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Affirmative action : an evaluation

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I. How Affirmative Action Came About

Perhaps one of the most discussed and controverted public policies of the past three decades is affirmative action. It has left politicians, social scientists, and economists debating its merits and possible alternatives. From the Supreme Court to the dinner table, the potential effects of this policy on our legal, political and social system have been argued.

There is a most serious dilemma at play. On the one hand, we believe in individual rights, equality, freedom, justice, property lights and fair opportunity as ultimately important -- and fight so the law reflects this. (Affirmative action supporters are no different in this regard.) On the other, we have the wretched history of what blacks have suffered and the wretched reality of how they are suffering, with the increasing poverty, alienation and withdrawal of blacks from mainstream America. This history is evidence that these rights remain unattained. It is as a result of the black experience that affirmative action has come about, and it is for this reason that an evaluation of affirmative action in reference to blacks will be the focus of this paper.

As Arnold Rose wrote in his book, *The Negro in America*, in 1944, "The moral struggle goes on within people and not only between them. When people's values are conflicting, behavior becomes a moral compromise." (10) The dilemma lives on for a new generation to grapple with. Those individual liberties, fights, and expectations of equality and opportunity for all that we hold most dear are unmistakably on the line. Our entire Creed is in danger of crumbling as the "Negro problem," discussed since the beginnings of this country, continues to be complex and troubling. As a country that has been founded, simultaneously, on the idea of individual dignity and the practice of institutionalized slavery, our desire to forge a new future of equality and justice must inevitably lead us

down unique and innovative roads. However, some attempts at this may develop in a way that produces more harm than good by working outside of established and respected parameters. And, in doing this, threaten those traditional methods.

This paper will analyze one of these attempts by looking at affirmative action in employment in respect to blacks. When discussing these themes together, however, two distinct areas come to play. One is the history of the American employment relationship rooted in individual freedoms. The other is the racial and civil rights history of this country. As both of these have developed independently of each other, it is helpful to look at them separately. It is as a result of President Johnson's leadership and the Civil Rights Act of 1964 that these two American strains joined to create affirmative action.

(A) History of Blacks and Civil Rights

Tile racial history of the United States has been a shameful one. The treatment of blacks from the first slave transported from Africa in 1619 to the young black child born in poverty in our inner cities in 1994, shows that the legacy of racism and racial oppression against blacks continues.

The history of the United States in relation to race has been sordid. "The Founding Fathers, in establishing the framework for a new federal government, handled the question of slavery as an economic and political rather than a moral matter, particularly so in light of the sensitivity of Southern delegates, who would brook no interference with their institution." (Bell, 22) Slavery not only existed during the time of our country's inception, but the Constitution condoned and protected it. Northerners did, generally speaking, hope to get rid of slavery, recognizing its inconsistency with white Americans' demand for their own freedom. However, fear and racism were, and continue to be, used as a means to lessen economic and political differences between rich and poor whites -- creating a common enemy in blacks. (Bell, 25) In fact, racism was conceded to and used to divert poor, white farmers from economic reform, at about the turn of the century. (Bell, 29) The effects of this decision on the part of the farmers is one that society continues to counter. There is no doubt; the condition of blacks today is a direct result of race based slavery, and its advocacy. "As de Tocqueville observed, "In the United States people abolish slavery, for the sake not of the Negroes but of the white men." (Bell, 6) Nevertheless, the hypocrisy of the country's belief in freedom and equality could not withstand the reality of an enslaved people. It was as a result of this internal dilemma that the thirteenth amendment was passed abolishing slavery.

One of the most important developments in the area of racial equality is the fourteenth amendment, which was ratified in 1868, almost one hundred years after the signing of the Constitution. This amendment, which was negatively rather than positively stated, declared in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to

> any person within its jurisdiction the *equal protection of the laws*.(emphasis added)

It is apparent that the amendment was wholly geared toward the issue of blacks and their unique plight in the United States. From its introduction to its passage, it was blacks who were referred to, and it was their unique circumstances that were at issue and which the law was geared toward changing. The equal protection clause has, and continues to play, an important part in the affirmative action debate.

Although the thirteenth and fourteenth amendments should have been sufficient legal restraints, in an atmosphere of compliance and favor, they were not because hostile racist forces would not allow such change. In addition, slavery, had rendered a class of people entirely ill equipped compete with whites. This reality continued as segregation began to be enacted between 1890 and 1910. It was in the landmark case of Plessy v. Ferguson (1896) that the Court required legally separate institutions and separate accommodations as an appropriate state response to the race question. Equal accommodations, however, were clearly not the case, however, as black facilities were consistently and systematically inferior. In essence, slavery, was washed out only to be replaced by a racial caste system, in which blacks were the untouchables. This notion of equality was decided in light of the thirteenth and fourteenth amendments. Hence, over half a century of Jim Crow would follow. Plessy serves as a clear indicator that the idea of equality is not all an objective idea, but rather one that is greatly influenced by subjective ideology and environmental factors. After all, equality is a relative measure. In this way, the Court's judgments have been a reflection, unfortunately at times, of the masses and their respective conflicts, as well as the justices' internal conflicts, rather than the arbiter of disputes using objective criteria and ideology.

(B) Brown v. Board of Education

It took almost sixty years for the Supreme Court to overturn the Plessy decision, holding separate to be inherently unequal. In 1954, in Brown v. Board of Education the Court found that separate was inherently unequal and that school segregation was no longer valid under the equal protection clause of the fourteenth amendment. The Court held: "To separate [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their heart and minds in a way unlikely to ever be undone." It was by this ruling that the system of segregation in education came to a legal end. In 1955, in Brown II, the Court decided that the schools should desegregate with "all deliberate speed." Nevertheless, its implications flowed over to other areas, creating an atmosphere of activity by showing that blacks could begin to be seen as equal by the government and by white society. It was a bold recognition of blacks as a people entitled to equality and a validation that they had been wronged by the existing system.

The reality of the decision, however, was that Courts did not press hard enough in indicating to white Southern school administrators that the system of segregation had firmly ended. As a result, these administrators did not work adequately at integration.

Then in 1968, the Supreme Court found that "very little progress had been made in many areas where dual school systems had historically been maintained by operation of state laws." (Bittker, 17) The call for "deliberate speed" became no longer "constitutionally permissible" and it was replaced with, "the obligation of every school district is to terminate dual school systems at once." (Bittker, 18)

(C) The Civil Rights Movement

The Brown rulings set a flame to the civil fights movement of the 1950s and 1960s, which affected positively the introduction and eventual passage of the Civil Rights Act of 1964. The mass movement began with one black woman, Rosa Parks, who, on December 1, 1955, refused to give her seat on a bus up to a white man. This one act grew into over a year of approximately 50,000 Montgomery blacks walking quietly to work, refusing to ride segregated buses. Eight months later, in response to Lyndon Johnson's efforts and public outrage all over the country, Congress passed the first civil fights legislation in 82 years, the Civil Rights Act of 1957. Then, as a result of mass lunch counter sit-ins which started in February by four black students of the Student Nonviolent Coordinating Committee (SNCC) (which the Dr. Rev. Martin Luther King of the Southern Christian Leadership Conference (SCLC) helped found) and the interest in the executive branch Congress soon passed the Civil Rights Act of 1960. All in all, both laws dealt with voter rights and were rather innocuous. Their passage, nevertheless, indicated shifts in thought that would ultimately lead to the 1964 act.

John F. Kennedy was vigorously campaigning for the presidency, making the status of blacks and the need for change part of his platform. Kennedy's political history as a Congressman and Senator gave no indication that he had any interest in this area. The issue was used as part of an electoral strategy, which was ultimately helpful in winning the election.

There were, as well, major events that took place in April and May of 1963 that greatly broadened support for the civil rights movement. The first involved picketing and sit-ins in Birmingham, Alabama, at stores that would not serve or hire blacks. In these protests, 2,400 people were jailed. During one of these demonstrations, Birmingham's police chief, Eugene "Bull" Connor, let dogs loose and turned fire hoses on the large crowd, which included children. Kennedy had called for the new legislation and had, at this point, lost the support of Southern Democrats and had nothing to lose. It was clear, it took a mass movement of frustrated and determined individuals to gain government leaders' attention; however, it seemed, it would take far more to get a decision.

The history and pattern of fair employment bills were that they came and went, either dying in committee or by the threat of Senate filibuster. No vote had been taken on such legislation since 1943. Kennedy made frequent promises in his campaign, but as the realities of the presidency and international affairs came into the spotlight, civil rights took a deliberate back seat. It was actually as a result of the work of the President's brother, Robert Kennedy, then attorney general, that things began to happen. (Whalen, 3) The attorney general took strong leadership by actively lobbying legislators and the

President, and interest in the bill began. At about the same time, the press was calling for stronger leadership on the Negro question, and the President could not afford to ignore the appeal. He finally had to react and, on May 31, 1963, he decided to go with a strong bill. It seemed that this civil rights bill, much less innocuous than its predecessors, would not pass or for that matter even be voted on. The fact was that Southern Democrats and conservative Republicans had control of the House, making it likely that any such proposal would be flatly rejected.

Then Medgar Evers, field secretary for the NAACP, was shot to death at his home in Jackson, Mississippi on June 12, 1963. On June 20, three freedom workers from COFO were murdered near Philadelphia, Mississippi. This was a great shock to the civil rights community and led to great activity. Kennedy met with King and other leaders of the famous August 28 march on Washington. The leaders took this chance to discuss the bill. They wanted the bill strengthened to include FEPC like provisions and a new title authorizing the Justice Department to intervene in cases of alleged discrimination (at the time, there was indication it would happen). [In 1941, President Roosevelt established the Fair Employment Practice Committee (FEPC), which was formed to ensure compliance with Executive Order 8802 that prohibited employment discrimination on the basis of race, and mandated the use of affirmative action in employment (Turner,4) -- making it the first presidential directive on black rights since Reconstruction.] In Birmingham, on September 15, four black Sunday school children were killed and twenty others injured as the result of a bomb attack. A riot ensued and the police responded with shotgulls and tanks, killing two more children. This the Senate could not ignore.

After President Kennedy died, Lyndon B. Johnson took the reigns, not only of the presidency, but of this most important piece of legislation. On November 29, he began a series of private meeting with various civil rights leaders. Johnson told a joint session of Congress: "We have talked long enough in this country about civil rights. It is now time to write the next chapter and to write it in the book of law." (Graham, 73-74) He also worked very closely with Robert Kennedy to ensure that a strong bill passed into law. (Graham, 77-78) Johnson's strong leadership and dedication to the bill was the most critical factor in its realization. He had committed himself to ensuring change, legal change, and was able to move decision makers to act. It was after endless introductions of amendments, endless debate, and a Senate filibuster that the bill was passed.

(1) Employment Law

Because a person's job and economic situation is perhaps the most important factor in determining his access to other rights and privileges available through American society, the struggle for equal employment opportunity has been the longest and hardest battle fought in the civil rights movement. It is in light of this that affirmative action in employment is the focus of this paper. As such, it is helpful to look at employment ideology, law, and judicial interpretation existing before the passage of the Civil Rights Act of 1964. In looking back at the history of employment law before the act, a number of major themes are distinguishable. These are: 1) the employment-at-will doctrine, related to the right of unilateral action; 2) the concept of "wrongfull discharge"; and 3) the notion of entrepreneurial independence. These themes have played a vital role in

constructing the American notion of the employment relationship prior to the act. By looking at these employment philosophies with the actual civil rights legislation it will be easier to put the monumental act and modem judicial interpretation in better perspective.

The traditional American view of the employment relationship is seen through the employment-at-will doctrine, which was used from the mid 1880s until the late 1950s. In common law practice, employers and employees could enter into and terminate at will their employment relationship, unless specifically prohibited by contract. Before the 1930s, the Supreme Court concluded in Adair v. US (1908) and in Coppage v. Kansas (1915) that statutes which limited such a fight were unconstitutional infringements on an employer's and employee's liberty of contract. Here the traditional view was upheld: the fight to contract is part of the liberty of every citizen and, is thus, protected under the due process clause of the Fourteenth Amendment. Free enterprise, though, cannot remain outside a complex society.

So, although this right could be practiced equally, the thrust of legislation in this area has been to limit this right on the part of the employer. The underlying assumption is that employers have power over employees that can potentially be abused in ways that warrant legal control. Legislators have enacted laws which seek to prevent oppressive wielding of authority in the process of forming a contract -- the potential for abuse that exists is what these laws attempt to work against. Furthermore, the financial ability of the employee relative to the employer is important in this, as "parties are not equally unhampered by circumstance" (Coppage v. Kansas, Kansas S.Ct). Ultimately, proprietors and operators do not stand upon equal ground and their interests are, to a certain extent, conflicting. (Holden v. Hardy 169 U.S. 366). Finally, in B. & Q.R. Co. v. Mc Guire, the Court held that" 'while all stand equal before the law, and are alike entitled to its protection, it ought not to be a reasonable objection that one motive which impelled an enactment'" of laws is to protect those who may otherwise be unable to protect themselves. (219 U.S.549, 570) The Court held that this inequity of bargaining power is enough justification for the state to come to the aid of the weaker party in the bargain. So, while there is an ultimate ideal of right to contract and equality in any agreement, there is recognition, by legislators and judges alike, that in practice things can be different. A balance needs to be met between the fights of the individual and the well-being of the greater society. Free enterprise cannot survive without a stable environment. (Dethloff, 13). There have always been rhetorical claims of free enterprise in the United States, but government intervention has been a constant theme, both in terms of legal restrictions on business and government support for it. (Dethloff, 14) These ideas that developed over time lend themselves to the support of legislation and policy that favors the applicant rather than the hirer.

In National Labor Relations Board v. Jones and Laughlin Steel Corp. (1937), the Supreme Court found constitutional legislation limiting the power of employers to discharge based on the power of Congress, under Article I, Section 8 of the Constitution, to regulate commerce. In this case the National Labor Relations Board found Jones and Laughlin guilty of unfair labor practices under the National Labor Relations Act of 1935. Jones and Laughlin defied NLRB's order to offer to reinstate the ten employees named in

the suit and make good on loss of pay. The corporation was found to be discriminating against members of the union by basing hiring and promotion decisions on membership in the union. It was also found guilty of coercing and intimidating employees in order to interfere with the employees fight to self-organization. This ruling was not found to conflict with the property fights of the employer. Interestingly, labor unions at this time were seen as simple fraternal organizations, much like private clubs, and thus, outside the domain of labor law. However, due to the economic power that modern labor organizations gained, they came to be considered an important part of the employment relationship. However, the Court warned, "[t]he scope of the power of Congress over interstate commerce may not be so extended as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectively obliterate the distinction between what is national and what is local and create a completely centralized government." It is here that Congress and the courts were cautioned as to the scope of law and to be careful in choosing what areas to be involved in. Although there is a recognition that reality often calls for a bending in ideology, this should be done in a minimalist fashion --where the ideal is never changed.

The second theme in employment law is the common law concept of "wrongful discharge." This concept applies to and protects workers from undefined, arbitrary, or generally unfair discharges. There are two theories that favor limiting this right of employers. The first relates to an implied contract between the employer and employee (in fact, courts have uniformly construed the employment relationship to be one of contract). This implied contract may, but need not, include employee manuals, letters offering employment, or any job advertisement. The reasoning is that contracts have an implied clause of "good faith" and "fair dealing," and that discharge for malicious reasons is not in accordance with the implied clause. (Monge v. Beebe Rubber Co. (N.H. 1974)- sexual harassment case) This concept goes well beyond the precept of politeness and courtesy, implying a right of individual dignity-- where one has a right to be treated fairly.

The second theory limiting an employer's right to discharge concerns the arena of public policy, pertaining to community standards of reasonableness. A number of courts have held that the common law will not allow discharges because of an employee's exercise of a statutory right (worker's compensation), the performing of a statutory duty (jury duty), or the refusal to commit an unlawful act. Defying any of these goes against the interest of public policy. In fact, some courts have ruled it illegal to discharge an employee for any reason that conflicts with some broadly defined, fundamental public policy, such as freedom of speech, political freedom, or privacy. It should be noted that these are not concerns based on the individual or on a just workplace, but rather on prevailing public policy goals or interests. Here one sees clearly the ideas of individual justice and social justice battling for an accord. Regardless of which takes precedent, it is certain that fights other than that of contract and the protection of societal interests are relevant in the employment relationship.

There is, on the other hand, a commonly held notion of entrepreneurial independence, which is almost completely uninterested in the concerns of the worker. This idea is

clearly a part of American industrial law. The major thrust of such law has been to provide a legal framework, whereby management and organized labor could limit the unilateral power of employers to help keep jobs and gain more control in hiring practices. This is a direct result of the idea of an employer's right to unilateral action, whereby employees can gain equal footing by making use of their numbers. This has been done in the preparation of collective bargaining agreements, for example, where some combination of merit or seniority is used in determining layoffs, promotions, etc., and where discharges and discipline are forbidden except upon showing "just cause." Such standards as merit and seniority are seen by both parties as a standard under the purview of "fair dealing." Therefore, fights have been generated through various private agreements, and not through governmental mandates. Here mutual agreement and negotiation are used to protect the fights of the employee and to avoid violating long established principles in the employment relationship. Such agreements are primarily individual contracts that implicitly limit the power of the employer, or collective agreements (i.e., collective bargaining) that provide a detailed framework of limitations on the employer's power to hire, promote, and discharge.

Here, one can see the reaffirming of the idea of contract and private negotiation, where employees are compensated for their inherent weakness in the dealing by utilizing group identification or collective dealing. However, employment discrimination statutes specifically authorize courts to fashion remedies that will "make whole" the victims of illegal discrimination. A collective agreement is not, therefore, an argument for any system that violates civil rights statutes. If such violation does occur, the courts have the power and the duty to order retroactive seniority and back pay, dating back to the initial offense to any or all victims of discrimination. From this, one can see that the right of contract, although held in highest regard, has its limitations. There are broader and perhaps more important civil rights that must be protected.

(E) The Civil Rights Act of 1964

It is after looking at the civil rights movement and employment law that one can better understand the Civil Rights Act of 1964. It is from a background of business freedom and drastic social change, coupled with strong executive leadership, that the act was ever even voted on.

Two of the main arguments made opposing the bill were that the rights of some citizens (whites) would be denied in the name of others and that the bill was not considered by committee. There was also fear that the federal government would interfere in every business. Senator John Stennis (D-Miss) said the act would be a "drastic intrusion into private business and will be unjust and coercive to employers and employees alike ... [and the] concept of individual liberty and freedom of action would go out the window if Title VII becomes the law of the land." (Congressional Record, 5810) Interestingly, Senator Joseph Clark's (D-Pa) remarks were centered on the moral need to recognize God given fights, and innate dignity --all of which are present day arguments for affirmative action. (Congressional Record, 7203)

Because of these wide ranging opinions on what the act would mean, it becomes important to look at the actual text. This text will also aid in the analysis of court decisions. There are two critical sections of Title VII that warrant attention, Section 703(j) and Section 706(g). In relation to preferential treatment, 703 (j) of Title VII reads, in part:

> Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor management committee subject to this title to grant preferential treatment to any individual or to ally 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 ... or labor organization ... 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.

This section of the law indicates that preferential hiring practices are wholly outside of what Congress allows. It recognizes that imbalances may occur, but that racial preference should not be construed to be the solution. This is made even more clear in provision 703(i), which states:

> Nothing contained in this title 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 all Indian living on or near a reservation.

It is clear form this statement that Congress has clearly defined what preferential racial policy would be allowed and it is clearly only for Indians. This section of the law is rarely discussed, but it lays a framework for 703(j). By explicitly stating who and in what case preferential policy is allowed, it is certain that such treatment is disallowed in every other case.

The next section that warrants attention is section 706 (g), which declares:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaing in an unlawful employmcnt practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practices, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the

> backpay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin ...

This section of the law is a clear message that it is the individual that is entitled to relief, not the group, and only for discrimination on the protected categories. The relief that is allowed is for identifiable victims, that have been denied an identified job, and that can be compensated in an identifiable dollar amount. There is neither mention or indication that groups of persons are entitled to any affirmative action measure.

Title VII, then, addresses the employment relationship by regulating the relationships of employer to employee (or applicant), of ration to member, and of employment agency to client. The law does this by prohibiting discrimination on the basis of race, color, national origin, sex, or religion in the employment relationship. This employment discrimination law does not attempt to ensure a just working environment for its employees, it seeks only to provide relief for victims, when the defined limitations are violated. Therefore, it does not actively work towards institutionalizing remedies in the context of the work environment. Rather, it allows for alleviation and recourse in the event of such violations, once bought to the proper authority's attention.

II What is Affirmative Action

(A) General

Title VII was a merging of the history, of employment law and the social change of the civil rights movement. Affirmative action was bought about as a result of a changing of ideology in relation to the employment relation and the role of government. Although affirmative action is looked at in terms of Title VII or the equal protection clause, neither has played the largest role hi bringing it about. The purpose of affirmative action is to address discrepancies resulting from historical events (i.e., slavely) or social pressures that are not necessarily attributable to a party's (employer's or union's) own discrimination. This is done by efforts geared toward increasing the number of minorities in a given workforce. Again, Title VII prohibits discrimination, and thus attempts to guarantee equal opportunity for individuals regardless of age, sex, race, etc.. It does not, however, command employers to achieve equality of result in an effort to address discrepancies.

It was not until the creation of two agencies that this directive came about. The two primary agencies that oversee affirmative action are the Office of Federal Contract Compliance, in the Fair Labor Standards Act and the Equal Employment Opportunity Commission (EEOC), in the Civil Rights Act of 1964. In fact, it was Executive Order

11246, issued by President Johnson in 1965 that created an Office of Federal Contract Compliance in the Department of Labor, and authorized it to issue guidelines to federal contractors. It was this order that injected the term "affirmative action" into the national jargon. (3. C.F.R. SEC. 339, 1965) The executive order imposed on employers, with significant federal contracts, an obligation to remedy the underutilization of women and minority employees in underrepresented job categories. These plans could include numeric goals and timetables. These numeric goals and timetables are a clear indication of a thrust towards equality of result and away from equality of opportunity.

In addition to this, if such parity did not exist between their availability in the workforce and their existence on the payroll, employers would have to declare "deficiencies" in their utilization of minorities. This was a necessary precondition to correcting the situation. Therefore, guilt was supposed by mere statistical disparity. It is in this way that the burden of proof and the remedy fell on the employer.

Specifically, a "series of Labor Department 'guidelines' for government contractors began in 1968 with requirements for "specific goals and timetables" involving the "utilization of minority group personnel," and by degrees this evolved into "result-oriented" efforts (1970), and finally (1971) it meant that the employer had the burden of proof in cases of "underutilization" of minorities and women, now explicitly defined as "fewer minorities and women in a particular job classification than would be expected by their availability..." (Block, 41)

These guidelines had the force of law, and given the large role of the federal government in the economy, the affected government contractors and subcontractors included a substantial proportion of all major employers. Approximately 40 percent of the civilian work force is employed by companies, which are federal government contractors. The "availability" of minorities and women, as judged by administrative agencies, often meant nothing more or less than their percentage in the population." (Sowell-Knowledge, 250) Title VII has not bought affirmative action about, but has been used to legitimize its existence.

Title VII was notably amended by the Equal Employment Opportunity Act of 1972, which allowed the EEOC to sue on behalf of individual victims of the prohibited discrimination. Although this did not affect the sections of the law relevant to judicial interpretation, studying its passage is helpful in understanding how affirmative action has come about, since it has greatly revolved around the agencies.

Actually, the initial goal of civil rights activists was to get "enforcement power" for the EEOC, but the Nixon Administration proposed an alternative which was ultimately adopted. Although Nixon came from a conservative background, he worked toward liberal measures as an electoral strategy. Much of his attention was paid toward foreign affairs, but addressing these domestic issues helped keep a needed electorate on his side.

The EEOC's primary responsibility is to enforce Title VII of the Civil Rights Act of 1964 as amended in 1972. It has jurisdiction over businesses with 15 or more employees, state

and local governments, and educational institutions. In 1978, the EEOC, along with other agencies, promulgated Uniform Guidelines on Employee Selection Procedure for voluntary affirmative action. Under the EEOC guidelines, affirmative action plans could utilize racial hiring percentages that were designed to reach goals according to specific timetables. Under these guidelines an employer, after self-analysis, can voluntarily impose an affirmative action plan. This would entail a written plan identifying ally imbalances, establishing goals for minorities in specific underrepresented job categories, and general instructions to decision makers to consider these goals in hiring and promotion decisions. It would also be legitimate for an employer to create a plan for one class or group and be underinclusive in its scope, thereby, targeting certain groups as beneficiaries. However, any plan should have a remedial purpose, and thus not be maintained indefinitely and it should not totally disregard objective selection criteria. It was by creating these standards of underrepresentation and goals with anti-discrimination that affirmative action was born.

These guidelines, were totally outside the authority intended for the EEOC. This is explicit in a statement by the chair of House Judiciary Committee: "[i]t is ... not true that the [EEOC] would have power to rectify existing racial or religious imbalance' in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. Only actual discrimination could be stopped."(110 Congressional Record, 1518) Regardless of the intention of the laws framers, the EEOC has been left virtually unhampered in its creation of guidelines.

As one can infer the guidelines, however, there are two crucial theories of employment discrimination that have main relevance to affirmative action. They are the adopting of an "equal achievement" or "equal result" approach to affirmative action. It is argued that such initiatives are presumptively valid, and that protected groups should be represented in the workplace in the approximate proportion to their availability in, or composition of the relevant labor force. Opponents of group-based, race-conscious treatment generally argue that such treatment is per se invalid. They insist upon a "color-blind" society approach to enforcement of fair employment laws and the Constitution. The color-blind Constitution and the colorblind approach to equality, in a nutshell, holds that the race of an individual should be completely irrelevant, and that traditional criteria, such as merit, ability, qualifications, and experience, should be the relevant factors in employment decisions. Individuals in this camp, accordingly, argue that all persons are entitled to "equal treatment," nothing more. (Turner, 6)

There is overwhelming support for the latter position in Senate debates over Title VII. This is made abundantly clear by statements made during debates. Senator Hubert H. Humphrey, one of the most vocal proponents of the bill, stated: "Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group." As well, that "[c]ontrary to the allegations of some opponents to this title, there is nothing in it that will give any power to the Commission or to any court to require lifting, firing, or promotion of employees in

order to meet a racial 'quota' or to achieve a certain racial balance."(110 Congressional Record, 12723)

In addition, Senator Harrison A. Williams states: "Under [this provision] an employer with only white employees could continue to have the best qualified persons even if they were all white." (110 Congressional Record, 1433) Also, in a joint Republican statement: "[T]he Commission must confine its activities to correcting abuse, not promoting equality with mathematic certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions." (Friedman, 1040)

The goal of equality of result was a product, really, of frustration over the lack of economic progress of blacks. As Roy Wilkins, of the NAACP, stated: "Our problem was how to come to grips with what seemed to be a failing faith in the 'equal opportunity' ideal." (O'Neill, 202) Although the ideal of color-blindness was a driving force in lobbying for civil fights legislation, civil rights workers felt that the forces of discrimination were too strong and too deeply imbedded -- that, ultimately the result would have to precede the change in behavior. This concept is clearly articulated by Lyndon Johnson when he said:

> But freedom is not enough. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "You are free to compete with all the others" and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and most profound stage of the battle for civil rights. We seek not just freedom of opportunity. We seek not just legal equality but human ability, not just equality as aright and a theory but equality as a fact and equality as a result.
> Lyndon Johnson - 1965
> commencement address
> Howard University

Inherent in this debate over which tact to take are competing concepts of justice. This word 'justice' conjures up different thoughts for different people, but basically it is the principle: "people should get what they deserve." Although, most people would agree this definition is accurate, there are differences in what people think is deserved. One perspective is, simply, a person should be hired on the basis of merit and other objective standards. Being treated on this basis is seen as fair and necessary to avoid discrimination. Ultimately, the process must be racially neutral in its application of hiring requirements, with blacks entitled to this treatment, as are all other groups. This perspective deals with creating equal conditions and opportunity for all, starting now, and for the future. Another perspective, however, looks at what blacks deserve through an opposing lens. The issue is seen as one of compensation, and, in this sense, backward looking. From this standpoint, what blacks are entitled to is a reflection of past

discrimination and victimization, as well as their present needs. This argument holds that the conditions of blacks today is a direct result of historical factors, and to fail to address their needs in this context is unjust. In effect, by the fact that there are needs that aren't met, an injustice has taken place which must be remedied. These can only be remedied by giving blacks what they have been denied, what they deserve, had there not been a system of discrimination. It is in the framework of these competing outlooks that affirmative action policy has developed.

(B) Affirmative Action in Employment

As mentioned previously, Title VII attempts to achieve equality of employment opportunities by removing barriers that have operated in the past to favor an identifiable group of white employees over other employees. It is negative in its structure, language, and philosophy. (I,aughlin McDonald. 101) Under Title VII of the Civil Rights Act, employers were left with the possibility of a wide range of judicial interpretations. There was, on one side, the letter of the law forbidding racial preference, and, on the other, the introductions of the idea of goals and timetables.

From these came two theories of Title VII liability: disparate treatment and disparate impact. (When dealing with equal protection, it is harder to establish liability.) Disparate treatment theory is "concerned with a narrow aspect of the process of employer decision making, rather than the results reached through that process." Disparate treatment theory focuses on the employer's treatment of individuals, and requires that the process used in making employment decisions be one of like treatment, which is not influenced by race or gender. (Cox, 772) If a decision to discharge or promote is reached by an employer on the basis of grounds proscribed by Title VII, the statute is violated and the employer has engaged in unlawful disparate impact. (Turner, 8) Disparate treatment is more easily understood, as it involves an employer simply treating some person less favorably than another because of his race, color, religion, sex, or national origin. In such an instance, proof of discrimination, intent is crucial -- although it can be inferred simply by the different treatment that exists. (Int'l Brotherhood of Teamsters v. U.S.431 U.S. 324).

Disparate impact analysis, on the other hand, is not as interested in intent and process as with effect. Disparate impact involves "employment practices that are facially neutral ... but that in fact fall more harshly on one group than another and cannot be justified by business necessity..." So, if an employment practice selves to disadvantage a particular class, it is considered under this heading. No proof of discriminatory motive is needed under disparate impact theory. (Int'l Brotherhood of Teamsters v. U.S. 431 U.S. 324, 1977)

The assumption of the disparate impact model is, plainly, that if things were as they should be -- with no discrimination -- blacks and whites would score approximately the same on exams and be hired in consistent proportions to the numbers that applied. In this way, disparate impact is the direct descendent of the equal results analysis. Any disproportion is perceived as an "underrepresentation" of blacks within a given area. This underrepresentation is a measure of the difference in the number of blacks hired relative

to the number available in the local labor force. Such an analysis is justified as a measure to modify any unjust system in the name of a greater good -- economic parity for blacks and whites. The distinction between disparate impact and disparate treatment becomes crucial in terms of the allocation of burden of proof as seen in later Supreme Court decisions.

In the area of employment, one of the most encompassing and accurate definitions of affirmative action is a "continuum of different responses to discrimination ... measures designed primarily to prevent discriminating ... by eliminating intentional and nonintentional personnel practices that have the effect of discriminating..." (Taylor, 235) This type of affirmative action can also be referred to as nondiscriminatory affirmative action, which can involve affirmative steps taken to ensure equal opportunity. Such measures can include expanding training and recruiting techniques, as well as job advertisement, to include blacks as a target group. Affirmative action in this vein receives little opposition.

Non-discriminatory affirmative action has rather uniformly been met with agreement from all sides because it is wholly in line with traditional concepts, as it seeks only to make the hiring process fair in the real world, in a practical sense. It seeks to create equal opportunity for persons as they enter the door for an interview. The argument follows that if a black person is less able to compete effectively as a result of past discrimination, then we should seek to perfect competition by: 1) making all individuals equipped to go into the job market, and 2) by effectively advertising to and recruiting blacks. As such, the actual decisions among applicants were then to be made without regard to race or ethnicity. This was the initial thrust of affirmative action and completely in line with Title VII.

Another form of affirmative action, however, has evolved over time and involves "measures desired to increase the numbers of women and nonwhites in the work force by giving them preference, and usually involves statistical measures to determine proportions of different groups in a work force, and hiring and promotion goals to increase the representation of women and nonwhites." (Taylor, 235-6) This form of affirmative action generates heated, often fierce, debates over its: 1) legality, in light of Title VII and the equal protection clause, and 2) its effectiveness in moving society towards equal opportunity.

Substantial changes have occurred in the legal definitions of discrimination, the methods of determining whether or not unlawful discrimination exists, and the kinds of actions which must be taken to eradicate discrimination where it exists. It is no longer enough for an employer to evaluate each person that walks through the door on an equal basis according to each person's individual abilities and qualifications. It is the results of the practices, as well as the intentions of the individuals and employers, which count.

At the root of much of this is a change in what equality means. Traditionally, equality has referred to innate rights, such as in 'equal before the law." The thrust of equal rights law has been to recognize that individuals should have equal freedom to do what is in their

self-interest -- that there is a right to self-determination. The new idea of equality, however, sees equality as meaning: "if two individuals are equal, they should be the same in all circumstances." With this as the goal, a system of equality is created, were a system of rationing occurs. The fact is, however, that inequality will exist in even the most just society, in fact it must exist. Individuals are different, with different ambitions and talents, which produces differences in outcomes. To force equality, however, in this way takes away freedom from individuals.

Civil Rights Act of 1964, with the Brown ruling, provided the most comprehensive protection of any single federal action. The act, along with its 1972 amendments, has virtually eliminated all legal forms of discrimination on the basis of race, color, national origin, religion, and sex in the areas of employment, housing, and public accommodations. In other words, according to the letter of the law, discrimination is dead" (Squires, 2)

In order to get support for the Civil Rights Act of 1964, spokesmen for blacks and a large majority of the public supported the idea of racial neutrality and a color-blind government. However, it would seem that would not be enough. One could distinctly see the beginning of moves from the color-blind ideology to special measures when Martin L. King wrote: "[t]he moral justification for special measures for Negroes is rooted in the robberies inherent in the institution of slavery. "(King, 152)

As a consequence of slow progress, civil rights enforcement shifted from an effort to eliminate overt acts of intentional discrimination perpetrated by individual whites against individual members of minority groups to an attack on systematic and institutional practices, with the focus being on the results rather than the motivation. In essence, the results, oriented approach was interested in achieving what supposedly would have existed in the absence of racial discrimination. In fact, it was believed that equality could not be achieved without artificially creating what would have been.

III The Legal Development of Affirmative Action: Landmark Supreme Court Decisions

President Franklin Delano Roosevelt once said that the great thing about tile Constitution is its flexibility; which allows it to remain effective in constantly changing times. Such a trait can be a positive thing, as this flexibility has been responsible for overturning some of the most disturbing laws in our history (i.e., Plessy). However, more important and intrinsic in a constitution is the need for resistance to these changing times -- a stable standard by which to judge. In this way, the virtue becomes a vice if it leads to inconsistencies and difficulty in interpreting the law. Affirmative action has not escaped this quandary, but selves as a unique example of how flexibility can lead to uncertainty.

The proliferation of civil rights legislation, court orders, executive orders, and agencies implementing regulations has made it increasingly difficult to keep up with what is

currently required by law. It is for this reason that looking at judicial interpretation is important. The case law, however, has not delineated consistent standards to govern the constitutionality of racial preferences, instead the Court has addressed the issue on a case by case basis. This, as indicated, has produced some conflicting responses, leaving opponents and proponents of affirmative action, alike, flowing in the wind. By looking at some of the crucial affirmative action decisions that have been decided since 1971, one will be able to see this at work. In so doing, one can also try to decipher some guidelines of what affirmative action is deemed acceptable, when these decisions are taken as a whole.

However, before beginning a consideration of the various Court decisions, two legal ideas pertaining to the discussion need elaboration. The two standards used in these cases are "suspect classifications" and "strict scrutiny." To begin, a suspect classification can be determined by meeting the following identifiers: (1) whether membership in the class "carr[ies] an obvious badge, as race or sex do; (2) whether treatment of the class members has "approached the severity or pervasiveness of the historic, legal and political discrimination against women and Negroes"; and (3) whether the disadvantaged class has been subjected to an "absolute deprivation" of a benefit available to others (Mathews v. Lucas, 427 U.S. 495 [1976]). In Bolling v. Sharp the Court demonstrated that race is the clearest example of a suspect classification. (347 U.S 497 [1954]) These limitations, although primarily based on the fourteenth amendment, which deals solely with states, are imposed on the federal government through the due process clause of the fifth amendment. The Supreme Court concluded that some denials of equal protection may be so gross as also to deny due process (Bolling v. Sharp). From these standards it is apparent that treatment of groups are to be considered in regard to how they have been treated in the past -- that the classification of a group is directly linked to its past treatment.

Any category, once it meets the above criteria, becomes a suspect classification because it has been proven to have been used to abridge some inherent right. This being the case, it falls under another standard, strict scrutiny. The logic that supports this higher level of scrutiny, is that some rights are on a higher plane. Strict scrutiny is a framework, or a formula, used to assess if a freedom is considered to be on that higher plane. There are three requirements that, if met, would warrant strict scrutiny. First, if legislation directly abridges a fundamental or "preferred freedom." If so, the assumption of constitutionality is reversed -- the burden falls on the government to show constitutionality. Second, the legislation must promote a "compelling government interest." Third, the legislation must be narrowly tailored in the sense of not infringing basic liberties by providing a wider remedy than is needed.

There are many concepts that can be dealt with under the heading of affirmative action, and the Court has had to deal with each at different times. Three of the main ones are the legitimacy of: l) the disparate impact analysis, 2) the implementation of quotas, and 3) the rights of nonvictims. In this section, Supreme Court decisions will be looked at, each within the framework of their rulings under Title VII and the equal protection clause. As

the Court has chosen to review affirmative action on a case by case basis, the specifics of the cases will also be looked at for better definition.

Disparate Impact

There are three main cases under consideration in this part, they are: 1) Griggs v. Duke Power, 2) Washington v. Davis, and 3) Regents of the University of California v. Bakke, and United Steel Workers of America (USWA) v. Weber. They will be discussed in chronological order.

The Griggs case (401 U.S. 424), which dates back to 1971, was the Court's first opportunity to interpret Title VII. A group of black employees bought a class action suit against Duke Power Company, arguing that the company's requirement of a "high school education and passing of a standardized general intelligence test" produced a disparate impact on black employees and applicants. Duke Power, on the other hand, felt the minimum of a high school diploma and passing of a test were not unreasonable prerequisites to employment at their plant. The question before the Court then, was whether these requirements were prohibited under Title VII if: "(a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operated to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites." In all these requirements, the issue of disparate impact is evident. The first criterion is related to the importance of using relevant exams to avoid a disparate impact, the second goes to the use of rate of passage based on race as a standard of test validity, and the third deals with disparate treatment and its relation with disparate impact.

In this case, a unanimous Court explicitly rejected racial preference in employment:

> [Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed...

The Court stated that the purpose of Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" and that "... good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." The intent of the employer is seen as irrelevant and the existing employment procedures are seen as part and parcel of a system of discrimination. This is made even more apparent, since the company made special efforts, by paying two-thirds of the cost of tuition for high-school training to help less educated employees, in an effort to ensure fair opportunity. (Blumrosen, 10) in this way, Duke Power established an interest in measures aimed toward equal opportunity that did not sacrifice hiring standards. Even in light of this, it was found that the testing practices used did not lead to "fixed measures of

capability" -- they were not definitive indicators of job performance and, therefore, not valid.

Now, although tests were permitted by section 703(h) of Title VII, the EEOC permitted only the use of job-related tests. The Court declared, "[w]hat Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Therefore, Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." (Griggs) Therefore, an employer could violate the law, even in the absence of any intent to discriminate, as seen here. A stricter analysis is used for validation -- because the test being used was reasonable, but not definitive and, therefore, unacceptable.

In addition, the Court recognized that blacks had for a long time received an inferior education in segregated schools and this has a bearing on the current law. In effect, the past treatment of a group can have an affect on present treatment of that group. Alluding to Gaston County v. U.S. (395 U.S. 285), where the Court decided that literacy exams were shown to be an unconstitutional prerequisite to voter registration. This decision was the result of finding the test to be an unfair burden on blacks. However, it would seem that it is substantially possible for a test to, at once, be a legitimate indicator of job performance, serve to disqualify blacks at a high rate, and be used by a employer who has favored whites in the past -- and still be allowed. The literacy exam may, in fact, be a fair indicator of responsible voting, but was not a relevant factor in the decision. It was the unfair burden that was more important. With the comparison of voting rights with that of fair employment practices, one is left to assume that the Court sees these rights on the same level. The right to vote, however, is a fundamental right, and it does not seem there is such a fundamental right to work.

Regardless, in such a case, the question becomes whether a past record of discrimination is enough to indicate present guilt of discrimination. The decision in Griggs repudiates the notion that minority underrepresentation in itself justifies the adoption of racial preference. In short, disparity in availability as contrasted with the numbers employed is not necessarily indicative of some systemic discrimination. Under Griggs, if it is found that a disparate racial impact exists, then both job qualifications and tests would have to be validated. Once validated, however, regardless of their impact, they would have to be seen as proper.

The Griggs decision, nevertheless, provides justification for race conscious affirmative action programs trader Title VII, once disparate impact is identified. In fact, an employer is required to be race-conscious and take action to correct the process to avoid liability in the absence of business necessity. Business necessity refers to the necessity of that part of the hiring process under review --whether the process used is predictive of or relevant to actual job performance. So, "[if] an employment practice which operates to exclude blacks cannot be shown to be related to job performance, the practice is prohibited. Therefore, in Griggs, disparate impact is a legitimate cause to suspect discrimination, and even absence mal-intent race-conscious measures can be imposed to alleviate the impact. It was also decided that affirmative personnel actions taken to comply with Griggs could

not be held to violate the statutory restrictions on preferential treatment in Title VII." (Blumrosen, 10) In the Court's words, "Congress directed the thrust of the act to the consequences of employment practices, not simply the motivation." From this ruling, however, one is left to wonder whether the Court is really in the position to determine something as subjective as business necessity. An employer may see an exam that predicts the performance of applicants, taken together, in such a way that those who do well would increase productivity by one percent, to be a business necessity. The Court, conversely, may not see a one percent increase to be necessary. The Court, however, decides the need of a practice without being exposed to any economic risk. Yet, it has placed itself in the to just that by deciding the necessity of a company's hiring requirements.

In the next case concerning disparate impact, Washington v. Davis (426 U.S. 229, 1976), the Court decided the constitutionality of a test used during the hiring process in the District of Columbia's police department. The Court agreed with the district court, overturning the court of appeals. In addition to agreeing with the District Court's ruling, they adopted the same standards used by it. The test was found to be valid and the Court pointed to three conclusions, "(a) The number of black police officers, while substantial, is not proportionate to the population mix of the city. (b) A higher percentage of blacks fail the Test than whites. (c) The test has not been validated to establish its reliability for measuring subsequent job performance." These district court standards, although often seen as a rejection of Griggs (Zimmer, 271), are similar to those in the Griggs case. The lower proportion of black police officers is analogous to the history of disparate treatment in the Grigg's standard, the second conclusion deals directly with disparate impact, and the final with validation. In any case, if the above criteria are met, this finding would be sufficient reason to shift the burden of proof to the employer, Washington. In the Court's words, "[w]ith a prima facia case made out, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" Racially neutral in this context means simply that the procedure or exam should not have a disparate impact. In such a definition lies the implication of guilt associated with disproportionate racial results. This is indeed at the heart of the issue. Is a test that is used in a hiring process invalid because it produces a disparate impact, or are these effects merely an indicator that further investigation is necessary?

The Supreme Court, in its decision, settled the question for the time being. In concurrence with the district Court, and with Griggs, it made clear that disparate impact alone did not prove unconstitutionality. The Court alluded to the Strauder case (100 U.S. 303), which made it unconstitutional under the equal protection clause to exclude blacks "from grand and petit juries in criminal proceedings." The analogy was made that simply because a jury or a series of juries is not in statistical parity with the community in terms of blacks, does not by itself indicate wrong doing. The Court held, "...it is untenable that the Constitution prevents the government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing."

Furthermore, the Court held, this time in contrast with Griggs, "...that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any difference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skill rather than ability." Therefore, once the test was validated (which is required), then it must be left alone.

Although intent does not play a great role in disparate impact cases, here it was used to buttress the Court's decision. The facts of this case were really not all that different than Griggs and neither were their standards for burden of proof. The Court chose a closer reading of the law. The Washington Court saw discrimination much more in terms of the employer's intent and in terms of treatment, rather than in terms of the results of its actions. On the other hand, the Griggs Court saw discrimination as a reflection of the impact of the employer's practices. This difference is critical in terms of determining guilt of discrimination and evidences the subtlety with which a practice can be acceptable and unacceptable. Two conflicting rulings were given as a result of a change in looking at treatment rather than impact.

The next critical case was University of California Regents v. Bakke (438 U. S. 265 (1978)). This case involved the special admissions program of a state medical school, where sixteen positions were set-aside for disadvantaged students, a classification intended to include only minorities. Allan Bakke, a white man, had applied to and was rejected from the medical school in 1973 and 1974, although his test scores and G.P.A. were much higher than those of the minority students accepted under the special admissions program.

In relation to Title VII, the Court found that, "Properly construed ... our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have, and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large." In this, one sees an addition to the standards used in previous decisions. Here, past discrimination inflicted by society can be used. The question then arises: when wouldn't these conditions be met? It seems, if disparate impact exists, then racial preference is acceptable to modify or eliminate the impact. These findings go directly against Griggs in relation to Title VII. As a result, the Court's two conditions become one; if an institution has persistent and severe minority underrepresentation, it may adopt racial preference in admissions. (Sindler, 10) The numbers alone could speak to the guilt or innocence of one's hiring practices. The need for validation is not addressed and in this way moves the thrust of action to concentrate solely on the impact of a process. Since hiring procedures can have a disparate impact on applicants absent any intent to discriminate the burden of proof has strictly moved to the employer to prove innocence.

The next year, the Court decided on its first affirmative action in private employment, United Steelworkers of America (USWA) v. Weber. (443 U.S. 469) The USWA and the

Kaiser Aluminum Chemical Corporation entered into a labor agreement in 1974 that covered fifteen Kaiser plants. Under the plan, 50 percent of in-plant craft training programs were reserved for black employees. Selection to the program was decided on "the basis of seniority by race." This master labor agreement was applied to its Gramercy, Louisiana plant. The plan was to be implemented until the percentage of skilled craft workers in the plant would near the percentage of blacks in Gramercy's local labor force. Less than two percent of the skilled craft workers were black, and the work force in the Gramercy area was roughly 39 percent black. Brian Weber, one of the rejected white employees, filed a class action suit, alleging that the program discriminated against white employees in violation of Title VII of the Civil Rights Act of 1964. Weber had more seniority than the most junior black accepted to the program. The opinion of the district court for the eastern district of Louisiana and the court of appeals stated that the program was indeed in violation of Title VII's ban on racial discrimination.

The Supreme Court overturned this, however, stating that the plan fell under the discretion left to private employers to adopt a voluntary affirmative action plan. The Court found that it fell under "the area of discretion left by Title VII to the private sector to voluntarily adopt affirmative action plans designed to eliminate conspicuous racial imbalances in traditionally segregated job categories." In section 703(j) of Title VII it states that the law "shall not be interpreted to *require*... ([the] grant of preferential treatment to any individual" (emphasis added) on account of their group affiliation. This goes directly to the principle of liberty of contract. Justice Brennan held that this section was "designed to preserve traditional management prerogatives," whereby upholding their freedom of business, by not profiting such voluntary measures. (Turner, 25) Therefore, if a employer and union perceive a disparate impact in hiring practices, they may make goals that reflect the proportion of the target group in the area.

The Court felt the purpose of the law was to address "the plight of the Negro in o[u]r economy." By using the purpose, or the intent, of the law's framers, they concluded that race conscious affirmative action plans did not violate Title VII. The Court felt that this case fell under what was permissible under the law, but pointed out the finding was narrowly defined --that the Court was ruling only on this case.

From these cases it becomes clear that the Court has been unable to deliver consistent standards for employers to go by. It is clear however, that the burden of proof is on the employer to prove a hiring practice is valid if it produces a disparate impact. This being the case, an employer is left to his own resources to avoid liability any way he call.

Quotas

In looking at quotas, there are five cases that are significant: 1) Bakke, 2) United Steelworkers of America (USWA) v. Weber, 3) Local, 28, Sheet Metal Workers v. EEOC, 4) Watson v. Fort Worth, and 5) City of Richmond v. J. A. Croson Company.

In the famous University of California Regents v. Bakke (438 U. S. 265 (1978)), the Court examined the purported purpose of the of the medical school's special admissions

program and concluded that if the purpose was to: 1) assure a specified percentage of a racial or ethnic group within the student body, it was "discrimination for its own sake" and therefore unconstitutional; 2) help victims of "societal discrimination," it would not justify a classification that imposed disadvantages to nonminorities; 3) improve the delivery of health care services to under served communities, would not be allowed because of lack of evidence; 4) attain a diverse student body, would be a constitutionally permissible goal for an institution of higher learning and wholly consistent with the first amendment. Justice Powell felt, however, that the problem was that the program focused solely on ethnic diversity. As previously mentioned, there were vast differences between Bakke's test scores and those of individuals accepted under special admissions. This can clearly be seen by following table provided in the case. Although grades for both years that Bakke applied were given by the Court, the information concerning 1974 is sufficient.

Table 1

Class Entering in 1974

			MCAT (Percentiles)			
	SGPA	OGPA	Verbal	Quantitative	Science	General
Bakke	3.44	3.51	96	94	97	72
Avg. of Regular Admittees	3.36	3.29	69	67	82	72
Avg. of special Admittees	2.42	2.62	34	30	37	18

Even with such immense differences in objective criteria, the Court concluded that the state could legitimately and constitutionally utilize a properly devised admissions program, involving the "competitive consideration" of race and ethnic origin. (Turner, 15) This competitive consideration of race would take shape by using race as one criterion in admission decisions. Although the Court made clear that assuring a fixed number of a certain group for its own sake was unconstitutional, it also ruled that societal discrimination was a reason not for its own sake. Now, the medical school was undoubtedly engaged in a strict quota in its practice of setting aside slots. The Court tried to bridge the gap between the idea of nondiscrimination and the importance of minorities having access to educational and employment opportunities. It however recognized that the implementation of a strict quota was outside this interest.

This case was full of justices concurring in part -- implicit in this is the conflict of the value of blind equal opportunity, coupled with the recognition that even with this minorities would not be represented in proportion to whites. For this reason, something else was used -- a "competitive consideration."

In United Steelworkers of America (USWA)v. Weber (433 U.S. 193 1979). Again, the selection to the program was decided on "the basis of seniority by race." (This standard is in line with Bakke's "competitive consideration.")

The Court held that Title VII did not bar an employer from establishing an affirmative action training program that gave preference to blacks. The Court felt it had only to address "...the issue of whether Title VII forbids private employers and unions from voluntarily agreeing upon affirmitive action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan..." The Court opted to look at a non-literal interpretation of the law, and concluded that the spirit of the law and the spirit of the affirmative action plan were in line. The Court also chose not to define what would be permissible or impermissible, but instead stressed that *this* plan was permissible under the law. This was one of those cases for a number of reasons:

1. The plan did not "unnecessarily trammel the interests of the white employees.";
2. the plan did not "require the discharge of white workers and their replacement with new black hires;
3. the plan did not "create an absolute bar to the advancement of white employees..."; and
4. the plan was temporary, and "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

Therefore, it did not violate the prohibition against preferential treatment of the 1964 Civil Rights Act.

In Justice Rehnquist's dissent, he reminded the Court of its decision in the Griggs case, that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." And the purpose of Title VII was to ensure equal opportunity regardless of race. Rehnquist went on to say: "[t]here is perhaps no device more destructive to the notion of equality than the numerous clausus -- the quota ... the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another..." He also criticized the majority because they chose not to look at the text's literal meaning in determining the outcome of the case, and instead chose to jettison traditional methods of interpreting the law.

A reading of the law that looks only at intent is problematic because intent is meant to be used as an aid in rendering a judgment. Intent is not the same as, and certainly not more important than, the law. Nevertheless, this was decided in light of the golden rule which states: "the court is supposed to follow the literal approach unless it produces absurdity (and perhaps inconvenience and inconsistency), in which case it should find some other meaning." (Zander, 15) The language of Title VII does not produce absurdity of the facts in the case and neither does it prove inconvenient or inconsistent. It seems that the majority of the Court was interested in allowing the quota to exist and, therefore, made it so.

This is an example of a case by case interpretation and an unwillingness to make definitive standards for judgment. In effect, the Court "updated" the meaning of Title VII, in the Weber decision, by reinterpreting the commitment of Congress to nondiscrimination. This decision was also made in light of the subsequent bureaucratic and judicial development of an expanding range of race-conscious programs and activities.

In 1986 the Court decided Local, 28, Sheet Metal Workers v. EEOC (106 S.Ct. 3019). In this case, there was no disagreement that the union had engaged in long term and persistent discrimination, as illustrated by Justice Powell's remark that "[i]t would be difficult to find defendants more determined to discriminate on minorities." The Court stated that in most cases, a court only has to order an employer or union to cease engaging in discrimination, practices and award make-whole relief to victims of those practices. In cases, however, of "particularly longstanding or egregious discrimination ... requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the workforce may be the only effective way to ensure the full enjoyment of the rights protected by Title VII."

In Justice Powell's opinion, he used the strict scrutiny analysis. He called for a two pronged examination of the constitutionality of race-conscious measures: (1) whether the racial classification was justified by a compelling governmental interest; and (2) whether the means chosen to effectuate the state's purpose was narrowly tailored to the achievement of that goal. (Turner, 46) Then, he went on to declared that: (1) it was doubtful that the district court had available to it any other effective remedy, given the union's violations; (2) the plan's goal was limited and not permanent; (3) the goal was directly related to the percentage of minorities in the relevant workforce; (4) the flexible application of the goal demonstrated that it was not a means to achieve racial balance; and (5) nonminorities would not be directly burdened, if at all, since no layoffs of nonminority workers would be required. (Turner, 46-7) In this decision when the Court speaks of rough proportions and goals, not racial balance, it has decided quotas are unconstitutional. However, in this case there was no other recourse but to implement a hiring goal.

Finally, in City of Riclunond v. J. A. Croson Company (488 U.S. 469, 1989), the Court struck down an affirmative action program that set aside 30 percent of the dollar amount of city construction contracts for minority-owned firms. The Court found that the equal protection clause was violated by the set-aside program. This was decided for the following reasons: 1) there was no evidence that the construction industry, had a history of discriminating and that societal discrimination was not sufficient reason for such rigid racial preference, 2) the random inclusion of groups that were not the victims of past discrimination indicated that the purpose was not to correct a past wrong, and 4) in all these ways, it was not narrowly tailored to remedy alleged past discrimination.

The Court held that the "standard of review under the equal protection clause is not dependent on the race of those burdened or benefited by a particular classification." Thus, the case bought to bear the question of whether such strict scrutiny should be applied to remedial or "benign" race conscious measures taken to provide advantages and employment opportunities to racial minorities. Recognizing that there is no way to determine whether classifications are benign or remedial, the need to use the strict scrutiny analysis was emphasized ever more important in such cases. The court found that these measures did not fall in that area and were unconstitutional.

In dissent, Justice Marshall called the Court's decision a "giant step backward." In this case, almost thirty years after Griggs, there is a return to the ideal held under Griggs -- that equal protection means precisely equal protection. There is also a return to caution, and the use of race-consciousness as a rare exception to the rule.

In these cases as well one can see a shift in opinion from recognizing goals as legitimate to recognizing that goals are not legitimate. There is no consistent reading because the Court, by its own statements, chooses a case by case approach, in addition, the burden of proof has not shifted and, therefore, employers continue to try and avoid liability.

Nonvictims

This analysis deals with the validity of 'nonvictims' receiving benefits from preferential treatment. Nonvictims are, literally, those individuals who are not identifiable victims of discrimination on the basis of the protected categories. Others argue that each black person is a victim and the term nonvictim is useless. The belief is that no black could have gone through life in the United States without being a victim of society's racism, and therefore each black is entitled to compensation. These differences in definition can be seen in the following cases. However, whatever may be true from a philosophical perspective, the fact is that the letter of law allows only for actual victims -- identifiable victims. The Court has interpreted this a number of different ways.

The cases to be studied in this section are: 1) Bakke, 2) Weber, 3) Firefighters Local Union No. 1784 v. Stotts, 4) Wygant v. Jackson Board of Education, 5) Sheet Metal Workers, and 6) Metro Broadcasting, Inc. v. FCC.

It is in this area of nonvictims that the famous Bakke case (438 U.S. 265 (1978)) is most useful. The medical school's 1973 application had a question, in which applicants could indicate whether they wished to be considered as "economically and/or educationally disadvantaged." Then, on the 1974 application the question was rewritten, and candidates were asked to indicate whether they wanted to be identified as part of a "minority group." Applications on which the above question was answered affirmatively were sent to a special admissions committee. The Court made mention that "[a]lthough disadvantaged

whites applied to the special program in large numbers, none received an offer of admission through the process." This fact goes directly to the consideration of whether preferential treatment is intended for individuals as victims or to members of a group as compensation likely victimization. As seen here, an applicant being disadvantaged and being black, or part of another minority, were used to mean ultimately the same firing. It became the racial status that was important, and not actual adverse effects from a system of racial and economic oppression. This is really a most fascinating aspect of the admissions process. One is boldly faced with the question of whether the goal is "making whole" a person for what happened to his great-grand parents or is it for an identifiable injustice that he, in fact, had to face. This change in language made clear that the school was predominantly interested in the race of individuals.

Moreover, in relation to nonvictims the Court held, "it is enough that each recipient is within a general class of persons *likely* to have been victims of discrimination."(emphasis added), and that "judicial findings of discrimination" were not necessary to justify racial preference." Finally, Powell noted that "the entity using explicit racial classifications" did not itself have to have been in violation of equal protection or of an anti-discrimination regulation. Here one can see a change from the idea of individual reparation, or an identifiable victim, to the idea of a likely victim and group reparation. In this way, the Court embraces the idea that racial preferences are acceptable if for the purpose of social justice. Both the history of the institution itself and that of the benefactor are unimportant; it is the general historical practices that are relevant.

In United Steelworkers of America (USWA) v. Weber (443 U.S. 193, 1979), the Court in upholding the Voluntary affirmative action plan recognized groups as legitimate recipients of preferential treatment. The significance of the Weber decision is that the majority's analysis relates an equal achievement/group justice approach to the question of the legality of affirmative action plans under Title VII. Although Title VII speaks of individuals affected by discrimination, the Court chose to leach a conclusion based on the purpose of the law and the propose of the affirmative action plan. Such an analysis is difficult to accept, and, moreover, troubling in understanding what is acceptable.

The next case that adds to the soup of these affirmative action decisions is the Firefighters Local Union No. 1784 v. Stotts (467 U.S 561), decided in 1984. Until this time, the majority of the Court's Justices had not voted in favor of affirmative action in employment and, the Court's decision was eagerly awaited. In this case, a district court approved and entered a consent decree in 1980, which established an interim annual goal of hiring qualified black applicants to fill 50 percent of job vacancies in the city of Memphis' fire department. The decree made no provisions for layoffs, awards of competitive seniority, or reductions in rank. In 1981, the city announced layoffs based on a seniority-based "last hired, first fired" rule. The district court entered a temporary restraining order, forbidding the layoff of any black employee, and an injunction which ordered that the city not apply seniority insofar as it would decrease the percentage of black employees in certain categories. The court then approved a modified plan where no blacks were to be laid off. (Turner, 28)

Reversing the sixth circuit, the High Court, ruled that the federal appellate court overstepped its bounds when it ordered the Memphis fire department to layoff a group of whites with more seniority than blacks in order not to endanger the gains made by newly hired blacks under an implemented affirmative action plan. Justice White wrote the opinion of the Court. It found that section 706(g) of Title VII "is to provide make-whole relief only to those who have been actual victims of legal discrimination..." Therefore, the Court was not authorized to give preferential treatment to nonvictims.(Tumer, 29)

Furthermore, the Supreme Court's 1984 ruling in Memphis v. Stotts was seen as a sign of nonsupport for affirmative action because the Court reasoned that the layoffs should be based on seniority and not on race. This decision goes against the Courts previous rulings in this area, and created confusion.

To many civil rights organizations, the Court's decision was a setback for efforts to implement affirmative action programs, particularly because they believed the Department of Justice broadly construed this decision as forbidding all race- and sex-conscious measures. (Jones, 127) Commentators initially concluded that Stotts struck a devastating blow to proponents of affirmative action. The Stotts decision, however, did not have an immediate impact on Title VII affirmative action litigation, as courts read Stotts narrowly and limited the decision to the cases particular parameters. (Turner, 31)

The next case went right to the heart of the affirmative action debate, In Wygant v. Jackson Board of Education (106 S. Ct. i842 (1986)), the constitutionality of preferential treatment for racial minorities was squarely at issue. The case involved the legality of a collective bargaining agreement between the Jackson, Mississippi Board of Education and the Jackson Education Association. The specific provision concerned the possible event of a layoff, stipulating that "teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel employed at the time of the layoff." This was done to maintain a balance of minority teachers employed. In 1974, the board of education did not comply with a remedy for societal discrimination by providing "role models" for minority students.

The Supreme Court found the provision unconstitutional --the school board could not lay off white teachers in order to preserve the jobs of blacks with less seniority. The Court also held that the role model theory was impermissible because it "allows the Board to engage in discriminatory" practices "long past the point of legitimate remedial purposes." (Turner, 32)) The school board's plan denied white teachers their right to equal protection of the laws. This was a civil right, a greater one, that was being violated.

However, the Court made it clear that affirmative action plans are not inherently unconstitutional. The question here was "whether a school board, consistent with the Equal Protection Clause, may extend preferential protection against layoffs to some of its employees because of their race or national origin." The Court found that it could not. However, the Court also made clear that the benefactor of such a policy, if applied

elsewhere, only has to be a member of the group being targeted; he need not have been a victim of discrimination.

In 1986, the Court decided Local, 28, Sheet Metal Workers v. EEOC (106 S. Ct. 3019). In this case, the petitioners were previously found guilty of discrimination against non-whites in 1975, and were ordered to end such practices and to admit a certain percentage of nonwhites into the union by July, 1982. In 1982 and 1983, the union was found guilty of disobeying these orders. The Court felt the question that needed to be addressed was whether section 706(g) "empowers a district court to order race-conscious relief that may benefit individuals who are not identified victims of unlawful discrimination." The Wygant case dealt with identifiable white victims and this case deals with unidentifiable black victims. As mentioned in the section on quotas, in the bulk of cases, ordering an employer or union to cease engaging in discriminatory practices and award make-whole relief to victims of those practices is a sufficient remedy. However, in a case of "particularly longstanding or egregious discrimination ... requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the workforce may be the only effective way to ensure the full enjoyment of the rights protected by Title VII."

Justice Brennan went on to declare, "[t]he purpose of affirmative action is not to make whole, but rather to dismantle prior patterns of employment discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief; and beneficiaries need not show that they were themselves victims of discrimination." It "may be necessary, to dissipate the lingering effects of pervasive discrimination." It is interesting that in this opinion, the idea of group relief is dealt with as more legitimate than individual relief. It can also be inferred from the judgment that the punishment of the employer is at times more important than the remedy for the victim, identified or otherwise. Here, the bending of the color-blind principle is done to punish the employer for past discrimination, however, those victims of the discrimination are left out, and compensation is given to others, solely on the basis of race. Although this has violated both the call to be racially neutral and that to compensate identifiable victims, the Court held that it may be necessary to resort to race-conscious affirmative action. (Turner, 45) In making this decision, courts need to consider "whether affirmative action is necessary to remedy past discrimination in a particular case before imposing such measure;" the court "should also take care to tailor its orders to fit the nature of the violation it seeks to correct" (Turner, 25) and, citing Weber, should make sure the measures are temporary. (Turner, 26) In this way, the Court recognized this case to be an extreme one, calling for a less rigid reading of the law.

In Justice Powell's opinion, he referred back to his remarks in the Wygant decision, using tile strict scrutiny analysis. He called for a two pronged examination of the constitutionality of race-conscious measures: (1) whether the racial classification was justified by a compelling governmental interest; and (2) whether the means chosen to effectuate the state's purpose was narrowly tailored to the achievement of that goal. (Turner, 46) He declared that (1) it was doubtful that the district court had available to it any other effective remedy, given the union's violations; (2) the plan's goal was limited

and not permanent; (3) the goal was directly related to the percentage of minorities in the relevant workforce; (4) the flexible application of the goal demonstrated that it was not a means to achieve racial balance; and (5) nonminorities would not be directly burdened, if at all, since no layoffs of nonminority workers would be required. (Turner, 46-7)

The Sheet Metal Workers case is meaningful because six Justices concluded that section 706(g) does not prohibit race-conscious relief that benefits nonvictims, and which may be ordered by courts in certain circumstances and that section 706(g) does not precluded relief for nonvictims in all instances. In fact, sometimes non-victims are more legitimate class as it relates to the broad discriminatory practices that need to be stopped, in this way, the Court takes a very active approach to Title VII by seeing it as a call to eradicate patterns of discrimination, rather than merely a prohibition against it.

Finally, on June 27, 1990 the Court decided on Metro Broadcasting, Inc. v. FCC. (497 U.S. 547) In the FCC's process of giving licenses, it awarded an enhanced credit for ownership and participation by members of minority groups. There was, in addition, a "distress sale" policy in which minority ownership was promoted by assigning the license of certain stations that may come into question, and assigning them to approved minority enterprise.

The Court found that the "specifically approved - indeed, Federal Communications Commission's (FCC) had been mandated - by Congress and "that benign race - conscious measures mandated by Congress" even if these measures are not 'remedial;' in the sense of being designed to compensate victims of past governmental or societal discrimination - are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." The FCC's preference policies served the governmental objective of broadcast diversity and was a sufficient basis for the FCC's minority ownership policies and that the policy was substantially related to the achievement of the government's interests. (Turner, 14) Justice White a member of the conservative majority in ther polices action cases was the swing vote. The federal government policies are seen through a different lens than those of state and local governments, and are, thus, subject to a different test. The Court announced that congressional race-conscious measures need not be remedial and tied to the compensation of victims of discrimination. (Turner, 15) This standard had already been established in other cases, however, the Court continues to read cases narrowly, being careful to have them fit the specifics of the case. It, by specifically speaking of the federal government, has greatly narrowed the implications of this one ruling.

All in all, these cases show great discrepancies in the Court's reading of Title VII in relation to entitlements of nonvictims. Section 706 (g) of the Title explicitly mentions victims as individuals, nevertheless, in some cases the Court has chosen to ignore this. Instead, a veritable juggling act has gone on. The Court's decisions have been based primarily on what the justices themselves found acceptable rather than what was acceptable under the law.

Indeed this is the problem. Affirmative action is a sensitive issue: it touches on virtually everyone's sensibilities on what is right and wrong. As mentioned at the outset, this dilemma between right and wrong causes inconsistencies and compromises in behavior. And, when these have been coupled with regulating agencies and the courts, it has produced utter confusion. This confusion has manifested itself in such competing standards on the issues of disparate impact, nonvictims, and quotas in relation to affirmative action.

Still, there have been a few consistent themes in the disparate impact and quota analysis. First, a disparate impact on blacks, as a result of exams or other hiring procedures, is just cause to shift the burden of proof onto an employer. Second, without validation no procedure can continue to exist. And third, any steps taken to remedy any disparate impact should necessarily be temporary. The Court in later decisions touched on some practical difficulties inherent in these standards, but was unclear in how to resolve them.

In the case of quotas, the most often debated aspect of affirmative action, the dilemma is seen again. Although quotas are rejected as unconstitutional, the need for statistical evidence and parity continues to attract the implementation of, if not quotas, goals, which may ultimately lead to the same thing. There is a recognition, by the Court, that quotas may be used in exceptional cases.

Although the Court has decided contrarily on many of these issues, it is likely that this pattern will continue. On such a complex issue, involving the two most fought battles, of individual business freedom and racial equality, the Court is prudent in taking a case by case approach -- thereby, leaving uncertainty about what is acceptable and what is not. Even though a number of the rulings fly in the face of the law, it is unlikely that these will be specifically overturned. These cases, as many more, have become part of employment law and are almost ingrained. It is difficult, once such measures are accepted, to end them. As well, the integrity of the Court is of such importance that on the question of changing prior decisions, it would choose stability over flexibility.

In the next section, an evaluation of affirmative action will be attempted in light of the above rationales, as well as, with the benefit of hindsight, of what almost thirty years of affirmative action has meant.

IV Evaluation of Affirmative Action

Disparate Impact

Disparate impact, as indicated in the previous section, is an accepted analysis by which to determine and, at least, investigate the existence of discrimination. There are a number of important elements in analyzing the implications of using such a standard. First, the problems that exist in validating exams. Second, the effect of the analysis on standards.

And third, the effects of allowing the idea of underrepresentation to shift the burden of proof on to employers.

Devaluation of tests

The disparate impact analysis has led to employers rethinking hiring requirements unrelated to job requirements. Employers have begun a more careful consideration of tests to determine fairness in what they are testing for and their ability in predicting actual job performance. Although this reevaluation of testing practices is based on questionable standards, it has produced this positive result. This shift to more pointed and relevant hiring practices is good for efficiency: it aids in having persons best suited to positions more able to obtain them. Certainly, this product of efficiency was not a concern or intention of the Court, as often their understanding of business needs are in contrast with those of employers. This aside, however, there are negative outcomes from such a review. There is a heavy burden put on an employer to validate an exam if a disparate impact is shown. This causes distinct complications in terms their effect on fairness and antidiscrimination. The first of these complications deals with validating exams and the other deals with its results.

To ask that a test be validated on its face does not sound unreasonable. However, this necessity is in essence a ban on the use of tests for many employers. The cost of validation "has been estimated by professional testers as "between $40,000 and $50,000 under favorable circumstances." In fact, it is likely that a validation cannot even be done because of a lack of population for statistical purposes in a specific area. There is also a "*differential* validation" which performs a breakdown that is ethnic specific -- this, if possible, is even more expensive. (Sowell-Knowledge, 252) Therefore, this requirement of validation does not lead to fairer, more job-related, tests in all cases, but rather to an elimination of tests, to their devaluation, or to the imposition of quotas.

To begin, by assuming that a test is fair only if the same percentage of people pass from each group as is present in the available workforce, the devaluation of testing and professional standards is inevitable. This happens because as different practices continue to produce a disparate impact on blacks those practices are called into question. This creates a feeling of illegitimacy related to test passing requirements, both by the public and by the employer. If the test becomes both burdensome and 'unfair,' they no longer are looked to as heavily as should be expected. There is nothing wrong per se with tests and requirements to gaining employment, these are all useful and effective ways to separate those that are desired and those that are not. Discrimination against individuals in the job market for their innate intelligence, talent, experience or credentials is not wrong. In fact, it is just. Discrimination, on the basis of legitimate characteristics, that are related to job performance is necessary for the successful running of any business. Any employer is interested in acquiring the best people so that they may do the best job. In the same way, applicants feel they should be looked at in terms of their ability to perform. Both parties have historically, as in the case of collective bargaining, seen these criteria as fair.

However, with this system, a test can be valid and valuable in its ability to predict an employees job effectiveness, but be unable to survive. What, in effect, is happening is these requirements are being condemned rather than having those who are disadvantaged look at what is handicapping them. The test becomes the culprit, rather than whatever causes blacks to do much worse on valid exams. This just allows inferiority to continue. By concentrating on the results a test produces as all indication of its validity, one completely ignores the distinct possibility that the test takers are simply ill-equipped to pass the exam.

Another route may be employed as well. The requirements or the standards may be reduced. This is perhaps one of the most troubling areas of concern. In the desire to diminish a disparate impact on certain target groups, the test or requirements become easier for more people to pass. The best example of this is unrelated to blacks, but illustrates it perfectly. Take the case of women and requirements in some fire departments. What has happened is height, weight, and ability requirements have been reduced to allow more women into the ranks. It is certainly true that if meeting these job requirements were not related to job performance, or if they were higher than necessary, they could be modified. This would, again, be a step toward efficiency. However, what has happened is a clear attempt to get more women (the target group) on the payroll, and avoid any liability. But what they have also done, in effect, is lower the standards of the fire department. In doing this, they have also endangered lives by not having the most able people on the job.

Aside from the issue of public safety, however, high standards and fierce competition are what create higher standards of living, better products, and advancement. Conversely, it is low standards that produce mediocrity and stagnation. The disparities or gaps in incomes and occupations of blacks has been translated to be evidence of discrimination by those in a position to exploit. On some levels this is true, blacks and other minorities are denied jobs because of group affiliation, and these acts should rightly be addressed and concentrated on. However, by accepting this to be the sole contributor, it becomes the marketplace, the employer, the institution, and society that are guilty of not providing a just process and are intruded upon by political, judicial, and bureaucratic forces. If this were not done, the actual disparity in qualifications and other capital between blacks and whites would have to be squarely addressed. Such a discussion would inevitably concentrate on how to make blacks more marketable, more qualified, and more in demand. These problems are far harder to address than simply blaming the system and institutionalized racism.

Finally, what can occur is the implementation of goals which in reality are the same as quotas. In hopes of avoiding costly litigation, that is brought under the disparate impact model, many employers begin to initiate affirmative action programs. As a result of the strong shift in the burden of proof, setting quotas to show an equal impact on all groups is increasingly becoming the only cost effective to avoid liability and costly litigation. (Watson v. Fort Worth (487 U.S. 977. 1988)) An employer, with any business sense, would impose quotas, treating the number of blacks in each job category as any other

business statistic. In effect, the acceptance of goals and timetables as legitimate remedies has resulted in the practice of imposing strict quotas.

Disparate impact and underrepresentation

Inherent in the disparate impact analysis is the notion of "underrepresentation." Comparing local percentages of a group to the percentage hired by an employer, and then using any disparity as an indicator of discrimination is problematic for a variety of reasons. This is so because a disparity, or underrepresentation, may exist for a variety of different reasons, which do not have to do with racial discrimination.

First, if one looks at levels of education of blacks there is a unique situation that has an effect on jobs and economic opportunity. For example, among "... blacks aged 55 to 64 years, more than 20 percent have less than five years of school, and only 4 percent have completed college." As a result, this "... combination of experience (age) and education needed for high-level occupations accentuates intergroup disparities in qualifications and income, both of which tend to be greatest in the older age brackets." (Block, 43-45) This difference in an educational trend of a part of the black population, as compared to the rest of the population, cannot be ignored as a legitimate cause for the underrepresentation of blacks in certain job categories. In fact, it is clear that as a result of segregation, certain older blacks have received an inferior education. Actually, it can also be argued that present education for blacks, as a result of living in poorer neighborhoods, is also inferior.

Although this disparity in education, in part as a result lack of educational opportunity, is noted as one reason for using a disparate impact analysis, its basis is still: if all else were equal there would be a proportionate number of each class of person in each group. By simply recognizing that blacks have received an inferior education and, then, eliminating exams that show this, the problem of poor education is not even addressed. A prime example of this is that "[b]lack doctorates in the United States outnumber Asian doctorates in history, but are outnumbered by Asian doctorates by six-to-one in mathematics and nearly nine-to-one in chemistry. More than half of all doctoral degrees received by American Negroes are in education, a notoriously undemanding field of study and a less remunerative field of work." (Sowell-Economics, 140) This being noted, the discussion must turn to creating more marketable black employees, not merely juggling numbers to give the illusion that blacks are progressing.

Next, an example of historical differences is the "over-representation of Jews in the clothing industry, Germans in the beer industry, or the Irish in politics and the priesthood, not to mention such general cultural differences as varying receptivity to formal education." (Block, 45) The history of various industries have lent themselves, in some instances through discrimination, to a disparate impact or underrepresentation of certain groups. One can certainly look at these areas and say they are traditionally underrepresented by blacks, but it is not certain that bar any discrimination a disparity would not still exist.

A distinction must be made between seeing each group as equals and seeing each group as the same. Different groups of people are not only socialized and labeled differently, but have actual differences. A prime example of this is cultural differences. The case of West Indian blacks shows that culture can cause different trends leading to disparity. If the current economic situation of blacks were due primarily to current employer racial discrimination, then it is difficult to account for the fact that West Indians incomes have not been similarly affected. For, "West Indian incomes are 94 percent of the U.S. national average, while the incomes of blacks as a group are only 62 percent of the national average. That is, West Indian's incomes are 44 percent higher than the incomes of other blacks. Their 'representation' in professional occupations is double that of blacks and slightly *higher* than that of the U.S. population as a whole.'"(Block, 48)

The cultural benefits that aid certain groups to advance from poverty to prosperity are not necessarily education and specific skills. Thomas Sowell points out, "[t]he Chinese who immigrated to southeast Asia or to the United States usually had little to offer besides a monumental ability to work hard and long, and to save their money. Even with groups who had useful job skills-such as the eastern European Jews who entered the garment industry in the United States-their greatest success ultimately came in other fields, using new skills acquired by education or experience. Attitudes and work habits are often more crucial-and take longer to acquire - than do specific skills." (Sowell-Economics, 139)

These statements, at first glance, may appear to be insensitive to the historical factors that have created a culture prone to failure. Actually, affirmative action is argued to be a means of addressing discrepancies that exist in light of historical factors. However, the real point of mentioning cultural, historic, and educational differences that lead to a disparate impact is to show that merely dealing with statistics and numbers is not addressing the causes of the problem. The unswerving claim is: "Without discrimination, all job categories would have equal representation." This is the primary fault of the underrepresentation analysis. This is not true and would not be true absent discrimination. In essence, these practices engineer an imagined reality into real life, and in so doing, produce imaginary progress.

Target Groups

When one speaks of underrepresentation of and affirmative action for a group, one has targeted a group in whose interest things will be geared. As Sowell points out, "No one regards the overrepresentation of black Americans on professional basketball teams as constituting discrimination against white Americans. "(Sowell-Economics, 160) Although this may sound like a clever joke, it is more than that. If one chooses to show preference to one group, and not the other, he would be clearly discriminating against that group which is not afforded preference.

The EEOC defines "minorities" as "Negroes, Indians, Orientals, and Hispanics." Since this unelected commission is free to make these decisions it is not required to justify their selections. It is clear they were not consistent -- "[o]rientals were included when they have higher incomes than other ethnic groups not included (such as Germans, Irish,

Italians, or Polish-Americans) - and in fact, had higher incomes than the average American." (Know, 251) Therefore, under this definition of minority, all others, except women, are unprotected. As well, even, though when comparing blacks and whites there are vast disparities, "blacks do not have the lowest incomes, I.Q.'s, occupational status, or educational levels, among American ethnnic groups, nor the highest levels of alcoholism or of female-headed families. Blacks are simply one of a number of groups in the same region of the distribution." (Sowell-Economics, 185)

Nevertheless, the inclusion of blacks within the protected class does not need to be justified, since it is as a result of their unique history that these issues are even around to be discussed. Affirmative action arose as a response to the special case of blacks in America and indeed it is a special case. No other ethnic or racial group endured centuries of slavery and Jim Crow.

The issue of non-minority victims is one that is often over-looked. It is frequently dismissed as a product of white male sensibilities and ego being damaged with any step toward equality. Often preferential treatment is seen as discrimination without a victim. On the other side, opponents argue that white males are innocent victims of preferential treatment.

The proponents' argument would read: 'whites who lose out on a job are not innocent because their expectations have been based on a system of discrimination and, in fact, their present circumstances are a result of such discrimination. And, if it were not for this discrimination, minority persons would already hold their' fair share of the jobs" This inherently does not link up, however. When someone has been denied a position, based on race, there is nothing harmless about it. A red flag should go up, and we should get the message: "race is a powerful tool, don't abuse it!" The entire strict scrutiny analysis has been based on this -- racial classifications are inherently wrong and should be broached most gingerly.

In creating a protected class of persons, however, others have been allowed to be adversely affected. And actually, it has been poorer whites who suffer the most as a result. These two groups tend to compete for jobs the most, and a preference for one, in a given situation, will lead to discrimination against the other. One can find identifiable victims, who have lost out on a position, not because his expectations were faltered by a history of benefiting from discrimination, but rather because, in this case, somebody lowered their standards or simply imposed a quota. This is not fair, and simply because a white man is the victim, does not make it a non-issue.

Temporary Measure

The Supreme Court has consistently insisted that any affirmative action measure must be temporary, and be narrowly tailored. With standards such as these, it is amazing to notice the proliferation, and potential for proliferation, of these plans and those protected under them. The ideal of a color-blind society is no longer universally respectable. People are seen as part of groups, and society is seen in terms of the position of these various groups

-- all competing for power. Any decisions to be race-conscious deities the importance of a racially neutral or color-blind Constitution.

The argument is made that it is necessary to be race-conscious to combat the effects of racism -- the Constitution was never color-blind, so there is no reason to start now. But it can not be forgotten that race-conscious measures of the past have been found wrong and are a cause of present day problems. Such invidious behavior is responsible for harming blacks and it is not clear that this newer race-consciousness will be helpful. Even if one were to concede that they have been helpful, the fact is they do not appear to be temporary. The need for affirmative action measures to be temporary has been a, if not the only, consistent requirement by the Court and by proponents of such policy.

Although the introduction of affirmative action has been totally geared towards blacks the door has been left open for virtually any group to claim minority status, underrepresentation, and benefits. Affirmative action serves to exclude all those it does not include -- and thereby creates an incentive for an "unprotected" group to become protected. An example of this is "[a] formal naval academy classmate of U.S. President Jimmy Carter [who] changed his name from Robert Earl Lee to the Spanish-sounding Roberto Eduardo Leon and is now eligible-as a minority-for preferential affirmative action treatment," as surnames are used as a method of determining membership. (Block, 26) In this way, Mr. Leon was able to become part of a target group and be eligible for benefits. In addition, if the only way to gain economic parity is perceived to be racial preference, other groups will inevitably be drawn and, the dynamics of the political process make it more likely to accede to their demands rather than to block expansion. Indeed, using the above criterion, if such measures were not expanded it would amount to an increase in racism, rather than an elimination of it, as noted by J.F. Paulucci, national chairman of the Italian American Foundation in 1977 in the wake of the Bakke case. (Sindler, 14) Mr. Paulucci was indicating that Italians, too, should be included as a target group as a result of what Italian immigrants had suffered.

The fact is that "[b]lacks are only about twelve percent of the U.S. population. But more than 60 percent of all Americans are legally entitled to preferential treatment. Women alone are 52 percent of the population" (Sowell-Economics, 33-37); from another perspective, discrimination against one-third of the U.S. population (Jewish, Italian, Irish, etc., males) is not only allowed, but in the case of government contractors, required as a result of goals and quotas. (Sowell-Knowledge, 252) It is, therefore, the majority, not the minority, that is entitled to preferential treatment.

This development is not surprising. Allan Sindler points out that, "[s]ocial programs characteristically perpetuate themselves and expand rather than contract and die. Transfer payments to individuals, for example, which have grown to constitute almost half of the federal budget, are politically very difficult to cut back because of the supportive constituencies and bureaucracies and because the recipients have come to consider their benefits as entitlements, not as temporary assistance subject to later reduction or elimination."(Sindler, 12) As affirmative action has grown, it has gained symbolic value, regardless of its results, and will not be let go of easily. In this lies the danger that

permanent attention will be paid to affirmative action and permanent social engineering used in order to overcome "underrepresentation" and "disparity." It has been underway for almost thirty years and there is no end in sight.

Impact on those who benefit

The stigma attached to affirmative action is an issue often raised in relation to affirmative action. It is a most valid one, affirmative action affects the 'black psyche' in two important ways. First, affirmative action creates a feeling of inferiority because of the lowering of traditional standards, such as test scores and qualifications, that are often an accompaniment to the policy. Such a practice inevitably sends the message: "you are not good enough to do it on your own." When a black person receives a position, whether it be in high demand or not, there is the suspicion, by blacks and others alike, that he has received the position as a result of lowered standards and preferential treatment. The validity of whether either has in fact occurred is irrelevant -- perception is more important than reality. Blacks have, in this way, been collectively exposed to an "enlargement of self-doubt" that handicaps them in a way much more subtle and profound than acts of direct discrimination. (Steele, 116)

Second, the idea of the individual (individual worth and responsibility) is lost in group identity. The individual is lost with the new philosophy of group justice. Group justice, group solidarity, and group identification have become the focus. This is not surprising because the social sciences, that have played such a crucial role in developing theories related to affirmative action, are necessarily interested in groups, not individuals. Their studies and research are made of groups, not individuals. However, it is the individual who is entitled to justice. Regardless of how one may want to classify a victim, it is the individual that is at the heart of our Constitution and whose fights are important. The idea of group rights is a result of years of discrimination and oppression of blacks, and, therefore, understandable. However, one needs to be careful not to embraced the concept, as their is no inherent right of a group, but only of the individual.

As well, the individual, in seeing himself as part of this victimized group, begins to expect less of himself and instead transfers responsibility for his life to others. During the civil rights movement motivation was fostered, but the idea of victimization and the policy of affirmative action do much to deter motivation -- there ceases to be a reason to fight -- and energies are focused on being a permanent victim.

For these reasons, much more attention needs to be paid to individuals and their inherent rights, and their personal worth -- not their worth as a reflection of collective worth. There is a dangerous trend of feeling pride and worth in the accomplishments of others classified to be in the same group. Black-history month is an example of this. This, ultimately, leads to less self-confidence than one might expect. It is a perpetuation of the racists' motto: "your worth is determined by the color of your skin." Indeed, inherent in supporting preferential treatment for a past wrong, is the idea that the right to compensation can be inherited. Not only are the sins of the father, the sins of the son, but victimization is also inherited. It is clear, however, that there are some blacks who are not

the descendents of slaves, and there are some whites who are not descendents of slave owners. In fact, "[i]n the United States ... more than three-quarters of the black population have at least one white ancestor, while tens of millions of whites have at least one black ancestor-and it is not uncommon for either blacks or whites to have a native American Indian ancestor." (Myrdal-Negro in America, 16) This really exposes the racial ideology as quite imperfect. For these reasons, this propaganda should not be continued, rather, it should be exposed for the lie that it is.

The skills and advancement of individuals is what must be addressed. The question should be, "how to make black people more in demand in the job market?" If this is not the tact that is taken and the idea of group worth is perpetuated, the future generations will have to grapple with the new progeny of racism. It may be in another form, and hauntingly more complex, but it is still damaging.

In addition, the individuals receiving benefits from such programs are the most able and ambitious individuals. These are people likely to gain employment anyway, and thus, the program does not effect those marginalized individuals that it is supposed to help. As a result, a phenomenon called "creaming" takes place -- where the creme of the crop, so to speak, are placed in available positions. Although government pressure moved employers to hire designated groups, it also moved them to hire "safe" (with more educated/more work experience) employees for increased security that they would work out. For if they did not work out, the potential for government scrutiny and action would increase. (Sowell, Economics, 201). It is in this way, that affirmative action is not even helping those it intends to help.

Conclusion

The condition of blacks is really a horrifying state of affairs, on would think it warrants a state of emergency. When people fall asleep to the lullaby of gunshots, the possibility of being accepted to a law school is, comparatively, meaningless. There has been enough rhetoric, enough waiting, enough of having a vested interest in poverty and an "underclass." Affirmative action has been used as a method of keeping the peace. Affirmative action is not expected to eradicate or solve the economic disadvantages that blacks must face. However, it has had an opposite effect, whether intended or not, to pacify leaders. Civil Rights activists have become attached to the idea of affirmative action, it is now a symbol of progress in the area of black fights. Affirmative action, however, has moved us further from the goal of equal opportunity.

The battle has been lost in relation to getting rid of agencies. They continue to be a vital force in the creation and enforcement of regulations, and, therefore, in the actions of others. The existence of the bureaucracy has greatly hampered the process of achieving fair and equal opportunity. The regulations of these agencies have resulted in, for the most part, superficial and "window dressing" changes. This being the case, it becomes even more crucial to look to private sector organizations to address the issue of creating a

marketable workforce. As a country that believes in free enterprise and capitalism, where the worth of someone is often viewed as his economic worth, as a factor of production, that the need to look at one's economic worth becomes critical. The need arises, then, to create a group of people who are valued in this sense. The only way to do that is with skills -- not assembly line, blacksmith, carpenter, and vocational training, but real training for jobs that have a more powerful place in the U.S. and world economy. This is necessary.

People's sensibilities and moral conviction have only bought us so far. Affirmative action has become a symbol of group solidarity, and breaking with its ideology raises questions of "loyalty and dedication." (Sowell-Compassion, 203) More generally, "by 1967, people who opposed preferential measures for minorities to overcome the legacy of discrimination were commonly seen as foot-draggers on civil rights if not closet racists." (Murray, 43) The political usefulness and meaning of it is not enough. It is the importance of profit and economics that have bought this country where it is and which will take it into the future. People do not have a right to be successful, and they are not owed jobs, they must earn them. In such a competitive job market, the reality is that nobody needs the bulk of black workers. With increased technology, their skills are becoming obsolete.

Blacks have had little difficulty in gaining interest in their "black culture," which is such a part of the American culture, especially youth culture. As singers, entertainers, and athletes, blacks are in demand. It is even more critical, though, that emphasis be placed on creating more professionals, entrepreneurs, and the like. If America does not need the majority of blacks, then their economic situation will reflect this. Concentrating on quotas and preferential treatment evades the issue.. There are also issues of culture that must be addressed. A letter written in the New York Times on July 6, 1978, by David L. Evans, a senior admissions officer for Harvard (Harvard had been praised in the Bakke case for their position on minority underrepresentation.), about the Bakke case speaks to this fact. The letter read:

To the Editor:

It is strange that on the day of the famous Bakke decision ABC televised a frightening documentary, "Youth Terror: A View From Behind the Gun," about millions of bitter and helplessly lost members of minorities in the urban center of this country.

If that documentary accurately reflects the existence of these young people (I have no reason to think that it does not), then debating the correctness of the Supreme Court's Bakke decision is like arguing over sun-deck chairs on the Titanic."

The fact remains, "[t]he greatest economic gains for blacks occurred in the 1940s and 1960s. Since the 1970s, the economic status of blacks relative to whites has, on average, stagnated or deteriorated." (Common Ground, 6) Without real economic security, not handouts, blacks will never reach economic parity. As important, is the cultural disintegration that has taken place. Jobs and money will not be useful to individuals that

have been trained in immediate gratification. A return to traditional values of hard work and accountability must be enforced. Rousseau wrote, in his *Discourse on Inequality Among Men*:

Peoples once accustomed to masters are no longer in condition to do without them. If they try to shake off the yoke, they move still farther away from freedom because they confuse it with an unbridled license that is opposed to it, and their revolutions nearly always deliver them into the hands of seducers, who only make their chains heavier than before.

Affirmative action is not a panacea for the plight of blacks. There are far more complex issues that need to be dealt with. If one must be race-conscious then target black schools and communities which, because of past and present disadvantages, are riddled with poverty, violence, and drugs. It is this type of suffering that produces frustration, and that, in turn, produces affirmative action. But, by attacking the symptom, the frustration does not cease. Admittedly, equality of opportunity is much more difficult to attain than equality of result, but breaking the chains of oppression and poverty of hundreds of years will take work, hard work -- for those who are really interested in that end.

Perhaps it has been helpful to have affirmative action. Perhaps an antithesis was needed to come to a new way of being. However, the time has passed. Some say three decades of preferential policy is not enough to compensate for almost four hundred years of racial oppression. Three decades is long enough, however', to practice a temporary solution. There is no end in sight. Other groups have latched on and it is fast becoming a way of life. This cannot be, and it should not be. Values and standards are the backbone of any culture and fair competition is the backbone of our economy. To allow the continuation and perpetuation, of what seems indefinitely, of race-conscious decisions, we undermine the fabric of our society. There is no question that race has been a horrid constant in U.S. history, but at least those oppressed had a moral high ground: they were fighting for equality and fairness. It seems now that civil rights leaders and black leaders are fighting for permanent phrases such as "victim," "target group," "unqualified," and "token" pasted on the foreheads of blacks, to be worn as an indicator of their very soul. The fact is that it is not an indicator of the individual, and it is individual worth and individual responsibility that will be the cornerstone of black progress.

From the beginning of affirmative action, one can see sincere people fighting for change and believing they had found an answer. However, in doing so, the country has been led astray on a path wholly inconsistent with our cultural, legal, and ideological history. As a result, a greater loss has been incurred than has been gained. Real change is possible, and in terms of the law this has already happened. There is no doubt that more needs to be done, but it should not be legally. Most of the change, however unfair this seems, must be done by blacks themselves. Social engineering does not help, it only prolongs the process.

Companies have spent large sums of money keeping up with goals, timetables, and test validation. Would not this money have been better served going into community projects

and education? Business has a vested interest in seeing that these conditions improve. "The future of this nation and the future of public education are inextricably interlocked...[t]herefore, all Americans, in both the public and private sectors, have a social and economic responsibility and moral obligation: to support the public schools where 90 percent of our children, forty million young people, go to study every day." (Aronoff, 61) Education, freedom, economic and social progress have everything to do with each other, and nothing to do with preferential treatment. There are many more possibilities of what can be done to right past wrongs that effect present day lives. However, these actions must be taken in such a way that we do not abandon those same principles, of individual fights and business freedom, that have allowed us to survive, and replace them with practices, such as race consciousness and discrimination, that have hindered us from being where we could be.

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