legal rules and inadequate legal remedies. A modern adaptation of equity's flexibility to a novel problem is illustrated by Congress' establishment of independent administrative agencies. The generous grant of authority that usually accompanies these administrative agencies is also found in most remedial legislation and, indeed, is specifically included in section 706(g) of Title VII. Section 706(g) empowers the court to issue orders requiring "such affirmative action as may be appropriate."¹⁰⁰

The second context in which race has been recognized as a permissible criterion for employment is illustrated by cases that have upheld the Executive Order Program against challenge. The leading case in this context is *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*,¹⁰¹ in which the Third Circuit upheld a broad based attack on the Philadelphia Plan, finding that the plan was a valid exer-

⁹⁵ 407 F.2d 1047 (5th Cir. 1969).

⁹⁶ 416 F.2d 123 (8th Cir. 1969).

⁹⁷ *Local 53*, 407 F.2d at 1055.

⁹⁸ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 301-02 (1978).

⁹⁹ 106 S. Ct. 3019 (1986); see also *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 106 S. Ct. 3063 (1986). For a discussion of *Local 28 of the Sheet Metal Workers* and *Local No. 93, Int'l Ass'n of Firefighters*, see *infra* notes 148-56 and accompanying text.

¹⁰⁰ Civil Rights Act of 1964, Pub. L. No. 92-261, § 706(g), 86 Stat. 104 (codified as amended at 42 U.S.C. § 2000e-5(g) (1982)).

¹⁰¹ 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

cise of the President's implied authority.¹⁰²

In the school desegregation cases, the Supreme Court has long recognized that public authorities may have more flexibility and authority to deal with issues of racial discrimination than the courts.¹⁰³ In *Fullilove v. Klutznick*¹⁰⁴ the Supreme Court reaffirmed those cases in declaring that Congress is not required to act in a wholly color-blind fashion.¹⁰⁵

A growing number of programs require affirmative action, including goals and timetables. Twenty-nine states and the District of Columbia have some form of affirmative action requirements relating to either employment or contracting.¹⁰⁶ Many of these requirements include provisions for minority set-asides.¹⁰⁷ The National Association of Counties, which represents more than 2100 of the nation's 3106 counties, recently adopted a resolution committed to maintaining affirmative action goals and timetables and increasing minority hiring.¹⁰⁸ A whole host of state and local governments have established affirmative action programs. They have acted in reliance upon the Supreme Court's evident approval of the appropriate use of such plans to deal with the intractable problem of employment discrimination.

VI. AFFIRMATIVE ACTION — THE CURRENT STATUS¹⁰⁹

A. *The Supreme Court's Affirmative Action Trilogy* — Bakke, Weber, and Fullilove

Both the opponents and proponents of affirmative action have been dissatisfied with the Supreme Court's treatment of the issue. However, a close reading of the three major cases in which the Supreme Court addressed the issue reveals that a majority of the Court, although taking different analytical approaches, has affirmed the constitutionality and legality of *appropriate* affirmative action programs. In *Regents of*

¹⁰² *Id.* at 171.

¹⁰³ *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); McDaniel v. Barresi, 402 U.S. 39 (1971); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

¹⁰⁴ 448 U.S. 448 (1980).

¹⁰⁵ *Id.* at 482.

¹⁰⁶ A complete guide to state affirmative action plans is collected in 8A Fair Empl. Prac. M. Lab. Rel. Rep. (BNA).

¹⁰⁷ *See id.*

¹⁰⁸ Williams, *County Officials Urge U.S. to Keep Hiring Goals*, N.Y. Times, Mar. 6, 1986, at A21, col. 1.

¹⁰⁹ I have discussed substantially the same matters as appear here in Jones, *Affirmative Action*, *supra* note 19, at 923.

*the University of California v. Bakke*¹¹⁰ four Justices found neither constitutional nor statutory imperfection in the University of California, Davis Medical School's affirmative action admissions program.¹¹¹ Justice Powell agreed that it was not per se unconstitutional to use race in affirmative action programs when the programs were appropriately crafted.¹¹² However, he concluded that this particular program offended the law. In the process of articulating his view, Justice Powell referred to cases sustaining the legality of the President's Executive Order Program of goals and timetables as illustrative of the appropriate process whereby governmental entities could establish such programs.¹¹³

In *United Steelworkers of America v. Weber*¹¹⁴ the Court approved an affirmative action program over the protest of a white male employee who alleged reverse discrimination. The company and a union voluntarily entered into the program although some dispute existed over whether the program was actually voluntary. Plaintiff based his claim of reverse discrimination on Title VII. The Court concluded that Title VII did not prohibit voluntary action by parties to correct past discrimination by utilizing a program that provided for one-to-one black/white participation.¹¹⁵ This program *did not* involve layoffs, but rather involved opportunities for participation in a training program that the parties established. The Court also provided some limited guidance as to the appropriate limits of affirmative action programs to avoid unnecessarily trammeling the rights of innocent workers.

In *Fullilove v. Klutznick*¹¹⁶ the Court examined a program, attacked as an unconstitutional quota, which Congress had established to provide for a ten percent set-aside of certain federal contracts for minority contractors. While the Executive Order Program had attempted to facilitate minority participation in government contracting activities, it had been less than successful. The Supreme Court sustained the constitutionality of this set-aside program by a six to three vote, although, again, several opinions addressed the nature of the judicial scrutiny required. Critically, the Supreme Court determined that the judiciary is not the exclusive branch to address the effects of past discrimination; rather, elected officials, such as chief executives and appropriate legisla-

¹¹⁰ 438 U.S. 265 (1978).

¹¹¹ *Id.* at 325-26.

¹¹² *Id.* at 315-19.

¹¹³ *Id.* at 301-02 n.40.

¹¹⁴ 443 U.S. 193 (1979).

¹¹⁵ *Id.* at 208-09.

¹¹⁶ 448 U.S. 448 (1980).

tive bodies, are the more appropriate governmental entities to establish affirmative action programs to deal with the legacy of our past.¹¹⁷

One court of appeals has indicated that the Supreme Court's decisions reveal the following standards for reviewing affirmative action programs:

- (1) that the governmental body have the authority to pass such legislation;
- (2) that adequate findings have been made to ensure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interests over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination. Legislation employing benign racial preferences, therefore, must incorporate sufficient safeguards to allow a reviewing court to conclude that the program will be neither utilized to an extent nor continued in duration beyond the point needed to redress the effects of the past discrimination.¹¹⁸

In *Wygant v. Jackson Board of Education*¹¹⁹ the Court addressed an issue left open in *Weber* regarding voluntary adoption of affirmative action plans by public employers. The City of Jackson and its union negotiated a collective bargaining agreement that not only provided for affirmative action in hiring, but protected minority teachers from layoffs. A majority of the Court concluded that the layoff provision was unconstitutional because it was not sufficiently narrowly tailored and because it maintained levels of minority hiring that had no relation to remedying *employment* discrimination.¹²⁰ It is difficult to identify specific court conclusions since a multiplicity of opinions comprised the majority. Justice Powell wrote for the plurality, Justice O'Connor concurred in all but part IV of Powell's opinion, and Justice White concurred in the judgment separately. Justices Marshall, Brennan, and Blackmun joined in a dissent, and Justice Stevens dissented separately. Despite the continued cacophony of opinions, it seems that a consensus has emerged on the fundamental issues.

Justice O'Connor's views are the most crucial since her vote was necessary to constitute a majority, and her opinion states the principles supported by a substantial majority of the Court. Justice O'Connor believed that the Court was in accord that "a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which

¹¹⁷ *Id.* at 483.

¹¹⁸ *South Fla. Chapter of Associated Gen. Contractors of Am., Inc. v. Metropolitan Dade County, Fla.*, 723 F.2d 846, 851-52 (11th Cir. 1984).

¹¹⁹ 106 S. Ct. 1842 (1986).

¹²⁰ *Id.* at 1851-52.

implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals."¹²¹

She concluded that the Court has rejected the proposition that contemporaneous *findings of discrimination* must exist before an employer may act. Rather,

[w]here these employers, who are presumably fully aware both of their duty under federal law to respect the rights of *all* their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings requirement should not be necessary.

. . . Indeed, our recognition of the responsible state actor's competency to take these steps is assumed in our recognition of the States' constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination.¹²²

Justices Marshall, Brennan, and Blackmun believed that the particular plan under attack was constitutional.¹²³ Justice Stevens, arriving at the point by a different route, also concluded that the plan was constitutional.¹²⁴

What can we glean from this multiplicity of voices that will assist us in determining the status of affirmative action? I suggest that a careful reading of the opinions identifies a substantial majority of the court (at least six members) that supports the proposition that public employers, like private employers under Title VII, may constitutionally adopt affirmative action programs giving certain special status to appropriate minorities. However, these programs must be carefully crafted. They must address the elimination of past discrimination and there must be some sort of record, a factual predicate if you will, of prior discrimination by the acting entity.¹²⁵ Interestingly, not even the plurality takes the position that the Constitution requires color-blind action. Justice Powell, joined by Justice Rehnquist and Chief Justice Burger, stated that "[w]e have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the

¹²¹ *Id.* at 1853-54 (O'Connor, J., concurring).

¹²² *Id.* at 1855-56 (O'Connor, J., concurring) (emphasis in original).

¹²³ *Id.* at 1861-65 (Marshall, J., dissenting).

¹²⁴ *Id.* at 1867 (Stevens, J., dissenting).

¹²⁵ *But see* Johnson v. Transportation Agency, Santa Clara County, Cal., 107 S. Ct. 1442 (1987) and text accompanying *infra* notes 171-77.

remedy."¹²⁶ This suggests that even Justice Rehnquist has given up the color-blind stance he took in *Fullilove*.¹²⁷ If we set aside their argument over which level of scrutiny is required, the differences that separate the Justices are over the *types* of affirmative action adopted, not whether *any* such program can be constitutionally crafted.

It is possible, indeed not very difficult, to abstract guiding principles from these cases that would permit the establishment of appropriate affirmative action programs with confidence that the programs would garner the support of a majority of the Supreme Court Justices. Unfortunately, since the Court speaks with so many voices, this guidance is not apparent. In its most recent decisions¹²⁸ the Court has not provided much additional clarity.¹²⁹

Clearly, *Wygant* rejects the Justice Department's assertion that affirmative action is limited to granting remedy to identified victims of discrimination. Justice O'Connor stated that plans need not be limited to remedying specific instances of identified discrimination to be deemed sufficiently narrowly tailored or substantially related to the correction of prior discrimination. While the administration has also contended that Title VII restricts relief to identified victims of discrimination, the courts of appeals have overwhelmingly rejected that position.¹³⁰

VII. AFFIRMATIVE ACTION AND THE SUPREME COURT — AGAIN, AGAIN, AND AGAIN

After the original version of this Essay was submitted to the House Committee on Education and Labor for inclusion in the Committee report,¹³¹ the Supreme Court decided *Local No. 93, International Asso-*

¹²⁶ *Wygant*, 106 S. Ct. at 1850.

¹²⁷ 448 U.S. 448, 522-23 (1980) (Stewart & Rehnquist, JJ., dissenting).

¹²⁸ See *infra* notes 132-79 and accompanying text.

¹²⁹ See, e.g., *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 106 S. Ct. 3063 (1986); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986).

¹³⁰ See, e.g., *United States v. City of Buffalo*, 779 F.2d 881 (2d Cir. 1985); *Britton v. South Bend Community School Corp.*, 775 F.2d 794 (7th Cir. 1985); *Deveraux v. Geary*, 765 F.2d 268 (1st Cir. 1985); *EEOC v. Local 638 . . . Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172 (2d Cir. 1985), *aff'd sub nom. Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986); *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985); *Grann v. City of Madison*, 738 F.2d 786 (7th Cir.), *cert. denied*, 469 U.S. 918 (1984).

¹³¹ STAFF OF HOUSE COMM. ON LABOR AND EDUCATION, 100th Cong., 1st Sess., REPORT OF THE STUDY GROUP ON AFFIRMATIVE ACTION (Comm. Print 1987).

*ciation of Firefighters, AFL-CIO v. City of Cleveland*¹³² and *Local 28 of the Sheet Metal Workers' International Association v. EEOC*.¹³³ In the following Term, the Court added two more affirmative action cases, *United States v. Paradise*¹³⁴ and *Johnson v. Transportation Agency, Santa Clara County, California*.¹³⁵

It is likely that more affirmative action cases lurk in the Supreme Court docket for the October 1987 Term. As the Court continues to speak to the issues with so many voices, there will be continued uncertainty as to the constitutionality of some aspects of affirmative action and continued litigation.¹³⁶

The controversy over affirmative action as remedy for egregious violations of Title VII usually involves questions of statutory interpretation rather than issues of great constitutional moment. The debate was fueled in 1984 when the Supreme Court decided *Firefighters Local Union No. 1784 v. Stotts*.¹³⁷ *Stotts* involved a pattern or practice of racial discrimination in the Memphis fire department's hiring and promotion decisions. The case eventually was settled and in April 1980 the city entered into a consent decree in which, without admitting any violations of law, it agreed to fill fifty percent of its entry level vacancies with qualified black applicants and to give twenty percent of all promotions in each job classification to blacks.¹³⁸ This remedy was considered necessary because in 1979, while blacks constituted about thirty-five percent of the Memphis target population, only ten percent of the fire department's employees were black, and this ten percent figure was largely the product of hiring goals incorporated in an earlier consent decree.¹³⁹ In 1981, when city-wide reductions in force were made necessary by budget deficits, the city announced that layoffs were to be governed by city-wide seniority with the last hired employees to be laid off first. Neither consent decree specifically mentioned layoffs, but the earlier decree specified that promotions were to be governed by city-wide seniority. In addition, the collective bargaining agreement with the firefighters included last-hired, first-fired seniority.

The plaintiffs sought an injunction to block the seniority layoffs because they would disproportionately affect the black firefighters. The

¹³² 106 S. Ct. 3063 (1986).

¹³³ 106 S. Ct. 3019 (1986).

¹³⁴ 107 S. Ct. 1053 (1987).

¹³⁵ 107 S. Ct. 1442 (1987).

¹³⁶ See *Symposium: Affirmative Action*, 72 IOWA L. REV. 255-85 (1987).

¹³⁷ 467 U.S. 561 (1984).

¹³⁸ *Id.* at 566.

¹³⁹ *Id.*

district court enjoined the city from applying the seniority policy in a manner that would decrease the percentages of the blacks employed in the fire department.¹⁴⁰ On appeal, the Sixth Circuit affirmed, concluding that the injunction was an appropriate means of enforcing or modifying the consent decree.¹⁴¹ The court rejected the argument that Title VII protected the city's bona fide seniority system from attack.

The Supreme Court reversed, holding that the district court's injunction was improper regardless of whether it was an effort to enforce the original terms of the consent decree or to modify those terms to take into account changed circumstances.¹⁴²

Had the matter rested at this point, *Stotts* would be an unremarkable case. There is a powerful argument that it should have. However, Justice White's opinion contains language suggesting that even if the case had been litigated and discrimination actually found, the policy behind section 706 of Title VII restricted the remedial authority of the Court to actual victims of discrimination.¹⁴³ In Justice White's view, this policy provides "makes whole" relief *only* to those who had been actual victims of illegal discrimination.¹⁴⁴

The Justice Department seized upon this dicta and took the position that the decision rendered all affirmative action programs under Title VII illegal.¹⁴⁵ The Justice Department initiated or participated in court challenges to all outstanding decrees and launched a campaign to persuade fifty public sector employers to seek to modify existing consent decrees that contained hiring or promotion goals. It claimed that the *Stotts* decision required the elimination of all such goals.¹⁴⁶ The lower courts uniformly rejected the Justice Department's position.¹⁴⁷

In *Local 93, International Association of Firefighters, AFL-CIO v. City of Cleveland*¹⁴⁸ the Supreme Court rejected the Justice Department's interpretation of *Stotts*. *Local 93 Firefighters* involved a chal-

¹⁴⁰ *Id.* at 567.

¹⁴¹ *Id.*

¹⁴² *Id.* at 572-76.

¹⁴³ *Id.* at 578-82.

¹⁴⁴ *Id.*

¹⁴⁵ See Pear, *Justice Department Presses Drive on Quotas*, N.Y. Times, Apr. 3, 1985, at 16, col. 1.

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., *EEOC v. Local 638 . . . Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172 (2d Cir. 1985), *aff'd sub nom.* *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986); *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985); see also M. GOLDBERG, *WAITING FOR WYGANT: AFFIRMATIVE ACTION IN THE AFTERMATH OF STOTTS* § 19 (1985).

¹⁴⁸ 106 S. Ct. 3063 (1986).

lunge to the legality of an affirmative action consent decree that provided hiring preferences to black firefighters who were not actual victims of the city's discriminatory practices. The Court concluded that whatever limits might be involved in section 706(g) on the remedial authority of the federal court, they were not implicated in a voluntary agreement as it determined the consent decree to be.¹⁴⁹ The decision is an extremely narrow and complicated one and avoids directly addressing many potential statutory and constitutional issues.

In *Local 28 of the Sheet Metal Workers' International Association v. EEOC*¹⁵⁰ the Court clearly rejected the Justice Department's crabbed reading of the scope of the statute by concluding that district courts have the power to order affirmative, race conscious relief when necessary to counteract egregious discrimination.¹⁵¹

Sheet Metal Workers involved a union that had been cited for discrimination as early as 1964. It was ultimately found in contempt and placed under the jurisdiction of an administrator to carry out the goals of the affirmative action program. This program sought to establish a nonwhite membership of twenty-nine percent.

What is significant about the decision is the majority's determination that the membership goal, or quota as it was attacked, as part of the remedy the lower court imposed, was subject to examination regarding its permissibility under the equal protection component of the fifth amendment.¹⁵² As in other affirmative action cases, there were a multitude of separate opinions.¹⁵³

The Court's decision is troublesome in that the multiplicity of rationales that made up the majority invites continued disagreement and litigation. With the addition of Justice Scalia to the bench since the case was decided, and the departure of Justice Powell, Justice O'Connor's position is probably more critical than ever before. She thought the case should have been reversed on statutory grounds and would not have reached the constitutional issue.¹⁵⁴ In her view, the rigid requirement to meet the membership quota was unjustified under the statute.¹⁵⁵ However, O'Connor reports that a majority of the Court

¹⁴⁹ *Id.* at 3072.

¹⁵⁰ 106 S. Ct. 3019 (1986).

¹⁵¹ *Id.* at 3035-36.

¹⁵² *Id.* at 3052-53.

¹⁵³ For a discussion of how the Justices line up in these cases, see Morris, *New Light on Racial Affirmative Action*, 20 U.C. DAVIS L. REV. 219, 252-64 (1987).

¹⁵⁴ *Local 28 of Sheet Metal Workers*, 106 S. Ct. at 3057 (O'Connor, J., concurring & dissenting).

¹⁵⁵ *Id.*

believes that the last sentence of section 706(g) does not prohibit a court in a Title VII employment discrimination case from ordering race conscious relief in all circumstances.¹⁵⁶ However, she does not expressly join that majority. Obviously, we will have to await further cases to determine what the new lineup will be on these narrow issues.

United States v. Paradise,¹⁵⁷ like *Sheet Metal Workers*, involved affirmative action as a remedy after adjudication of discrimination in an *egregious* situation. In litigation extending back to 1972, the Alabama Department of Public Safety had been repeatedly adjudged to have discriminated against blacks. In the first case the court ordered the Department to hire one black trooper for each white trooper until blacks constituted approximately twenty-five percent of the state trooper force.¹⁵⁸ After repeated efforts to obtain compliance and after numerous consent decrees, the case finally reached the Supreme Court on the constitutionality of the remedy ordered. Prior to the Supreme Court's consideration, the plaintiffs had obtained supplemental relief from the district court on the issue of promotions.¹⁵⁹

Primarily, the issue presented was whether the court's power to order relief in egregious cases included promotions in addition to hiring. The second issue was whether the form of one black for one white promotion was permissible under the equal protection guarantee of the fourteenth amendment. Again, the Justice Department intervened and maintained that the race conscious relief ordered in the case violated the fourteenth amendment.¹⁶⁰

The Supreme Court rejected this position, concluding that the pervasive, systematic, and obstinate discriminatory conduct of the Alabama department created a profound need and a firm justification for the race conscious relief ordered by the district court.¹⁶¹ It also rejected the government's contention that even though the conduct provided a *compelling state interest*, the relief was not sufficiently narrowly tailored to meet the standards that the court had enunciated previously.¹⁶²

Again the Court, in determining whether race conscious remedies are appropriate, looked to several factors "including the necessity for the relief and the efficacy of alternative remedies, the flexibility and dura-

¹⁵⁶ *Id.* at 3058.

¹⁵⁷ 107 S. Ct. 1053 (1987).

¹⁵⁸ *Id.* at 1058.

¹⁵⁹ *Id.* at 1063-64.

¹⁶⁰ *Id.* at 1064.

¹⁶¹ *Id.* at 1065.

¹⁶² *Id.* at 1067.

tion of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."¹⁶³ It concluded that the remedy imposed was an effective, temporary, and flexible one, applying only if qualified blacks are available and only if the department has an objective need to make promotions.¹⁶⁴ Moreover, this proposal was contingent upon the Department's failure to implement a promotion procedure that did not have an adverse impact on blacks. The Court concluded that the race conscious relief imposed was amply justified and narrowly tailored to serve the district court's legitimate and laudable purpose.

Justices O'Connor and Scalia and Chief Justice Rehnquist dissented. Primarily, they objected that the district court did not consider available alternatives in fashioning its relief and therefore it was not consistent with the strict scrutiny standard requirement that relief be narrowly tailored.¹⁶⁵

I find it difficult to imagine more egregious cases in the history of Title VII enforcement than *Local 28* and *Paradise*. If the dissenters do not find justification for quota relief in cases of this nature, it is hard to imagine what kind of record would meet their conditions.¹⁶⁶

Perhaps what troubles Justice O'Connor in these quota cases is the extent to which they seem inconsistent with her perception as to the differences between goals and quotas. More than anyone else on the Court, she seems to understand this fundamental aspect of the affirmative action concept and would carry it over into the crafting of relief as well as the establishment of affirmative action programs.¹⁶⁷ Future liti-

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1070-71.

¹⁶⁵ *Id.* at 1080-81 (Rehnquist, J., dissenting).

¹⁶⁶ While the Supreme Court's 5-4 decision suggests a delicate balance in approval of the type of relief at issue, the parties reached a settlement agreement, subject to the approval of Federal District Judge Myron Thompson, which includes quotas for increasing the number of blacks at various ranks in the police department. It is reported that the settlement could cost the state as much as \$2.5 million. See *Alabama Bias Case Near Resolution*, N.Y. Times, July 29, 1987, at 24, col. 1. The agreement provides that the department will promote 15 blacks to the rank of corporal within a month, raising the percentage of blacks at that rank to 25%. It also calls for blacks to make up 10% of the sergeants within a year, 15% after two years, and 20% after three; 10% of lieutenants within 18 months, 15% after three years. In addition, within three years blacks are to make up 10% of the captains in the department. After these promotions are completed, a new promotion and hiring procedure developed by professors of psychology at the University of Maryland are to be adopted.

¹⁶⁷ See *Local 28 of Sheet Metal Workers*, 106 S. Ct. at 3060-62.

gants would be well advised to pay close attention to O'Connor's opinion in *Wygant*,¹⁶⁸ her concerns expressed in *Local 28*,¹⁶⁹ and her dissent in *Paradise*.¹⁷⁰

The latest case is *Johnson v. Transportation Agency, Santa Clara County, California*.¹⁷¹ In *Johnson* a male employee of the county brought an employment discrimination action alleging that he was denied a promotion because of his sex. The court below granted retroactive promotion and pay and enjoined the county agency from further discrimination.¹⁷² On appeal, the Ninth Circuit reversed, holding that the county agency's affirmative action plan, which had been adopted to obtain a balance between the sexes in the work force, was valid.¹⁷³ The court reached this conclusion even though the plan contained neither an express statement fixing its duration, nor a statement that it was intended to be permanent. Further, the agency did not show that it had a history of purposeful discrimination but it did demonstrate conspicuous imbalance in its work force. In addition, the plaintiff failed to show that the plan prevented or would preclude men from attaining promotions.

The promotion was granted to a woman under the agency's voluntary, noncollectively bargained affirmative action plan. The plan did not set quotas in any job classification but established a long-range goal to attain a work force whose composition in all major job classifications approximated the distribution of women, minorities, and handicapped persons in the county labor market. The plan specified no past discriminatory practices but merely stated that women had been traditionally underrepresented in the relevant job classifications and recognized the extreme difficulty in significantly increasing the representation of women in certain technical and skilled craft jobs. At that time, no woman held any of the agency's 238 skilled craft positions.

The Supreme Court upheld the court of appeals' decision.¹⁷⁴ Once again, we have Supreme Court "opinion salad." Justice Brennan wrote for the majority, joined by Justices Marshall, Blackmun, Powell, and Stevens. Justice Stevens wrote a separate concurrence; Justice O'Connor concurred in the result but did not join the Brennan opinion;

¹⁶⁸ 106 S. Ct. 1842, 1852 (1986) (O'Connor, J., concurring).

¹⁶⁹ 106 S. Ct. 3019, 3057 (1986) (O'Connor, J., concurring & dissenting).

¹⁷⁰ 107 S. Ct. 1053, 1080 (1987) (O'Connor, J., dissenting).

¹⁷¹ 107 S. Ct. 1442 (1987).

¹⁷² *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 770 F.2d 752, 753 (9th Cir. 1984).

¹⁷³ *Id.*

¹⁷⁴ *Johnson*, 107 S. Ct. at 1442.

Justice White dissented. Justice Scalia wrote a separate dissent joined by Chief Justice Rehnquist and Justice White.

The majority stated that it was applying the *Weber* standards to the agency plan.¹⁷⁵ Given the obvious imbalance in the skilled craft category and the agency's commitment to eliminating those imbalances, the Court found that it was plainly reasonable for the agency to consider sex *as one factor* in making its decision.¹⁷⁶ The plan did not unnecessarily trammel the rights of male employees or create an absolute bar to their advancement. It set aside no positions for women, but rather merely authorized that consideration be given to affirmative action concerns when evaluating qualified applicants. Finally, the plan was intended to attain a balanced work force, not to maintain one.

Unfortunately, the plaintiff did not raise the constitutional issue but chose to bring his action solely under Title VII. Thus, the Court addressed the case as a matter of statutory construction and did not address the more interesting issue of the constitutional standards to be applied in a case involving sex classifications. While race classifications require strict scrutiny, the Court has not considered sex classifications suspect, and therefore they are judged by a sliding or intermediate constitutional standard of scrutiny.¹⁷⁷ Thus, it will be interesting to see how the Court handles the constitutional issue when a combined sex-race case arises.

Justice Scalia wrote a biting dissent that took issue with the majority in a number of ways. In his view, *Weber* should be overruled.

Today's decision does more, however, than merely reaffirm *Weber*, and more than merely extend it to public actors. It is impossible not to be aware that the practical effect of our holding is to accomplish *de facto* what the law — in language even plainer than that ignored in *Weber* — forbids anyone from accomplishing *de jure*: in many contexts it effectively *requires* employers, public as well as private, to engage in intentional discrimination on the basis of race or sex. . . . A statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism, not merely *permitting* intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.¹⁷⁸

The Justice continued:

In fact, the only losers in the process are the Johnsons of the country, for

¹⁷⁵ *Id.* at 1449-53.

¹⁷⁶ *Id.* at 1455.

¹⁷⁷ *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976).

¹⁷⁸ *Johnson*, 107 S. Ct. at 1475 (Scalia, J., dissenting) (citation omitted; emphasis in original).

whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals — predominantly unknown, unaffluent, unorganized — suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.¹⁷⁹

Justice Scalia's characterization certainly does not reflect the extent to which the position of the Johnsons have been placed before the Court in this odyssey of affirmative action cases by a multiplicity of powerful organizations. He has neglected to check the brief filing record. The critical cases have involved construction, police, and fire unions, which not only are powerful organizations throughout the country and in their local communities, but also represent some of the most egregious examples of exclusion of blacks and women from meaningful participation in job opportunities. They have also been among the most intransigent in complying with the Court's orders to make even minimal progress.

Finally, I wonder which court Justice Scalia has in mind that considers itself the champion of the "politically impotent"? Certainly, the Supreme Court's past has not made it much of a champion of politically impotent minorities, despite its preoccupation with and use and misuse of the teachings of *United States v. Carolene Products*.¹⁸⁰ Maybe it is the Warren Court that was fond of thinking itself as the champion of the politically impotent. Certainly, the Courts prior to 1954 would not have received even passing marks regarding the protection of the rights of its most numerous minority. How quickly we seem to forget what the 1950s and the 1960s were all about. How even more quickly we forget our history prior to *Brown v. Board of Education*.¹⁸¹

As this country celebrates the bicentennial of its Constitution, perhaps we need to be reminded of the Supreme Court's role in creating and protecting an unequal and color conscious world of law from which we have yet to extricate ourselves. A quick rereading of *Dred Scott v. Sandford*,¹⁸² and a reconsideration of *Plessy v. Ferguson*,¹⁸³ leads to the recognition that the whole notion of color-blind was an impassioned dissent of the first Justice Harlan, which had absolutely nothing to do with the history and practices of this country and this Court.

We also need to remember that it was the Supreme Court's decisions that eroded and eventually repealed, for all practical purposes, Recon-

¹⁷⁹ *Id.* at 1476.

¹⁸⁰ 304 U.S. 144, 152 n.4 (1938).

¹⁸¹ 347 U.S. 483 (1954).

¹⁸² 60 U.S. (19 How.) 393 (1857).

¹⁸³ 103 U.S. 537 (1896).

struction Era statutes designed to benefit former slaves. By 1896 the brave beginning and the progress made in the first civil rights revolution were virtually reversed. Today, the rate of change in our society is much more rapid than that bygone era and we could lose all of the gains of the 1950s and the 1960s in less than thirty years.

CONCLUSION

The origins of affirmative action as *remedy* and affirmative action as *program* are fairly clear in our history. Although we have been preoccupied with the new label for the past two decades, the old concepts are firmly rooted in both our judicial and our legislative history. While the pattern has been painfully slow in coming, it seems the Supreme Court is finally etching out the dimensions of acceptable programs with sufficient clarity to advise individuals who wish to craft affirmative action remedies that will withstand judicial scrutiny.

What this nation needs now is additional clarity from the Court and a clear mandate from Congress. There is no doubt that an act of Congress requiring affirmative action for government contractors and specifically authorizing affirmative action plans as remedy for employment discrimination would pass constitutional scrutiny.

The civil rights community has previously, but mistakenly, concluded for more than forty-five years that the existence of Executive Order Programs made affirmative action under the direction of the executive safe. However, the Reagan Administration's attacks on the entire structure of civil rights, and affirmative action in particular, suggest that Congress should act to limit the President's discretion in the implementation of all equal employment opportunity programs. Making the basic affirmative action obligations of government contractors a matter of statutory duty would go far in resolving the current crisis.

All of us in this country are the ultimate victims of invidious discrimination. The fraud of racism, which has infected our society since its inception, has tarnished our Constitution, our laws, our education, our science, our morals, and our religions. It has been the most persistent and divisive element in this society and one that has limited our growth and happiness as a nation. The only way to put racism behind us is to be race conscious in our remedies. Affirmative action alone cannot solve all our problems, but it can continue to make a contribution. If sustained sufficiently over time, it could help to cleanse our country of the effects of its sordid history. If we do not address this issue, racism will continue to be a strain and a drain upon our corporate resources. If there is such a thing as "human capital," our society cannot afford to

continue to underutilize what is likely to become an ever increasing share of its human resources.

It would be the cruelest hoax if the Constitution were used as a *sword* to cut away the only programs that have made an effective dent in the encrusted walls of invidious discrimination. It would be a modern tragedy of gross proportions if constitutional concepts developed to *shield* minorities, the discrete and insular minorities, from malignant attacks by states are converted into analytical devices to defeat or unduly restrict the affirmative action concept. The Constitution, if it and we are to survive as a democracy, must remain a living document sufficiently flexible to adjust to the necessities of the present and the future.

