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**A Special Report to the Congress**

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**REFORMING AFFIRMATIVE  
ACTION IN EMPLOYMENT:  
HOW TO RESTORE THE  
LAW OF EQUAL TREATMENT**

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**Editor's Note:** Should federal law be entirely neutral with respect to race and sex? Or should federal civil rights laws and affirmative action programs be implemented so as to apply to some races or a certain sex, but not others?

During the more than thirty years since Congress passed the Civil Rights Act of 1964, activist judges and agency bureaucrats dramatically expanded the scope of "affirmative action" in ways that Congress itself explicitly intended to avoid. Today, race-conscious policies have proliferated in virtually every area of federal law. Employers, colleges and universities, lenders, and government contractors all must use racial quotas in order to produce the right "numbers" to insulate themselves from costly lawsuits under federal law. Fortunately, there appears to be a growing consensus among policymakers that government policies which bestow privileges on the basis of race and sex are wrong. Such policies have served only to divide the nation along racial and ethnic lines and betray the original intent of the 1964 Act.

Once again, Congress is reviewing federal civil rights laws and literally hundreds of programs that contain preferences, set-asides, and quotas favoring certain groups. The Supreme Court, too, has taken a new look at race-based preferences in federal law. In *Adarand Constructors, Inc. v. Peña*, the Court severely limited the ability of the government to use race as a criterion in governmental actions. Numerous polls, moreover, indicate that overwhelming majorities of Americans oppose special preferences based on race or sex and agree that federal law should embody the principle of equal treatment under the law.

To help policymakers better understand this issue, The Heritage Foundation plans a series of detailed Committee Briefs that will discuss the extent to which race and sex preferences have proliferated in federal law, and what to do about them.

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## INTRODUCTION

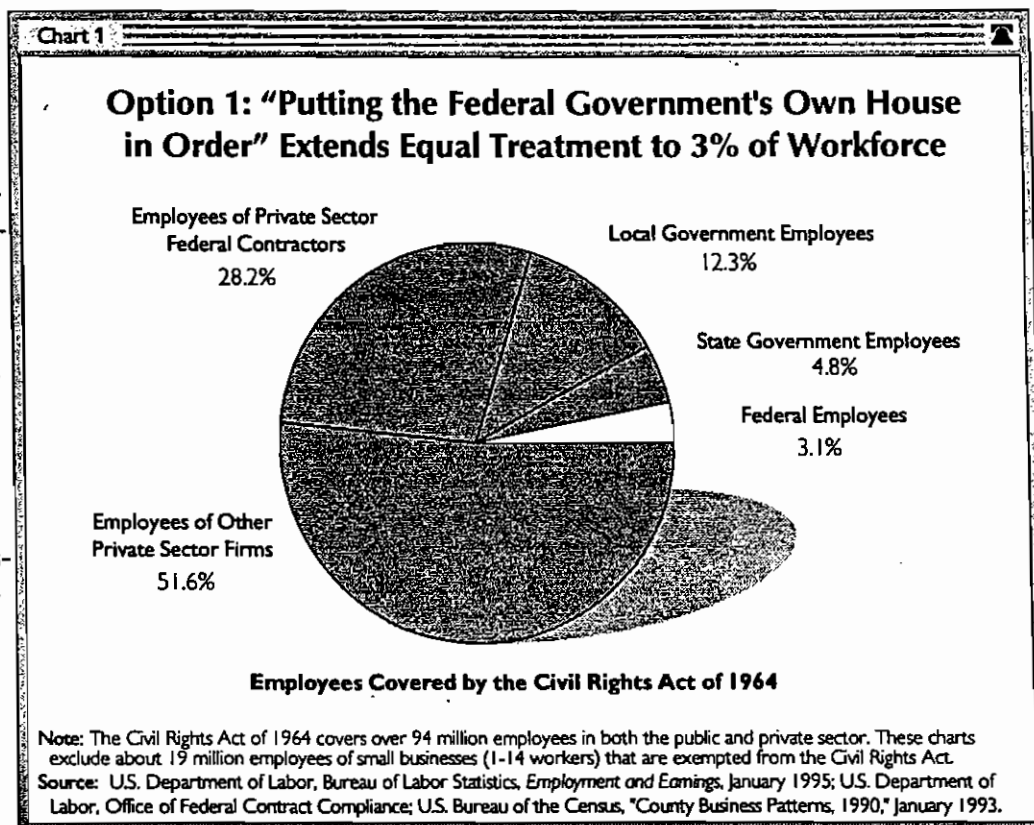
In his recent speech on affirmative action programs, President Clinton strongly reaffirmed the federal government's long-standing, and thoroughly discredited, approach to this subject. That approach is easy to sum up: Proclaim a fervid opposition to discrimination, but practice a policy of discriminatory preferences and favoritism for selected groups. The euphemisms and Orwellian doublespeak by now are quite familiar:

| <i>Public Proclamations</i>                                     | <i>Underlying Reality</i>                                                                                          |
|-----------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------|
| No "quotas."                                                    | "Numerical goals and timetables" are actively encouraged.                                                          |
| No "unjustified preferences for <i>unqualified</i> applicants." | Carefully preserve the existing practice of giving preferences to <i>less</i> qualified applicants.                |
| No "illegal reverse discrimination."                            | But <i>legal</i> reverse discrimination continues.                                                                 |
| End programs once they have "succeeded."                        | But proponents define "success" to mean the achievement of proportional representation, so the programs never end. |

President Clinton's embrace of the discriminatory status quo puts the burden on Congress to initiate meaningful reform. Such reform must address three principal areas in which the federal government practices or fosters discriminatory preferences: contract set-asides, education, and employment. Congress in all likelihood will consider the following three options.

**OPTION 1: Put the federal government's own house in order.** This approach, which has been embraced by Senate Majority Leader Bob Dole (R-KS) and Representative Charles Canady (R-FL),

would dismantle the notorious system of minority and sex-based quotas for federal contracts and forbid the federal government from discriminating in hiring and promotions. Federal contract set-asides increase the cost of government procurement by preventing agencies from accepting the low bids on many contracts, and they discriminate against low-bidding firms that are owned by people of the wrong color or sex. Abolishing this practice would be a significant step in the

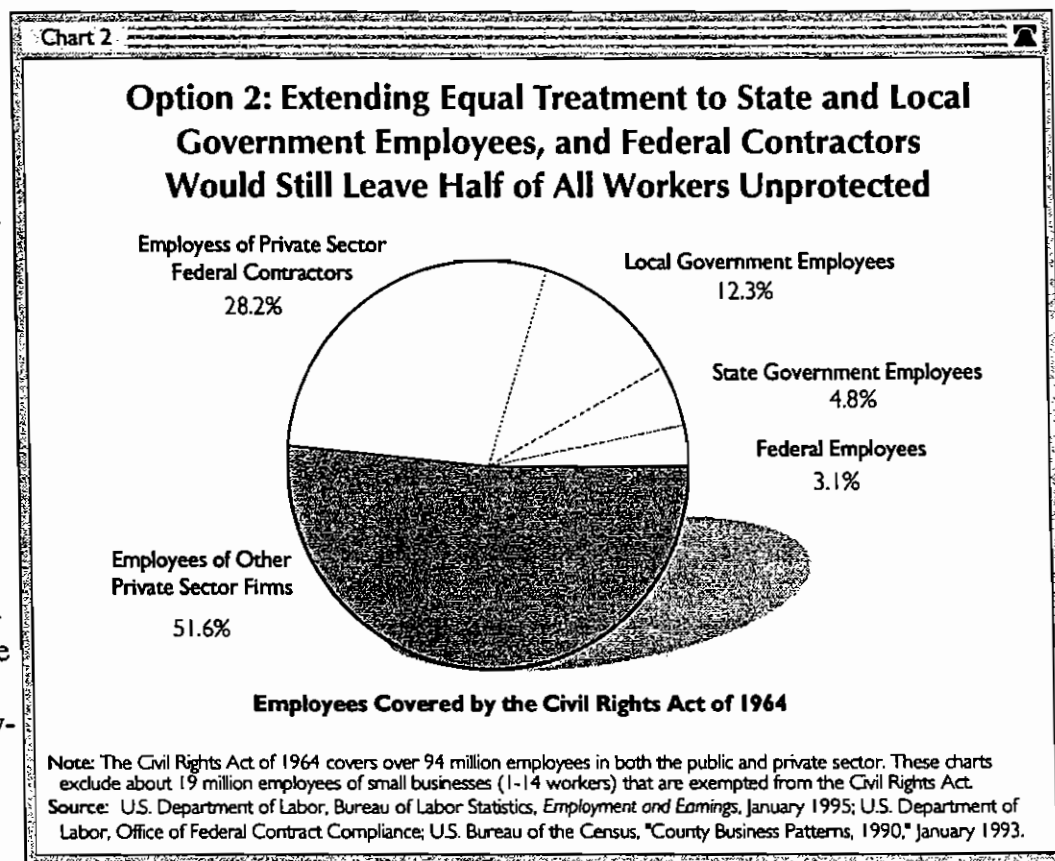


right direction by establishing a level playing field for the more than \$161 billion in federal contracts awarded annually.<sup>1</sup> Abolishing discriminatory practices in federal hiring and promotions, moreover, would substitute individual merit for group status and give equal legal rights to more than 2.8 million federal employees.

The limits of this approach, however, are evident from Chart 1, which shows that the federal government employs only 3.1 percent of the workers now protected by the principal anti-discrimination statute. Federal contractors, moreover, would still be allowed to use discriminatory preferences, and Labor Department bureaucrats could still bring pressure for "better numbers," so long as they avoided the imposition of formal goals and timetables. And discriminatory preferences in college admissions would be virtually untouched.

**OPTION 2: Outlaw discriminatory preferences imposed not only by the federal government, but also by federal contractors and subcontractors, and by state and local level governments and other recipients of federal grants.** Although this is not a complete solution, it would extend the principle of equal treatment to an additional 26.5 million employees of firms that do business with the federal government and the approximately 16 million Americans who work for state and local governments.<sup>2</sup> And it

would cover practically all colleges and universities. This approach adopts the well-accepted principle that the federal government should neither engage in discrimination nor finance discriminatory conduct by others. That principle has been applied for many years to protect women and certain minorities from discrimination by those who do business with the federal government or who accept federal financial assistance.



But, again, this approach leaves something to be desired. Under this approach, it would still be legal to discriminate against half of those Americans currently covered by the federal civil rights law.

<sup>1</sup> Figure taken from statement of Shirley J. Wilcher, Deputy Assistant Secretary for Federal Contract Compliance, U.S. Department of Labor, before the House Committee on Economic and Educational Opportunities, Subcommittee on Employer-Employee Relations, June 21, 1995.

<sup>2</sup> It would also cover some of the employees in the shaded area of Chart 2, but no estimate of their numbers is available.

**OPTION 3: Require equal treatment for 100 percent of the population that is now covered by federal civil rights law.** The most complete solution is also the simplest. The Civil Rights Act of 1964 clearly forbade employment discrimination against either sex and against any racial or ethnic group. Although federal agencies and the courts have refused to implement Congress's straightforward mandate, the Congress can now insist that its original intent be honored. This would extend the principle of equal treatment to the more than 94 million American employees now covered by the 1964 Act. Similarly, racial discrimination by federal grantees—which includes almost all colleges and universities—has been formally forbidden for thirty years. Congress need only insist that this law be enforced as written.

This study explains in some detail why Congress should opt for a comprehensive

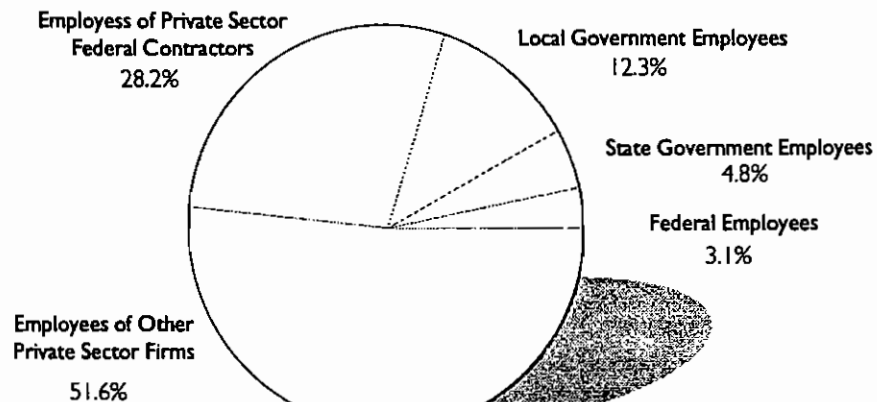
approach to the problem of discriminatory preferences in employment. After exploring the illegitimate origins of the current system, it discusses the nature of the current problem and explains why partial solutions are unsatisfactory. It also unmasks the myths behind "voluntary" affirmative action and the "disparate impact" theory of discrimination. Finally, it offers an outline of the legislation Congress ought to consider if it wants to restore the ideal of equal treatment under the law.

## OVERVIEW

The Congress of the United States has never sanctioned the discriminatory conduct that now occurs routinely in the American workplace under the rubric of "affirmative action." To the contrary, Title VII of the Civil Rights Act of 1964 outlawed discrimination in employment against any individual "because of such individual's race, color, religion, sex, or national origin." Senator Hubert H. Humphrey (D-MN), who was the Democratic floor manager for the 1964 Act, assured the Senate that "nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group."<sup>3</sup> Even more dramatically, Humphrey challenged one skeptical colleague by saying:

Chart 3

### Option 3: Equal Treatment for All Workers Covered by 1964 Civil Rights Act is the Best Option



Employees Covered by the Civil Rights Act of 1964

**Note:** The Civil Rights Act of 1964 covers over 94 million employees in both the public and private sector. These charts exclude about 19 million employees of small businesses (1-14 workers) that are exempted from the Civil Rights Act.  
**Source:** U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, January 1995; U.S. Department of Labor, Office of Federal Contract Compliance; U.S. Bureau of the Census, "County Business Patterns, 1990," January 1993.

If the Senator can find in title VII... any language which provides that an employer will have to hire on the basis of percentage or quota related to color... I will start eating the pages one after another, because it is not in there.<sup>4</sup>

Technically, Senator Humphrey was right. But federal judges and bureaucrats soon proved him wrong by using Title VII to create the elaborate system of quotas and preferences that we see all around us today. This transformation was accomplished through a series of Orwellian distortions of the law, none of which has ever been ratified by Congress.

Congress can solve all the important problems arising from affirmative action in the workplace by emphatically reaffirming the law it enacted in 1964. This would have the effect of repealing the complicated system of racial and sex-based preferences that have proliferated thanks to rogue judges and regulators. Congress must understand that these problems cannot be solved simply by getting the federal government itself out of the business of discrimination. The most serious effects of the federal government's twisted interpretation of Title VII are occurring in the private sector and in state and local government. Unless Congress addresses those effects, any claim of leadership will ring hollow indeed.

## UNDERSTANDING AFFIRMATIVE DISCRIMINATION

Group-based employment preferences are incompatible with the ideal of equal opportunity that every federal employment statute has claimed to advance. They are also incompatible with the views of the overwhelming majority of Americans.<sup>5</sup> For the same reasons that Congress has quietly accepted the insidious spread of such preferences, however, it will be reluctant to abolish them. Powerful special interests, ranging from civil rights lobbyists and labor unions to significant elements of the business world, will ferociously defend the discriminatory status quo. Legislators who make their stand on the principles articulated by Hubert Humphrey and Martin Luther King, Jr., will be accused of racism, insensitivity, and political expediency. As a consequence, true expediency may tempt them to soften the rougher edges in the current system through cosmetic reforms and empty symbolism, leaving the underlying problem unresolved.

One common perception about affirmative action is that it began as a benign effort to combat discrimination and has evolved gradually into the current system of quotas and preferences. Affirmative action, according to this view, simply requires employers to "cast a wider net" so that members of historically neglected groups can enjoy the opportunity to compete on an equal footing for jobs and promotions. While there is some truth in this view, there also are indications that it was no accident that "affirmative action" became a device for smuggling legalized preferences into the fabric of American life.

In September 1965, for example, President Lyndon B. Johnson issued an executive order requiring federal contractors to agree that they would take "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."<sup>6</sup> This sounds perfectly innocuous. Only a few months earlier, however, Johnson had said that "equality of opportunity is essential, but not enough." What was really required, according to Johnson, was a transition to "the next and the more profound stage of the battle for civil rights.... We

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4 110 *Congressional Record* 7420 (1964).

5 A recent poll, for example, showed that 84 percent of the public opposes "favoring a minority who is less qualified than a white applicant, when filling a job in a business that has few minority workers," while 73 percent of those polled are in favor of companies making "special efforts to find qualified minorities and women and then encouraging them to apply for jobs with that company." "Affirmative Action: The Public Reaction," *USA Today*, March 24, 1995, p. 3A.

6 Executive Order 11,246, §202 (September 24, 1965).

seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact *and equality as a result.*"<sup>7</sup>

Whatever the original vision of affirmative action may have been, it soon became a tool for imposing equality of results rather than equality of opportunity. While federal law on its face forbids discrimination against members of any racial group or either sex, this apparently simple principle has been obscured and twisted by a complex web of lies, censorship, doublespeak, and code words. Those whom the law now disfavors can be denied a job or promotion because of their skin color or their sex without being victims of "discrimination" in its new legal meaning. This miracle is accomplished by calling the denial either (a) affirmative action taken to *prevent* discrimination; (b) an unfortunate side effect of an attempt to cure "historic injustices"; (c) a prerequisite to achieving "diversity in the workplace"; or (d) the result of a presumption of "social disadvantage" for everyone in the preferred racial group.

The dizzying and ever-changing array of intellectual rationales for discrimination has been accompanied by an elaborate code of misleading language. Quotas become "measurable goals and specific time-tables." When a job applicant is rejected because of race, it was not really because of his race: it was just that the favored person had *his* race counted as a "plus factor." Or discrimination isn't really bad unless it is also "stigmatizing" (an effect that apparently can be experienced only by certain legally favored groups). All of this evasive rhetoric has arisen because the underlying practices are so difficult to defend. And because of that difficulty, they are rarely defended. Instead, they often are just carried out covertly. But the discriminatory nature of affirmative action cannot be concealed entirely.

**Example:** A 1989 poll of *Fortune* 500 executives indicated that only 14 percent of these firms even claimed to eschew discriminatory preferences in favor of merit-based hiring decisions. A majority of the firms claimed to employ "affirmative action goals," and a full 18 percent acknowledged that they have adopted specific quotas.<sup>8</sup>

**Example:** In 1990, Max Frankel, who was then executive editor of *The New York Times*, acknowledged that the standard of excellence that his organization applied to employees depended upon the individual's skin color:

We've reached a critical mass with women. I know that when a woman screws up it is not a political act for me to go fire them. I cannot (easily) say that with some of our blacks. They're still precious, they're still hothouse in management, and if they are less than good, I would probably stay my hand at removing them too quickly. It's still a political act and it would hurt the organization in a larger sense, so you tolerate a little more in the short term.<sup>9</sup>

**Example:** The state of California enacted a law setting a goal that "by fiscal year 1992-93, 30 percent of all new hires in the California Community Colleges as a system will be ethnic minorities."<sup>10</sup>

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7 Commencement speech at Howard University, "To Fulfill These Rights," June 4, 1965, 2 *Public Papers of the Presidents: Lyndon B. Johnson* 635, 636 (emphasis added). See also Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy* (New York: Oxford University Press, 1990), pp. 104-116, discussing the response of early civil rights leaders to political opposition engendered by calls for preferential treatment and "compensatory justice."

8 Alan Farnham, "Holding Firm on Affirmative Action (Fortune 500-CNN Moneyline CEO Poll)," *Fortune*, March 13, 1989.

9 Josh Getlin, "Editor is Back in Hot Water," *The Los Angeles Times*, October 24, 1990, Part E, p. 1.

10 California Educational Code, §87107 (West, 1989).

**Example:** After the *Philadelphia Inquirer* was criticized for an editorial advocating that poor black women be encouraged to use the contraceptive Norplant, the paper's editor announced a quota of 50 percent minorities and 50 percent women for all newsroom hires during the succeeding five years.<sup>11</sup>

**Example:** The Xerox Corporation has adopted a kind of "hidden hand" alternative to quotas: Annual bonuses are based in part on a manager's success in promoting blacks and women.<sup>12</sup>

**Example:** The Washington Bureau chief of the *Los Angeles Times* has announced that no white males will be hired "until we [do] more for minorities and women."<sup>13</sup>

**Example:** Apparently seeking to increase the "diversity" of its workforce by hiring more women, the U.S. Forest Service's Pacific Southwest Region created "upward mobility positions" limited to "applicants who do not meet the [Office of Personnel Management] qualifications requirements." A Forest Service spokesman defended its amazing search for *unqualified* workers with the following revealing comment: "On its face, this seems bizarre. However, the intent—if not the choice of language—was appropriate to the circumstances...."<sup>14</sup>

**Example:** On January 20, 1995, Oklahoma City decided to withdraw from the U.S. Department of Justice's Police Hiring Supplement Grant program, under which it had been authorized to hire 25 officers. Police Chief Sam Gonzales objected to a Justice Department letter that demanded an "underutilization analysis" for women and minorities and an affirmative action plan including specific steps to achieve "goals" for correcting the underutilization that the Justice Department *assumed must exist*. Justice Department officials also demanded that the city develop a specific plan for the "equal employment of women and minorities within the Police Department's sworn personnel." Chief Gonzales commented: "I believe this particular language to be very significant in that it states 'equal employment' of women and minorities rather than 'equal employment opportunity.'"<sup>15</sup>

## THE ILLEGITIMATE SOURCES OF AFFIRMATIVE ACTION

The main goal of the Civil Rights Act of 1964 was to dismantle the Jim Crow system, under which black Americans were pervasively, overtly, and legally discriminated against in substantial portions of the nation. The prohibition against employment discrimination in Title VII of that statute was meant to enhance the economic well-being of this oppressed minority by requiring employers to give blacks the same opportunities available to whites. That goal was achieved: Jim Crow was destroyed, and economic progress among southern blacks increased dramatically during the decade following the enactment of Title VII.<sup>16</sup>

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11 Howard Kurtz, "Inquirer's 'Quotes' Divide Staff," *The Washington Post*, February 26, 1991, Part B1.

12 Claudia H. Deutsch, "Managing; Listening to Women and Blacks," *The New York Times*, December 1, 1991, p. 25.

13 Richard Harwood, "'Diversity' Comes Home," *The Washington Post*, November 27, 1993, p. A27.

14 Ruth Larson, "Forest Service Hit for 'Quota Lunacy': Herger Plans Bill to End Excesses," *The Washington Times*, February 6, 1995, p. A6. Representative Wally Herger, Republican of California, has introduced legislation directing the Secretary of Agriculture to take steps to end this discriminatory employment practice. See H.R. 1716, the Forest Service Employment Opportunity Act of 1995.

15 Letter from Inez Alfonso-Lasso, Director, Office for Civil Rights, Office of Justice Programs, U.S. Department of Justice, to Sam Gonzales, Chief of Police of the Oklahoma City Police Department, December 19, 1994; Memorandum from Sam Gonzales, Chief of Police of the Oklahoma City Police Department, to Donald D. Brown, City Manager, December 28, 1994.

16 See, e.g., James J. Heckman and J. Hoult Verkerke, "Racial Disparity and Employment Discrimination Law: An Economic Perspective," *Yale Law and Policy Review*, Vol. 8 (1990), p. 276.

Although the motivating force for the Civil Rights Act was opposition to the legalized oppression of Jim Crow, Congress did not stop there. Following a long American tradition, exemplified by the Fourteenth Amendment itself, the legislature established universal legal rights that apply everywhere in the country. Significantly, Title VII contains no special provisions for blacks, and no special provisions for the South. The concept of "protected groups" is alien to the fundamental principles of Title VII, which establishes individual rights belonging to every employee and applicant for employment.<sup>17</sup>

Although it rested on universal principles, Title VII originally included exemptions for certain entities, most notably small employers and government agencies. The original statute also provided exceptions for certain kinds of traditional practices, such as treating men and women differently where sex is a "bona fide occupational qualification reasonably necessary to the normal operation" of a business.<sup>18</sup> Subsequent acts of Congress expanded the reach of the statute to cover state and federal agencies,<sup>19</sup> as well as some small employers exempted in the original Act and certain forms of unintentional discrimination. The law has also been amended to increase the powers of the principal enforcement agency (the Equal Employment Opportunity Commission) and to enlarge the monetary relief that victims can recover from defendants.

Not once, however, has Congress created any "affirmative action" exception to Title VII's prohibition against discrimination.<sup>20</sup> The exceptions that have arisen are entirely the product of executive and judicial action.

## QUOTAS BY EXECUTIVE ORDER

Pursuant to executive orders issued by Presidents Kennedy and Johnson, the Department of Labor undertook the most important early initiatives promoting illegitimate forms of affirmative action. These initiatives were not dictated by the executive orders themselves, which required only that federal contrac-

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17 Section 703(i) specifically authorizes one very limited form of discriminatory preference for a "protected group": "Nothing contained in [Title VII] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." 42 U.S.C. §2000e-2. By specifically including this exception to the basic rule of Title VII, the statute clearly implies that similar preferences for other groups are *not* authorized.

18 §703(e), 42 U.S.C. §2000e-2(e). This exception from the basic prohibition against discrimination applies with respect to religion and national origin, as well as sex. Reflecting Congress's special concern with racial discrimination, the statute makes no provision for treating race or color as a bona fide occupational qualification.

19 An important exception exists for the uniformed military services. See, e.g., *Roper v. Department of the Army*, 832 F.2d 247 (2d Cir. 1987).

20 Section 107(a) of the Civil Rights Act of 1991 added a provision to Title VII that, by its terms, would seem specifically to prohibit typical forms of discriminatory affirmative action: "Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1991, §107(a), 42 U.S.C. §2000e-2(m). Section 116 of the 1991 statute, however, also provided that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." Civil Rights Act of 1991, §116, 42 U.S.C. §1981 note. If affirmative action policies that were permitted under pre-1991 judicial precedents are assumed to be "in accordance with the law" within the meaning of Section 116, then Section 107(a) can be interpreted to allow their continuation. Because the legislative history of the 1991 Act does not evince an intent to overrule those judicial precedents, the Supreme Court is unlikely to hold that Section 107(a) outlawed previously permissible affirmative action policies. Cf. *Officers for Justice v. Civil Service Commission*, 979 F.2d 721 (9th Cir. 1992), cert. denied, 113 S. Ct. 1645 (1993). By the same token, however, the legislative history of the 1991 statute does not manifest congressional intent to codify the judicial decisions that permit discriminatory affirmative action. For further detail, see Nelson Lund, "Lawyers and the Defense of the Presidency," *Brigham Young University Law Review*, 1995, pp. 17, 90 n.196.

tors "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."<sup>21</sup> In light of the long-standing patterns of racial discrimination that existed at the time, especially in the South and in certain unionized industries, this language implied no more than that firms wishing to do business with the federal government should resist the strong inertial forces supporting those odious practices. But this unexceptionable goal was soon left behind.

Early in the Nixon Administration, the Labor Department quietly promulgated an order requiring that "the rate of minority applicants recruited should approximate or equal the ratio of minorities to the applicant population in each location."<sup>22</sup> After an outcry against this proportional representation scheme, the order was replaced with a more subtly worded set of rules that nonetheless had the effect of requiring racial quotas and preferences. Under the current version of these rules, federal contractors must establish numerical "goals and timetables" (one of many popular euphemisms for quotas) whenever minorities are "underutilized" according to arbitrary standards that do not measure actual discrimination.<sup>23</sup> Enforced by the Office of Federal Contract Compliance Programs (OFCCP) in the Labor Department, these rules give OFCCP the power to issue debarment orders forbidding federal agencies from doing business with firms that show insufficient zeal in meeting their quotas. Needless to say, the threat of debarment has powerful *in terrorem* effects.

## JUDICIAL AUTHORIZATION OF QUOTAS

Had the federal courts enforced the plain meaning and intent of Title VII, the arbitrary quota policies promoted by the Nixon Administration and its successors might have withered on the vine. In *United Steelworkers v. Weber*,<sup>24</sup> however, the Supreme Court held that racial quotas are permissible under Title VII. The case arose when Kaiser Aluminum and the United Steelworkers adopted a collective bargaining agreement establishing a training program that would qualify unskilled Kaiser workers for jobs in various skilled trades. Eligibility for the program was determined by seniority, but Kaiser succumbed to pressure from the Labor Department and imposed a 50 percent quota for black applicants.<sup>25</sup> While acknowledging in his majority opinion that the language of Title VII's prohibition against discrimination "because of race" plainly forbade this affirmative action program, Justice Brennan nevertheless pretended that Congress intended something other than what the statute says. He was unable, however, to find a single shred of evidence to support this position. Justice Rehnquist's dissenting opinion, by way

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21 See, e.g., E.O. 10,925, 301 (March 6, 1961); E.O. 11,114, §201 (June 22, 1963); E.O. 11,246, §202 (September 24, 1965).

22 Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy* (New York: Oxford University Press, 1990), p. 342.

23 Federal regulations, for example, require that every "utilization analysis" consider the minority population of the surrounding labor area, the size of the minority unemployment force, and the percentage of the minority workforce compared with the total workforce. In addition to such factors, which ignore qualifications entirely, the regulations also require the consideration of factors that do not take account of the relative qualifications among individuals, such as the availability of "promotable and transferable minorities" within the contractor's organization. See 41 C.F.R. §60-2.11(b)(1). Contractors must take "special corrective action" when there is an "underutilization" of minorities, or when other phenomena occur, as when a lower percentage of minority than nonminority applicants meets the firm's employment criteria, or minorities meet the firm's promotion criteria at a lower rate than nonminorities. *Id.* §60-2.23. These phenomena, obviously, are not necessarily caused by discrimination, and "special corrective action" often will entail discrimination against better qualified individuals.

24 443 U.S. 193 (1979).

25 See *Weber v. Kaiser Aluminum & Chemical Corporation*, 563 F.2d 216, 226 (5th Cir. 1977): "[T]he district court found that the 1974 collective bargaining agreement reflected less of a desire on Kaiser's part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts."

of contrast, assembled a massive array of evidence conclusively refuting Brennan's audacious misinterpretation.

In *Johnson v. Transportation Agency*,<sup>26</sup> the Supreme Court affirmed and expanded the affirmative action exception to Title VII. Employers in both the public and the private sectors now face pressure to grant discriminatory preferences when there is a "manifest imbalance" of minorities or women in "traditionally segregated job categories." Despite what one might think from reading this language, however, affirmative action is not limited to rectifying segregationist practices by discriminatory employers. Rather, discrimination is legitimized whenever women or minorities are "underrepresented" in some job. The standards for determining "underrepresentation" are extremely loose, and have been met even when it has been caused by some vague and unspecified form of "societal discrimination."<sup>27</sup>

With perfect circular reasoning, "discrimination" is presumed to exist when "underrepresentation" in particular jobs is found.

## INNOCENT VICTIMS OF QUOTA POLICIES

The Supreme Court has also stated that legitimate affirmative action plans must not "unnecessarily trammel the interests of the [disfavored] employees."<sup>28</sup> Here again, however, the Court permits employers to impose explicit racial quotas even when those quotas offer no relief to victims of proven discrimination.<sup>29</sup>

Quotas and preferences, moreover, are legal even when they deny employment opportunities to individuals who have never benefited from an employer's prior discrimination.

The *Weber* decision is once again illustrative. The white plaintiff in that case, an unskilled laborer, had never belonged to one of the unions whose racist policies had presumably excluded blacks from the skilled trades. Yet the Court upheld a discriminatory quota that deprived this plaintiff of an opportunity that would have been open to him but for the color of his skin. While in theory there are limits to how far employers can go in trammeling the interests of people in disfavored groups,<sup>30</sup> in practice, the Supreme Court has never held that an affirmative action plan violates Title VII. In fact, the Court has created a legal rule that presumes the validity of discriminatory affirmative action plans, thus requiring victims to assume the heavy burden of *disproving* the validity of such plans.<sup>31</sup>

With the law stacked so heavily against them, victims of affirmative action policies seldom seek legal redress. The reported decisions therefore do not present anything like a true picture of the underlying problem. It is completely absurd to argue, as one Clinton Administration consultant has contended, that the paucity of reported judicial decisions means that "the problem of 'reverse discrimination' is not widespread; and that where it exists, the courts have given relief."<sup>32</sup> One might as well argue that the

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26 480 U.S. 616 (1987).

27 In *Johnson* itself, for example, the undisturbed factual finding of the trial court was that the defendant "has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular." *Johnson v. Transportation Agency*, 41 Fair Empl. Prac. Cas. (BNA) 476 (N. D. Cal. 1982).

28 *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 637-638.

29 In neither *Weber* nor *Johnson*, for example, was there evidence that the beneficiaries of the affirmative action plans had been discriminated against by the defendant.

30 The Court apparently would forbid only such extreme tactics as firing incumbent employees to make room for minorities or women. See, e.g., *Weber*, 443 U.S. at 208 (noting that the affirmative action plan at issue in that case did "not require the discharge of white workers and their replacement with new black hires") and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (discriminatory layoffs by public agency held to violate Fourteenth Amendment).

31 *Johnson*, 480 U.S. at 626.

paucity of litigation about employment discrimination in the 1950s meant that discrimination against blacks was a rarity.<sup>33</sup>

Although reported cases are not especially numerous, a few examples offer some insight into the sort of policies that courts find acceptable.

**Example:** A county agency, which had never discriminated against women, adopted an affirmative action plan with a "goal" of 36.4 percent women (corresponding to the proportion of women in the county's workforce) on highway maintenance crews. Despite the utterly obvious fact that women are less likely than men to seek jobs involving heavy physical labor, the Supreme Court labeled this a "traditionally segregated job category." The Court approved the county's decision to deny a promotion to a male applicant in favor of a less qualified woman.<sup>34</sup>

**Example:** After receiving the highest score on a competitive examination, a white firefighter was denied a promotion to engineer in favor of a black firefighter with a lower score. Without discussing the percentage of blacks in the fire department or in the engineer position, and without making any comparisons with the available labor force, the federal courts discovered a "manifest imbalance" in a traditionally segregated job category. In upholding the fire department's racial discrimination, the appellate court commented, in words that could have been applied as easily to Jim Crow itself, that the affirmative action plan "minimizes the disruption of employees' expectations by providing clear guidelines for when race may be taken into account."<sup>35</sup>

**Example:** In approving a plan to increase the number of women in a university sociology department by discriminating against male applicants, a federal court held, apparently with a straight face, that "[w]hen approximately fifty percent of the nation's population is women and only thirty-four percent of the recipients of Ph.D.'s in sociology are women, sociology must be considered to be a traditionally segregated field."<sup>36</sup>

**Example:** A county school board approved a policy involving race-based involuntary transfers of teachers among schools. The courts acknowledged that the challenged policy "does classify and burden individual teachers on the basis of race." Although the policy had been adopted in connection with a desegregation case, there were no vestiges of discrimination in faculty assignments. The courts nonetheless upheld the discriminatory policy "because the goal of providing to schoolchildren a racially diverse learning environment is clearly a legitimate one under Title VII."<sup>37</sup>

**Example:** A court approved a university's decision to raise the salaries of women faculty members by amounts ranging from 1 percent to 40 percent. The school's decision was based on a statistical study showing that women were paid less than "comparable" men. The comparability study, however, took no account of variables such as "research productivity and quality, teaching quality and load, publication quantity and community service" because such variables generally "are not available and/or not suitable for statistical analysis compared to the relatively straightforward coding of other factors such as rank or tenure status." Thus, nondiscriminatory factors that could obvi-

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32 Alfred W. Blumrosen, "Draft Report on Reverse Discrimination Commissioned by Labor Department: How the Courts Are Handling Reverse Discrimination Claims," *Daily Labor Report* (BNA), March 23, 1995.

33 For a more detailed critique of the Blumrosen report, see Robert R. Detlefsen, "Reverse Discrimination," *Legal Times*, May 1, 1995, p. 27.

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

35 *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), cert. denied, 489 U.S. 1051 (1989).

36 *Enright v. California State Univ.*, 57 Fair Empl. Prac. Cas. (BNA) 56, 57 (E.D. Cal. 1989), aff'd, 931 F.2d 59, 1991 WL 64853 (9th Cir. 1991).

37 *Vaughns v. Board of Educ. of Prince Georges County*, 742 F. Supp. 1275, 1291, 1297, 1307 (D. Md. 1990), affirmed sub nom. *Stone v. Prince George's Cty. Bd. of Educ.*, 977 F.2d 574 (4th Cir. 1992), cert. denied, 113 S. Ct. 973 (1993).

ously create salary disparities were ignored because the court did not have any numbers handy with which to measure them.<sup>38</sup>

## THE SCOPE AND NATURE OF EMPLOYMENT DISCRIMINATION

Any honest discussion about the prevalence of employment discrimination must begin with two propositions. First, no one knows or can know how much discrimination against any group actually occurs. Second, no law can eliminate such discrimination completely.

There simply have been no reliable studies measuring either how much discrimination American employers actually engage in or against whom they discriminate the most. We can be sure of one thing, however: discrimination against virtually all groups does occur, and will continue to occur. If the laws against murder, a crime that is easily detected and severely punished, have never come close to eliminating it,<sup>39</sup> our anti-discrimination laws will not eliminate discrimination. Thus, the claim that discriminatory affirmative action policies must be maintained until we achieve a "color-blind" society is simply a ruse that will guarantee eternal life to those policies.

Although anti-discrimination laws will never produce a color-blind society, policymakers can certainly craft a color-blind law. That is exactly what Congress set out to do when it passed the Civil Rights Act of 1964, and the legislature was perfectly correct in expecting that law to reduce the incidence of discrimination. To the extent that Title VII raises the cost of discriminating against those protected by the statute, it is simply inevitable that less discrimination will occur.<sup>40</sup> It emphatically does not follow, however, that the goal of reducing discrimination against groups that have historically been the victims of prejudice requires the use of preferences in their favor.

The upside-down notion of using discrimination against some groups to combat discrimination against other groups begins with the false premise that any statistical "imbalance" in the workforce must be the result of discrimination against the underrepresented group. This premise is not only false; it is preposterous.<sup>41</sup> No society has ever existed in which human beings sort themselves into jobs and occupations according to the mathematical laws of chance:

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38 *Smith v. Virginia Commonwealth Univ.*, 856 F. Supp. 1088, 1093 n.14 (E.D. Va. 1994).

39 There were more than 22,000 murders in the United States in 1992. See U.S. Federal Bureau of Investigation, *Crime in the United States* (1992).

40 This applies, obviously, only to the sector of the economy in which an anti-discrimination law is enforced. Because Title VII contains an exemption for firms with fewer than 15 employees, its actual effect could consist largely in shifting minorities and women from smaller firms to larger firms. Such an effect is magnified when pressure is exerted on larger firms to discriminate in favor of minorities and women. There is some empirical evidence suggesting that exactly this has occurred. See, e.g., Ferrell Bloch, "Affirmative Action Hasn't Helped Blacks," *The Wall Street Journal*, March 1, 1995, p. A14: "While black unemployment rates have remained twice those of whites, the proportion of blacks working for firms with 100 or more employees (who must file annual EEO-1 reports to the Equal Employment Opportunity Commission), federal contractors (who are subject to Labor Department affirmative action requirements), and local, state and federal government has grown dramatically. For example, in 1966, black female managers were 40% less likely than white male managers to work in firms with 100 or more employees. But by 1980, black female managers were 50% more likely than their white male counterparts to work in these larger companies."

41 See Thomas Sowell, *Civil Rights: Rhetoric or Reality* (New York: William Morrow, 1984), p. 116: "There is neither evidence nor even the pretense of evidence for the proposition that all groups are prepared to make the same sacrifices to achieve the same ends, quite aside from any question of equal capability, natural or acquired. Yet without that assumption, there is no reason to expect the even representation which is used as a norm to measure discrimination."

The even distribution or proportional representation of groups in occupations or institutions remains an intellectual construct defied by reality in society after society. Nor can all this be attributed to exclusions or discrimination, for often some powerless or persecuted minorities predominate in prosperous occupations.<sup>42</sup>

Attributing every "imbalance" to employer discrimination assumes away the manifest effects of differences in educational achievement, family upbringing and cultural traditions, marital patterns, and even the physical differences between the sexes. When one begins indulging assumptions like that, one has left reason behind and entered the realm of mysticism.

What discriminatory affirmative action policies certainly can do is increase the number of minorities and women holding desirable jobs. That is the basis of their political appeal, just as the artificial allocation of desirable jobs to whites was a critical contributor to the political durability of the Jim Crow system. Reserving certain jobs for certain groups, or giving preferences to members of those groups, obviously serves the narrow self-interest of those who enjoy the preferences. These beneficiaries inevitably, and ironically, are drawn from the most elite and *least* disadvantaged segments of the preferred groups. As one shrewd observer has pointed out, "race-based set-asides have amounted to no more than a cruel bait-and-switch game in which conditions of poor Blacks were used to garner preferences that ultimately benefited upper-income Blacks and White corporations."<sup>43</sup> In effect, the current preference system creates a labor cartel, allowing the legally privileged groups to command above-market wages or (what amounts to the same thing economically) to depress the demand for their competitors' services. This is wonderful for the cartel's members, but everyone else pays the price.

Apart from the economic inefficiencies imposed on society in general, the costs of affirmative action are borne largely by two groups:

**Whites, Men, and Other Unfashionable Groups.** The most obvious victims of legalized discrimination are those individuals, "predominantly unknown, unaffluent, unorganized,"<sup>44</sup> who are excluded by preferential policies from positions they otherwise would have obtained. These victims of affirmative action are neither the CEOs of major corporations nor their highly paid Washington lobbyists. Nor are they neurotics who deserve to be subjected to President Clinton's condescending pop psychology.<sup>45</sup> On the contrary, they are mainly ordinary working people who suffer the same losses experienced by other victims of discrimination. They are easy to ignore or make fun of inside the Beltway, but that says more about the climate in Washington than it does about those who must live with the decisions that are made there.

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42 Thomas Sowell, *Race and Culture: A World View* (New York: Basic Books, 1994), p. 2.

43 Robert L. Woodson, Sr., "Affirmative Action Has Accomplished Little for Most Blacks," *The Ethnic Newswatch*, May 31, 1995, p. 42. Woodson also has pointed to statistics showing that "the income gap between different tiers of black income groups has been steadily growing since the enactment of the first civil rights legislation. Between 1970 and 1986, the percentage of black families with incomes over \$50,000 nearly doubled, while the percentage of black families with incomes under \$10,000 rose from 26.8 to 30.2 of the population." Robert L. Woodson, Sr., "Why I'm Proud To Be a Black Conservative: A Tradition of Self-Reliance Has Brought America's Black Community Through the Worst of Times," *Orlando Sentinel Tribune*, December 22, 1991, p. G1.

44 *Johnson*, 480 U.S. at 677 (Scalia, J., dissenting).

45 See John F. Harris, "Clinton Asks Support for Policy Review: Party Must Back Study Of Preferences, He Says," *The Washington Post*, April 9, 1995, p. A11: "[Clinton] said affirmative action supporters must understand that this is 'psychologically, a difficult time for a lot of white males—the so-called angry white male.'"

**Minority Victims.** A less obvious group of victims comprises those minority individuals and women who would have succeeded without preferential policies, but whose achievements become clouded by the suspicion and resentment of others. The fact that resentment against these individuals is actually unjustified will not prevent it from occurring.<sup>46</sup>

## THE OPPOSITION TO REFORM

Perhaps the best evidence that discriminatory preferences are a serious and widespread phenomenon is the ferocity of the opposition to abolishing them.<sup>47</sup> For every beneficiary, there is a corresponding victim. Thus, if the beneficiaries of this discrimination believe they stand to lose a great deal if it ends, that suggests that reform of the status quo is an urgent matter.<sup>48</sup> Accordingly, it is imperative that Congress enact the simple reforms that are needed to remove the stamp of legal approval from the discrimination that the law now promotes. But that will not be easy. Besides the direct beneficiaries of quotas and preferences (including those who are paid to administer or advocate preferential policies), politically significant business interests have incentives to preserve the current legal regime.

First, inefficient quota requirements—whether imposed directly or indirectly—confer advantages on large, established business enterprises vis-à-vis their smaller competitors. This effect, which is a matter of simple economics, is especially powerful when the regulatory regime involves massive paperwork and reporting requirements like those imposed by the EEOC and OFCCP.

Second, after decades of government pressure to get their numbers right, a great many large companies have institutionalized affirmative action as a significant element in their corporate cultures. These firms thus have large and powerful *internal* constituencies for such programs. Those internal constituencies will fight to protect their interests and will help shape the public posture of the firm on issues that affect those interests.

The incentives that exist for business interests to support the status quo will not necessarily produce aggressive *public* support for policies that favor discrimination. Indeed, business leaders often adopt an anti-regulatory rhetorical posture even when they are actively seeking anti-competitive government regulations. With affirmative action, there are especially strong reasons to avoid getting caught up directly in the public controversy: For most big firms, almost any position they adopt on the public policy question is bound to offend a significant portion of their employees and customers.<sup>49</sup> But these consid-

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46 A recent *USA Today*/CNN/Gallup Poll found that 19 percent of black women and 28 percent of black men believe that their colleagues "privately questioned your abilities or qualifications because of affirmative action." The same survey found that 32 percent of whites thought that "a racial minority where you worked got an undeserved job or promotion as a result of affirmative action programs." "Affirmative Action: The Public Reaction," *USA Today*, March 24, 1995, p. 3A.

47 The mere possibility of a voter initiative to curtail affirmative action in California has generated threats of an economic boycott against that state. And those threats apparently are meant to have a wider effect: "This [boycott threat] is also directed at two Washington players: Congress and the White House," said one civil rights leader, who spoke only on condition of anonymity. "Both have to be reminded that there is going to be a major effort to bring political costs into this debate and balance the scales of consideration. Right now the debate is tilted in favor of accommodating the political views of white males." Steven A. Holmes, "Government Acts to Set its Policy on Race Programs," *The New York Times*, June 24, 1995, p. 1. The Clinton Administration obviously will not challenge the civil rights establishment. Unfortunately, the urge to temporize in the face of intimidating tactics undoubtedly remains strong even among conservatives. One prominent Republican, for example, recently made the amazing pronouncement that "we as a party need to work hard to earn the right to deal with this issue and to deal with it in a sensitive way." See Nancy E. Roman, "GOP Panel To Go Slow on Affirmative Action: Leaders Don't Want to Alienate Blacks," *The Washington Times*, June 7, 1995, p. A12. Because it is obvious that no one has to "earn" the right to do the right thing, statements like this inevitably give off an aroma of cynical political calculation.

48 On the other hand, if the beneficiaries (and thus the victims) of preferential policies are actually the rare exception in the American workplace, what harm could there be in restoring the law of equal treatment?

erations need not prevent business interests from taking quiet and indirect steps to protect their interests. The dubious arguments that support those interests therefore need to be confronted.

## THE MYTH OF "VOLUNTARY" AFFIRMATIVE ACTION

One of the most enduring myths about affirmative action is that it reflects voluntary efforts by American employers to comply with Title VII's spirit of equal opportunity. An especially dangerous corollary of this myth is that Congress should merely forbid the federal government from engaging directly in discrimination, leaving the private sector to continue behaving as it has in the past. In order to appreciate why both the myth and the corollary are fallacious, a very rudimentary introduction to the economics of discrimination will be helpful.

There is a respectable, though hardly unimpeachable, economic argument for repealing the legal constraints on discrimination by private employers.<sup>50</sup> According to this argument, ordinary market forces will minimize employer discrimination that is based on such arbitrary factors as a personal distaste for members of certain groups. The market, however, would still reward economically efficient forms of discrimination. This can occur when race or sex is correlated with desirable characteristics that are costly to identify directly. Thus, for example, if very few women possess the physical strength to perform a certain job, it may be cheaper for an employer to exclude women from consideration than to administer strength tests to all applicants. Such discrimination, according to the economic argument, should be tolerated because the efficiencies it creates benefit *all* groups over the long run, even if some individuals are denied jobs for which they are the best qualified.<sup>51</sup>

Business interests sometimes use variations on this economic argument to defend discriminatory affirmative action programs. They argue, for example, that a diverse workforce is an essential business imperative because firms need to respond to a racially and ethnically diverse consumer population.<sup>52</sup> When used to defend discriminatory policies, these arguments rest on the assumption that members of certain racial groups are more likely to understand what consumers in their own group will find appealing, or on the assumption that customers are more likely to patronize firms that give a prominent role to employees of their own race. For example:

Given the national demography and the fact that much of our domestic business is with city and state governments, walking in with an all-white male team is a tie-breaker negative, said one chief executive who was quoted anonymously in the [Glass Ceiling] report. "If I go to Washington, I need black representatives to interact with the people who can give me contracts."<sup>53</sup>

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49 Cf., e.g., Judith H. Dobrynski, "Some Action, Little Talk," *The New York Times*, April 20, 1995, p. D1: "[W]hile many of the more than two dozen company and industry association executives contacted spoke privately about affirmative action, almost none would comment for the record."

50 This argument is developed at length in Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, Mass.: Harvard University Press, 1992).

51 In addition, there are substantial costs involved in administering and enforcing the anti-discrimination laws. If those costs were eliminated, some of the savings would be used to increase wages and/or create more jobs.

52 See, e.g., Jonathan Kaufman, "Management: How Workplaces May Look Without Affirmative Action," *The Wall Street Journal*, March 20, 1995, p. B1: "Eastman Kodak Co. maintains it is committed to diversity because the composition of the American work force is changing and so is its customer base. 'If affirmative action wasn't legislated, we'd still continue with our goal of building a diverse work force,' says Patricia Fleming, Kodak's director of affirmative action. Kodak won't specify how many women or blacks it has in top positions, but it recently tied a portion of management compensation to recruitment and promotion of minorities and women."

53 Peter T. Kilborn, "White Males and Management," *The New York Times*, March 17, 1995, p. A14.

Assuming that such assumptions are correct, they do not answer the moral and political question: Should private firms be allowed to enhance their efficiency by engaging in racial discrimination or pandering to the racial preferences of their customers? And even if one believes that private firms should be allowed to do this for the sake of efficiency, the economic argument cannot justify forbidding firms to discriminate against some groups but not others. Efficiency is efficiency, whether it leads firms to appeal to the preferences of black consumers or white consumers. Thus, if the economic argument justifies allowing firms to engage in discriminatory affirmative action, it must also justify allowing firms to resume old-fashioned patterns of discrimination *against* women and minorities.

For moral and political reasons, Congress is not likely to give serious consideration to "deregulating" the market by repealing Title VII. Some in Congress, however, may be tempted to believe that leaving private-sector affirmative action programs alone is an economically benign form of "partial deregulation." This temptation must be resisted, for the theory on which it rests is entirely false.

## THE INADEQUACY OF LIMITING REFORM TO THE FEDERAL GOVERNMENT

Some opponents of racial preferences support a legislative strategy that focuses primarily on the most notorious forms of direct discrimination by the federal government, such as contract set-asides. There certainly are plenty of deserving candidates for extinction among these programs. Most of them, however, should be doomed in any event by the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Peña*,<sup>54</sup> which held that racial classifications by the federal government are unconstitutional unless they are narrowly tailored to serve a compelling government interest. Congress can and should prevent the Clinton Administration from wasting society's resources by engaging in protracted litigation in defense of programs that are legally dubious and morally wrong. But genuine leadership requires more than staying half a step ahead of the courts. In any case, this alone would barely touch the most significant problems that federal law has created. To suppose that the federal government can get its own house in order merely by ceasing to practice direct discrimination ignores the pervasive effects that its laws have on the rest of society.

**First**, even from a strictly economic or libertarian perspective, reforms that are limited to the federal government would be grossly inadequate. Such reforms would allow discrimination to continue in important economic sectors that are not subject to the full discipline of market forces. This includes state and local governments, as well as firms that are otherwise insulated from competitive forces, such as those in the nonprofit sector and in some heavily regulated industries. No "reform" that leaves these institutions free to discriminate can be defended on the basis of free-market principles.

**Second**, the federal government does not merely permit private firms to engage in discriminatory affirmative action. On the contrary, it actively *pressures* them to discriminate through compliance reviews of federal contractors by the Labor Department and through the litigation policies of the EEOC. Just as the supposedly "voluntary" racial quotas at issue in *Weber* actually were adopted in the face of Labor Department pressure, much of the current culture of affirmative action has developed in an effort to satisfy the demand of federal bureaucrats for the "right numbers."

**Third**, and perhaps most important, the current legal doctrines on affirmative action *inherently* promote discrimination by private firms because of the asymmetrical treatment of different groups. **Even if federal agencies were to get completely out of the business of promoting discrimination, the law itself would continue to promote discrimination through the incentives it creates for private employers.** Consider the choice confronting an employer who has two candidates, one minority and one

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54 67 Fair Empl. Prac. Cas. (BNA) 1828 (1995).

white, for a promotion to a managerial position. If both candidates possess the minimal qualifications for the position, the employer faces a substantial risk of litigation if the white is promoted, even if the white candidate has better qualifications. If the employer denies the promotion to the better-qualified white candidate under an affirmative action plan, however, the risk of liability is near zero. Faced with these asymmetrical incentives, rational employers inevitably and systematically will discriminate against legally disfavored groups, especially whites and men. Allowing this to continue is not a benign form of "partial deregulation," but a powerful engine of government-sponsored favoritism. Until these incentives are removed, market forces will continue to *foster* discrimination rather than discourage it.

## THE EXAGGERATED THREAT OF DISPARATE IMPACT LITIGATION

Because the economic, or "free market," rationale for allowing minority preferences is untenable, business lobbyists may claim that they must engage in this form of discrimination in order to protect themselves from litigation based on statistical underrepresentation. This argument has some merit in theory, but its practical significance can easily be overstated. To the extent that the argument is valid, moreover, it suggests the need for reform of the rules governing statistics-based litigation, *not* for the preservation of rules permitting employers to engage in discriminatory affirmative action. To understand why the threat of litigation over "bad numbers" is less than pressing, though still worth solving, a brief discussion of the law's evolution is required.

In a 1971 decision, *Griggs v. Duke Power Co.*,<sup>55</sup> the Supreme Court accepted the Nixon Administration's contention that employment criteria that lead to "underrepresentation" of minorities in a company's workforce can be unlawful even if the employer has not intentionally discriminated against anyone. This theory, which goes by the name of "disparate impact analysis," had no basis in the law and in fact was incompatible with the statute. Chief Justice Burger's opinion flouted the text of Title VII, distorted and misrepresented the legislative history, and even went so far as to misstate the factual findings of the district court in the *Griggs* case itself.<sup>56</sup> Apart from being a legislative rather than a judicial exercise, the legislative draftsmanship in the *Griggs* opinion was utterly incompetent. Burger declared that statistical disparities could lead to liability, but he offered no intelligible test either for deciding what statistical comparisons should be used or for deciding how large the disparities must be.

Burger's opinion also created a legal defense that employers could use to justify disparities that otherwise would produce liability, but he offered no fewer than eight different and conflicting formulations of the standard that such employment criteria must meet. The hopeless ambiguities and vagueness of *Griggs*, and the impossibility of seeking guidance from the statute that *Griggs* had recklessly amended, set the Court on a long and difficult search for a manageable set of legal standards. During the early years of this process, many lower courts made it relatively easy for plaintiffs to establish a statistical case against an employer, and employers often were held to absurdly high standards of "business necessity" in defending employment criteria that failed to generate "enough" minorities and women in certain jobs.

Employers that used race-neutral hiring criteria (as Kaiser Aluminum had been doing before the Labor Department pressured it to adopt the racial quota that was challenged in *Weber*) thereby exposed themselves to liability if such criteria had a disparate impact on minorities. Unless employers were allowed to get their numbers "right" by discriminating against whites, they would be placed in a Catch-22: vulnerable to Labor Department sanctions and/or lawsuits by minorities if race-neutral criteria led

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55 401 U.S. 424 (1971).

56 See Nelson Lund, "Retroactivity, Institutional Incentives, and the Politics of Civil Rights," *Public Interest Law Review* (forthcoming).

to disparate effects and liable to whites if they sought to avoid such suits by instituting preferential policies. By permitting employers to engage in preferential treatment of minorities, the Court offered them a comparatively cheap way of escaping this Catch-22.

Employers will oppose any legal regime that forces them to make decisions that expose them to liability no matter what they do. They can hardly be blamed for this, and the law certainly should not create Catch-22s for anyone. In 1989, however, the Supreme Court articulated standards of proof for disparate impact cases that were much more favorable to employers than the rules that had taken root in the lower courts.<sup>57</sup> Under these standards, plaintiffs were required to show that the employer's conduct actually caused substantial underrepresentation. The Court also concluded that defendants could escape liability simply by producing evidence that their employment criteria were based on legitimate business reasons. This ruling greatly reduced the threat of disparate impact liability for all but the most inexplicably arbitrary employment practices, and thus greatly reduced the pressure on employers to adopt preferential policies designed to produce statistically balanced workforces.

In the Civil Rights Act of 1991, Congress codified the theory of disparate impact, thus ratifying a previously illegitimate doctrine. In doing so, however, the legislation preserved almost all of the safeguards for employers that the Supreme Court had established in its 1989 decision. More important, perhaps, the 1991 statute created a new remedial scheme authorizing compensatory and punitive damages in cases involving intentional discrimination, but *not* in cases arising under the disparate impact theory.<sup>58</sup> This new rule creates tremendously powerful incentives for plaintiffs and their attorneys to forego disparate impact litigation in favor of claims based on the standard theory of intentional discrimination.<sup>59</sup>

These incentives, together with the relatively circumscribed disparate impact standards codified in the 1991 statute, have caused the virtual disappearance of serious disparate impact litigation.<sup>60</sup> For that reason, business interests no longer can legitimately maintain that the restoration of a color-blind legal rule will create the Catch-22 described above.

Business lobbyists nonetheless might argue that courts and enforcement agencies may revive disparate impact litigation at some future time. This possibility cannot be ruled out completely. The most likely way for this to happen would involve an aggressive disparate impact campaign by the EEOC and the Justice Department, combined with judicial misinterpretation of ambiguous language in the 1991 statute. Because EEOC and Justice are public agencies, they are less subject than the private plaintiffs' bar to the financial disincentives that the 1991 Act created for disparate impact litigation. And the

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57 *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

58 In a disparate impact case, remedies are confined largely to injunctive relief, limited back pay, and attorney's fees. These limitations applied to all Title VII cases prior to 1991. The new statute caps compensatory and punitive damages for intentional discrimination at different levels according to the size of the defendant. For the large firms that offer the most attractive targets for disparate impact and class action lawsuits, the cap is set at \$300,000 per claim.

59 For further detail, see Glen D. Nager and Julia M. Broas, "Enforcement Issues: A Practical Overview," *Louisiana Law Review*, Vol. 54 (1994), pp. 1473, 1482-1483.

60 I have been able to find only one reported case in which a private firm was held liable under the disparate impact provisions of the 1991 Act. In *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795 (8th Cir. 1993), the court forbade a pizza chain's relatively trivial practice of requiring employees to be clean-shaven. This case almost certainly will not become an important precedent, for the court's reasoning was extremely poor. The Eighth Circuit's opinion, for example, did not even discuss the operative provision of the statute, and it actually misquoted the provision on which it purported to rely. In *EEOC v. Joint Apprenticeship Committee*, 828 F. Supp. 264 (S.D. N.Y. 1993), the court used a disparate impact theory to invalidate a high school education requirement for admission into an apprenticeship program. This case was tried well before the 1991 Act came into effect, and its significance is reduced by the fact that the defendant chose for tactical reasons at trial only to challenge the government's *prima facie* case without offering a "business justification" defense.

courts, as we have seen so often in the past, are perfectly capable of seizing on any real or imagined ambiguity in the civil rights statutes when they want to expand the reach of those statutes beyond what Congress has authorized.

This possibility—that federal agencies and the courts again will cause disparate impact litigation to become a serious problem—does not seem likely to materialize in the foreseeable future. The EEOC's workload has gone up dramatically in recent years, largely because of an increase in intentional discrimination claims under Title VII (especially claims involving sexual harassment) and under the Americans With Disabilities Act of 1990. The agency's budget, however, has not seen commensurate increases, and the agency would therefore have difficulty in diverting significant resources to disparate impact litigation. Similarly, while the courts certainly have the power to interpret the 1991 statute in a way that would greatly facilitate abuses of the disparate impact theory, recent judicial trends do not suggest that this is likely to happen.

## HOW TO RESTORE THE COLOR-BLIND LAW THAT CONGRESS ENACTED

Congress is not to blame for the misinterpretations to which Title VII has been subjected. Writing in 1979, then-Justice Rehnquist noted:

Were Congress to act today specifically to prohibit the type of racial discrimination suffered by [the plaintiff in *Weber*], it would be hard pressed to draft language better tailored to the task than that found in [sections 703(a) and (d)] of Title VII.<sup>61</sup>

Rehnquist's comment remains equally valid today, and there is little reason to tamper with the operative language of the statute. Rather, what is needed is an amendment requiring the courts and executive agencies to begin obeying the law that Congress framed three decades ago.

In fact, Congress foresaw in 1964 that its clear language might be misconstrued and included in the statute a provision specifically foreclosing any interpretation requiring the correction of statistical imbalances in an employer's workforce.<sup>62</sup> Had the *Weber* majority not been driven by an Orwellian contempt for the meaning of words,<sup>63</sup> this precautionary provision would have accomplished its purpose.<sup>64</sup>

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61 *Weber*, 443 U.S. at 226 (dissenting opinion). See also *Johnson*, 480 U.S. at 657 (Scalia, J., dissenting).

62 Section 703(j) provides: "Nothing contained in [Title VII] shall be interpreted to require any employer... subject to this [title] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." 42 U.S.C. §2000e-2(j).

63 For a discussion comparing the *Weber* majority's behavior to that of the nightmare government in Orwell's *1984*, see Justice Rehnquist's *Weber* dissent. 443 U.S. at 219-221.

64 The *Weber* majority inferred from §703(j)'s ban on interpretations *requiring* employers to grant preferential treatment that Congress meant to allow interpretations *permitting* employers to grant preferential treatment. This negative inference is absurd. There are an infinite number of possible misinterpretations of any statutory language, and §703(j) could not possibly list them all. The fact that it rules out one misinterpretation, therefore, does not imply that it means to allow any others. By contrast, a valid negative inference can arise when a statute creates express exceptions to an otherwise general rule. Absent contrary evidence, the creation of such express exceptions implies that similar exceptions are not intended because it shows that the legislature considered and rejected the need for exceptions other than the ones it expressly included. Title VII includes an express exception for preferential policies, which is carefully limited to certain circumstances involving Indians living on or near reservations. See §703(i), 42 U.S.C. §2000e-2(i). This

A more comprehensive and carefully drafted statement of congressional insistence that Title VII means what it says, however, can now accomplish what Congress sought to achieve in 1964. While there can be no absolute assurance against the flouting of legislative commands, the courts have become less reckless in recent years. They are unlikely to defy Congress on this issue, and enactment of legislation embodying the principles summarized below should assure that the principle of equal opportunity finally is accepted into the law.

## Legislative Solutions

The key provisions of such a legislative approach are as follows:

- ① **Ban quotas and preferences.** Congress should forbid courts and enforcement agencies from interpreting Title VII to authorize, permit, or encourage the use of quotas or preferences relating to race or sex.
- ② **Permit legitimate affirmative action.** Congress should state that employers may adopt *legitimate* affirmative action policies that promote equal opportunity without using or encouraging the use of quotas or preferences. This proviso would allow employers to ensure that minorities and women are not excluded from employment opportunities by managers' prejudices, stereotypes, or inappropriate recruiting habits.<sup>65</sup>
- ③ **End backdoor quotas.** Employers should be prohibited from engaging in indirect forms of discrimination through euphemisms like "diversity," "inclusiveness," or developing a "multicultural workforce." The existing cast of bureaucrats and corporate affirmative action officers also should be forbidden from repackaging the same old surreptitious racial quotas under some new rubric like "socially disadvantaged background."<sup>66</sup>

The promoters of preferences repeatedly have shifted their language and invented new excuses for continuing the discriminatory policies of the past. In order to deprive them of the legalistic arguments at which they have proven so adept, any legislation adopted by Congress must contain airtight legislative language that closes the door to the use of new euphemisms and new rationales for discrimination.

This, in brief, is the appropriate way to restore the ideal of equal treatment under the law to which Title VII originally was dedicated. There is neither any need nor any justification for compromises, incremental changes, or further temporizing.

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exception clearly implies that other forms of preferential affirmative action are forbidden.

- 65 The legislation should leave untouched the existing law regarding employers' use of classifications based on sex, religion, or national origin where such characteristics are a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." §703(e), 42 U.S.C. §2000e-2(e). This exception to Title VII's prohibition against discrimination has been construed more narrowly than Congress had reason to anticipate in 1964, but the issues raised by these narrowing constructions are separate from the issues raised by affirmative action.
- 66 For concise critiques (from different points on the political spectrum) of the notion of giving preferences to the "socially disadvantaged," see James P. Scanlan, "No Substitute for The Real Thing," *Legal Times*, May 1, 1995, p. 29; Abigail Thernstrom, "A Class Backwards Idea: Why Affirmative Action for the Needy Won't Work," *The Washington Post*, June 11, 1995, p. C1; Jeffrey Rosen, "Affirmative Action: A Solution," *The New Republic*, May 8, 1995, pp. 20-22.

# EQUAL EMPLOYMENT OPPORTUNITY RESTORATION ACT OF 1995

- ◆ The intention of the Act is to **restore** the original meaning of Title VII of the Civil Rights Act of 1964 and to overrule judicial misinterpretations of the statute.
- ◆ **Reaffirms** Justice Thurgood Marshall's statement that the Civil Rights Act "prohibits all racial discrimination in employment, without exception for any group of particular employees."
- ◆ **Forbids** Title VII from being construed to authorize, permit, or encourage the use of quotas or any other preferences involving race, color, religion, sex, or national origin.
- ◆ **Permits** affirmative action programs that ensure equal employment opportunities and that do not use or encourage the use of quotas or preferences involving race, color, religion, sex, or national origin.
- ◆ **Preserves** the existing legal provisions allowing certain preferences for American Indians and allowing sex-based classifications where sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."
- ◆ **Retains** existing judicial remedies, but forbids courts to grant relief, on the basis of group membership, to individuals who have not themselves been the victims of discrimination.