A TRIDENT SCHOLAR PROJECT REPORT

NO. 203

Affirmative Action: A Synthesis of Competing Distributive and Compensatory Models

UNITED STATES NAVAL ACADEMY
ANNAPOLIS, MARYLAND

U.S.N.A.--Trident Scholar Project Report; no. 203(1993)

Affirmative Action:
A Synthesis of Competing Distributive and Compensatory Models

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Accepted for Trident Scholar Committee

Francis D'Connell
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May 17, 1993
Date

REPORT DOCUMENTATION PAGE

Form Approved
OMB no. 0704-0188

1. AGENCY USE ONLY (Leave blank)	2. REPORT DATE	3. REPORT TYPE AND DATES COVERED
	May 17, 1993	

4. TITLE AND SUBTITLE

Affirmative action : a synthesis of competing distributive and compensatory models

5. FUNDING NUMBERS

6. AUTHOR(S)

Patrick Michael Keane

7. PERFORMING ORGANIZATIONS NAME(S) AND ADDRESS(ES)

U.S. Naval Academy, Annapolis, MD

8. PERFORMING ORGANIZATION REPORT NUMBER

U.S.N.A. - Trident scholar project report ; no. 203

9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)

10. SPONSORING/MONITORING AGENCY REPORT NUMBER

11. SUPPLEMENTARY NOTES

Accepted by the U.S. Trident Scholar Committee

12a. DISTRIBUTION/AVAILABILITY STATEMENT

This document has been approved for public release; its distribution is UNLIMITED.

12b. DISTRIBUTION CODE

13. ABSTRACT (Maximum 200 words)

Affirmative action remains one of the more divisive issues on the Civil Rights agenda. Recent Congressional battles over the Civil Rights Act of 1991 focus the debate on quotas and claims of reverse discrimination. This study goes beyond the issue of quotas, and concentrates instead on the underlying justifications for affirmative action programs.

The Supreme Court originally used an affirmative action model, which stressed the redistribution of resources along racial lines. Later, this model was challenged by a compensatory approach adopted by a more conservative Court under Chief Justice Rehnquist. In the compensatory model, affirmative action is limited to a remedial role when overt discrimination has already been established. Both of these models have serious shortcomings. The distributive model creates controversial group based rights, while the compensatory model advances a narrow definition of racial discrimination.

This study analyzes the two major affirmative action models and proposes a new framework for debate based on the "equitable enfranchisement" of disadvantaged individuals. It is argued that socio-economic characteristics rather than strict racial classifications serve as more effective and equitable triggers in entry level affirmative action programs.

14. SUBJECT TERMS	15. NUMBER OF PAGES
affirmative action, Supreme Court, distributive model, compensatory model, equitable enfranchisement	57
	16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATATION OF ABSTRACT
UNCLASSIFIED	UNCLASSIFIED	UNCLASSIFIED	UNCLASSIFIED

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Introduction

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...Men and women of all races are born with the same range of abilities. But, ability is not just the product of birth. Ability is stretched or stunted by the family that you live in--by the school you go to and the poverty or richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man.[1]

-President Lyndon Baines Johnson
Howard University 1965

The "hobbled runner" analogy dramatizes the classic justification for affirmative action. Without assistance from quotas and racial preferences, minorities may never recover from the legacy of discrimination they face in this country. To facilitate minority social and economic enfranchisement proactive policies like affirmative action are essential.[2] However, affirmative action strikes at the fundamental concept of American equality. Seymour Martin Lipset explains this dichotomy as a confrontation between American egalitarianism

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[1] S.M., Lipset, "Affirmative Action And The American Creed", Woodrow Wilson Quarterly, Winter 1992, 56.

[2] The term "enfranchisement" will be used throughout this study. It is defined as "to admit to political privileges or rights." This definition does not limit "enfranchisement" to the right of suffrage. "Enfranchisement" is viewed as an empowering of the minority community with social, political, and economic rights they have historically been denied. See Randall Kennedy, "Persuasion and Distrust; A Comment on the Affirmative Action Debate," in Racial Preferences and Racial Justice: The New Affirmative Action Debate, edited by Russell Nieli, (Washington D.C.: Ethics and Public Policy Center, (1991), 48.

and individualism.[3] To remain consistent with egalitarian notions, American society must strive to counteract a 200 year tradition of racial discrimination without sacrificing its belief in individual achievement. Some would argue that by dispensing entitlements to racial groups affirmative action threatens the fundamental concept of individual achievement. Under affirmative action, minority groups can gain entitlements by highlighting their differences and accentuating their problems without striving to improve their condition. This creates a mindset which Russell Nieli has termed "ethnic tribalism". "Ethnic Tribalism" is a "mode of consienceness that tends to view human beings, not as unique persons, but as stereotyped and depersonalized representatives of a larger racial collective."[4] Both Nieli and Lipset argue that to achieve racial equality American society must sacrifice its historic commitment to individuality. This study challenges this notion and asserts that it is possible to achieve egalitarian racial goals within the liberal framework of the Constitution.

This study sets forth the advantages and disadvantages of the most prominent affirmative action models. It then proposes a new framework for the affirmative action debate. It is argued that socio-economic characteristics rather than strict

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[3] Wilson at 52.

[4] R. Nieli, "Ethnic Tribalism and Human Personhood," This World, Fall 1987, pp 12-23.

racial classifications serve as more effective and equitable triggers in entry level affirmative action remedies. The new model attempts to synthesize the advantages of the distributive and compensatory models, while avoiding the strict scrutiny standard in equal protection review. It is hoped that this new model, termed "equitable enfranchisement," can refocus the affirmative action debate on a more productive dialogue.

Historical Development of Affirmative Action

The National Association for the Advancement of Colored People, in its amicus curiae brief to the Supreme Court in Regents of the University of California Medical Center at Davis v. Bakke, traces the development of affirmative action to the Freedman's Act of 1866.[5] The Freedman's Act strove to force the acceptance of Negroes into the American mainstream. James Jones provides a more thorough historical development of affirmative action. Jones theorizes that affirmative action developed from the Executive Orders of Presidents since Roosevelt.[6] Much of Roosevelt's New Deal legislation concentrated on the growing concern for Civil Rights. The

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[5] Brief of the NAACP Legal Defense and Educational Fund, as amicus curiae, Bakke 438 U.S. 265 (1978).

[6] J. Jones, "The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities.", 70 Iowa L. Rev. 901 (May 1985), 938-947.

Unemployment Relief Act[7] and the Public Works Administration Act[8] both had anti-discriminatory provisos. Roosevelt went on to link affirmative action directly to employment in the Fair Employment Practices Committee (FEPC) created by Executive Order in 1941.[9]

Following Roosevelt, Presidents from both parties continued to link Civil Rights to employment and economic issues. Truman created the Committee on Government Contract Compliance to replace the FEPC. Eisenhower appointed the members of the Committee on Government Contracts and even made Vice-President Richard Nixon the chairman of the committee.[10] This committee insured that government contractors were adhering to Civil Rights legislation passed by Congress.[11] These early executive programs were important because they stressed the linkage between anti-discrimination policies and economic powerlessness.

The first use of the term "affirmative action" can be found in Section 706(g) of the Civil Rights Act of 1964.

> If the Court finds that the respondent has intentionally engaged or is engaging in an unlawful practice charged in the complaint, the Court may enjoin the

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7 Unemployment Relief Act of 1933, 48 Stat. 22 (1933).

8 Title II of the National Industrial Recovery Act of 1933, 48 Stat. 195-200.

9 Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 Comp).

10 Jones at 905.

11 Ibid.

> respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate. (emphasis added)[12]

Nathan Glazer portrays this innocuous sounding phrase as, "a modest kernel from which quota's sprout."[13] After the passage of the Act, "affirmative action" became the buzzword for any racial policy that "tried harder" to support and protect minorities.[14] Examples of "trying harder" included minority recruitment and special minority training programs. The emphasis was on making a special effort to include minorities without demanding statistical equality.

President Kennedy used the phrase "affirmative action" in Executive Order 10,925 which "required government agencies to take affirmative action to ensure equitability of employment opportunity." (emphasis added)[15] Even James Jones, who drafted the regulations pursuant to Executive Order 10,925, "did not begin to appreciate the awesome potential of the innocent appearing phrase."[16] Comments like this point to the haphazard development of affirmative action. It was never a highly conceptualized or planned social policy. Rather,

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[12] The Civil Rights Act of 1964, Pub. L. No. 88-352, Section 706(g) 78 Stat. 253.

[13] N. Glazer, "Affirmative Discrimination: For or Against", from Ethnic Dilemmas 1964-1982, (Harvard University Press: Cambridge MA) 1983, in Racial Preference and Racial Justice, ed. by Nieli, 1991, p 8.

[14] Id. at 6.

[15] Jones at 944.

[16] Id. at 944.

affirmative action was the expedient interpretation of an "innocent appearing phrase." Lacking an overarching justification affirmative action continued to develop in the Johnson and Nixon administrations.

President Johnson articulated his Civil Rights agenda in the famous "hobbled runner" speech given at Howard University in 1965. From this speech it is clear that "LBJ's solution (to racial discrimination) was the War on Poverty."[17] Johnson sought racial justice through progressive economic policies. Johnson's Executive Order 11,246, similar to Kennedy's, called for the government to take affirmative action to insure equality in its contractual agreements. Johnson put the administration of the programs under the Department of Labor,[18] leaving interpretation and implementation of the programs to officials in the Labor Department, not the White House staff. This diffusion of power added to the confusion toward affirmative action policies and helped lay the seeds for the current affirmative action controversy.

Until this point, affirmative action was not controversial. The term, if used at all, simply meant "trying harder." The Executive Orders of Johnson and Kennedy were seen as encouraging minority recruitment and other special efforts

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[17] Ibid.

[18] Executive Order 11,246, 3 C.F.R. 339 (1964-1965 Comp), reprinted in 42 U.S.C @ 2000e (1982).

to increase minority representation short of quotas.[19] However, Department of Labor officials broke with this approach by drafting the famous Philadelphia Plan under the guidelines of Executive Order 11,246. The Philadelphia Plan contained the first use of quotas and timetables and is, the genesis of the modern concept of affirmative action.[20]

The Philadelphia Plan may never have been adopted if not for a series of embarrassments faced by the Nixon Administration in the Civil Rights area. On February 14, 1969, the U.S. Commission on Civil Rights submitted a damning report to George Schultz, the new Secretary of Labor, on the role of the federal government in Equal Employment Opportunity. The report emphasized the need to strengthen the compliance of government contract operations. Despite this report, the Department of Defense relaxed their Equal Employment Opportunity compliance standards for defense contractors. These events triggered a media crisis concerning the Administration's commitment to equal opportunity.[21] Nixon needed a program to relieve public pressure concerning his stand on racial equality, and he adopted the Philadelphia Plan as a ready made solution.[22] Affirmative action, one of the most far reaching social policy of the post-war era, was

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19 Glazer at 6.

20 Jones at 901.

21 Jones at 912.

22 Id. at 947-949.

instituted by a President trying to avoid the glare of the press. At the time, no one in government seemed to recognize the implications. The Philadelphia Plan shifted the focus of the Civil Rights movement from the equality of opportunity to the equality of results. This violated the traditional individualism of the American Creed and shattered the American consensus on Civil Rights.

Even current proponents of affirmative action, such as Randall Kennedy, recognized that the affirmative action controversy damaged the cause of Civil Rights in the United States.

> The Affirmative Action controversy has contributed significantly to splintering the coalition most responsible for the Civil Rights revolution. That coalition was comprised of a broad array of groups; liberal Democrats, moderate Republicans, the national organizations of the black and jewish communities, organized labor and others that succeeded in invalidating de jure segregation[23]

Prior to 1969 and the publication of the Philadelphia Plan, Civil Rights activists were unanimous in their support for racially-blind remedial programs. These activists lobbied successfully for the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Immigration Act of 1965, and the Fair Housing Act of 1965.[24] These color-blind solutions were

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[23] R. Kennedy, "Persuasion and Distrust: A Comment on the Affirmative Action Debate", originally in Harvard Law Review (1986), reprinted in Racial Preference and Racial Justice, ed. by Nieli, 1991, p 47.

[24] Glazer at 5.

consistent with American liberalism and allowed for a coalition between Civil Rights activists and moderate liberals.

These solutions may have enjoyed broad support, but their implementation progressed slowly. The slow advancement of color-blind justice was highlighted by a rise in ethnic violence, particularly in urban areas. One of the earliest full scale race riot in the post-war era occurred in Los Angeles in July of 1965.[25] This was followed by much larger riots in Tampa and Detroit during July of 1967.[26] The Detroit riot so outraged the nation that President Johnson appointed a National Advisory Commission to study urban violence. The Kerner Commission, as it came to be called, placed the blame for the riots on the legacy of racial discrimination.[27] The link between urban violence and the country's racial problems alluded to in the Kerner Commission Report was highlighted in 1968 when the foremost leader of the Civil Rights Movement, Dr. Martin Luther King, was assassinated. The assassination touched off violence not only in Memphis but also in the District of Columbia, Detroit, and Chicago.[28] The rise in

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[25] J.P. Mitchell ed., Race Riots In Black and White, (New Jersey: Prentice Hall, 1970), 106.

[26] Id. at 109.

[27] From Report of the National Advisory Commission on Civil Disorders, (Washington, 1968) 91-93, In Race Riots In Black and White, edited by Mitchell, (New Jersey: Prentice Hall), 51.

[28] Mitchell at 99.

racial tension and the slow pace of social change created an environment ripe for the exploitation of "ethnic tribalism." Affirmative Action was introduced at this time when the nation sought a new approach to alleviate increasingly apparent racial stratification.

Originally the NAACP perceived quotas as an attempt to alienate blacks from labor unions.[29] Emerging leaders in the Civil Rights movement such as Mary France Barry and Blandina Ramirez gradually accepted programs like the Philadelphia Plan. These new leaders began advocating "racial enfranchisement" or equality of result over equality of opportunity.[30] They also made acceptance of the emerging view of affirmative action a prerequisite for joining the Civil Rights lobby. This stifling of alternative views froze out the early color-blind activists and helped create the highly polarized coalitions which recently battled over the Civil Rights Act of 1991.

Many Civil Rights commentators lament this lack of a middle ground between egalitarian and individualistic ideals in the Civil Rights arena. Stephen Carter articulates the personal impact this lack of tolerance has had on several respected scholars in his pseudo-biographical work,

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[29] Lipset at 56.

[30] M. B. Abram, "Fair Shakers and Social Engineers", in Racial Preference and Racial Justice, ed. by Nieli, 1991 p 43, originally printed as "Persuasion and Distrust: A Comment on the Affirmative Action Debate", 23 Harvard Law Review 1020, (1986).

Reflections of an Affirmative Action Baby.[31] Morris Abram, a leader of the Civil Rights movement in the deep south during th 1940's, lambastes the emerging "social engineers" for abandoning the original principles of the movement and degenerating Civil Rights into a spoils system.[32] The dissent of these traditionalists was futile because group based rights became the focus of the Civil Rights lobbying effort.

Putting the Quota Issue Aside

To discuss affirmative action rationally, the quota issue must first be put in perspective. According to the Uniform Guidelines on Employee Selection Procedures, published by the Department of Labor, affirmative action is "one part of an effort to remedy past and present discrimination."[33] In order to achieve this goal the guidelines allow for six race consience remedies: 1) provide career advancement training 2) include effected candidates in a separate pool 3) reevaluate selection instruments 4) redesign training programs 5) recruit from effected groups and 6) establish goals and timetables for minority advancement.[34] These guidelines utilize quotas as

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31 S. Carter, Reflections of an Affirmative Action Baby, Basic Books Inc., New York, 1991.

32 Abram at 32.

33 K. Greene, Affirmative Action and Principles of Justice, Greenwood Press, Westport, CT, 1989, p 1.

34 Id. at p 2, from (UGESP 1978: 38309).

one of several tools in a much broader program. Affirmative action is any voluntary, Court ordered, or governmental program which seeks to remedy the effects of past or present discrimination. It may, but need not, include quotas to achieve this goal.

Opponents of affirmative action have often exaggerated the quota issue. A Gallup Opinion Poll conducted in 1989 found that only ten percent of respondents felt minorities should be given preferential treatment.[35] Politicians like Pete Wilson, Jesse Helms, and David Duke have run highly successful election campaigns by exploiting the public misperception of quotas. The Civil Rights Act of 1991, which was signed into law in November of 1992, was attacked from the start as "quota legislation." The debates in Congress and the signing ceremony on the White House lawn became so muddled in anti- and pro-quota propaganda that the content of the bill was overlooked.[36]

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[35] Lipset at 58.

[36] On the day that the Civil Rights Act of 1991 was to be signed, the White House issued a directive to all federal agencies that would eliminate all racial and gender preference programs. The directive contradicted the Uniform Guidelines on Employee Selection Procedures. The directive also encouraged executive agencies to interpret the Act according to the legislative memorandum read into the Congressional Record by Senator Robert Dole. This directive and the memorandum were seen by many as an attempt to cloud the legislative history of the Act. See A. Devroy and S. LaFraniere, "U.S. Moves to End Hiring Preferences; Affirmative Action Policies Targeted", The Washington Post, Nov 21, 1991, Sec A p 1 and S.LaFraniere, "Civil Rights Act Turns to Enforcement; Debate over Standard for Business Continues", The Washington Post, Nov 26, 1991, sec A p 19.

Nevertheless, the Civil Rights Act of 1991 is a milestone in this nation's struggle to end discrimination. The Act highlights the conservative stance of the Rehnquist Court. The Act expressly overturns ten recent Supreme Court affirmative action decisions. The preamble of the Act expresses the intent clearly: "This bill is written to respond to recent decisions of the Supreme Court by expanding the scope of relevant Civil Rights statutes in order to provide adequate protection to victims of discrimination."[37] This conflict between the legislative and judicial branches was highlighted by the Anita Hill-Clarence Thomas hearings which were conducted concurrently with much of the floor debate on the Civil Rights Act.

This split between Congress and the Court is reminiscent of the tensions which split the Civil Rights movement in the late 1960's. The Court, like the color-blind traditionalists in the Civil Rights movement, accepted a compensatory version of affirmative action. Congress, on the other hand, championed a distributive vision for affirmative action. For example, in the Civil Rights Act of 1991 Congress forced businesses to prove the "business necessity" of hiring practices which had a disparate impact on minority participation.[38] This

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[37] The Civil Rights Act of 1991, Pub L. No. 102-166, sec 3, purpose (4) 105 Stat. 1071.

[38] W.T. Coleman and V.E. Jordan, "How the Civil Rights Bill Was Really Passed; The Administration Did Compromise.", The Washington Post, 18 Nov. 1991, 21(A).

overturned the Court's decision in Wards Cove Packing Company v. Atonio.[39] With such a fundamental difference in justification, the debate over affirmative action became even more controversial. Supporters of racial preferences on the Court and in Congress disagreed on the extent to which they should be implemented. The reconciliation of the affirmative action debate between Congress and the Court can be accomplished by a synthesis of the underlying distributive and compensatory justifications.

The Distributive Model

Distributive justice theory is used as a justification for affirmative action.[40] According to distributive theory, all societies have mechanisms for distributing finite resources. In the United States, this distribution of scarcity is accomplished by two forces; the free market and government entitlement. The assumption is that, barring discrimination, these resources would be divided evenly throughout society. Since all indicators depict high percentages of disenfranchised minorities, it is reasonable to assume that discrimination has played a substantial role. Proponents of the distributive model, like Ronald Dworkin and Peter Wasserstrom, argue that affirmative action is the logical vehicle to correct this shortcoming in our society's

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[39] 493 U.S. 547, 550 (1989).

[40] Greene at 8.

distributive process.[41] Affirmative action is simply a government entitlement program based on race.

The distributive model advances two reasons for race consienceness in entitlement programs. The first is reminiscent of President Johnson's "hobbled-runner" analogy. To remedy the present effects of past discrimination, the government must seek to "remove the vestiges of discrimination with all deliberate speed."[42] Affirmative action, by channeling government entitlement to affected minorities, attempts to remove the vestiges of discrimination. The underlying premise of this reasoning is that affirmative action is a temporary fix. Once minorities are brought into the mainstream of society, there will be no need for affirmative action programs.

The second rationale for race consience government entitlement is more utilitarian. A society with obvious socio-economic stratification is inherently unstable. By redistributing resources to those who are disadvantaged, affirmative action serves the overall good of society.[43] This utilitarian argument predicts that individual rights may have to be sacrificed in order to serve the greater goal of social equality. Under this argument, reverse discrimination is a

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41 Id. at 9-10.

42 Brown v. Board of Education, 394 U.S. 294, 295 (1955).

43 M. Rosenfeld, Affirmative Action and Justice: A Philosophical and Constitutional Inquiry, Yale University Press, New Haven, CT, 1991, pp 94-116.

moot criticism. The government is justified in making distinctions along racial lines provided the distinctions are not based on concepts of racial inferiority. Benign-racial distinctions are simply tools which the government has chosen to use as the most efficient means of channeling resources to disenfranchised minorities.

The best example of society using benign-racial distinctions to rechannel resources is the Minority Business Enterprise Act (MBE) initiated by Congress in 1977. Section 103(f)(2) of that Act set aside ten percent of all federal public work contracts for minority owned businesses. Minority owned was then defined as any business owned by an African-American, Hispanic, Oriental, Indian, Eskimo, or Aleut. In order to meet the ten percent goal, minority businesses were given technical assistance, bond requirements were waived or lowered, the Office of Minority Business Enterprises was solicited for assistance, and special guidance was given in the bidding process.[44]

Congress justified this proactive social program using the classic distributive arguments concerning discrimination as a societal force. Representative Mitchell, when he initiated the Minority Business Enterprise Act on the floor of the House of Representatives explained that, "minorities could not be expected to benefit significantly from the Public Works

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[44] Fullilove v. Klutznick, Secretary of Commerce 448 U.S. 448, 448 (1979).

Program as formulated,"(before the Act)[45] Disparity studies showed that insular business practices, such as a construction market dominated by several large contractors, had an adverse impact on newly formed minority businesses. "The cause of this disparity was perceived (by Congress) as involving the longstanding existence and maintenance of barriers" to minority participation.[46] It was this disparity that Congress hoped to remedy with the minority set aside program.

The Supreme Court reviewed the MBE set aside program and articulate its support for distributive justice in 1979 in the landmark case Fullilove v. Klutznick, Secretary of Commerce.[47] Several non-minority owned businesses challenged the minority set-asides as a violation of their equal protection rights implicit in the Fifth and Fourteenth Amendments. The Supreme Court overruled the plaintiffs objections and affirmed the set aside programs.[48]

The Court in its opinion followed a two step analysis.[49] First the Court sought to determine if the objectives of the program were within the powers of Congress. The 1977 Act was a clear exercise of Congress' spending power under Article I,

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[45] Id. at 459.

[46] Id. at 463.

[47] 448 U.S. 448 (1979).

[48] Id. at 449.

[49] Id. at 473.

Section 8, Clause (1) of the U.S. Constitution.[50] Secondly, under the enforcement provision of the Fourteenth Amendment, Congress has the power to enforce by appropriate legislation the equal protection guarantees of that Amendment.[51] Under the enforcement provision Congress has the right, indeed the duty, to remedy the present effects of past discrimination.

The Court next considered whether the means Congress used were constitutionally permissible. The Court stated plainly that they "reject the contention that in the remedial context Congress must act in a wholly color-blind fashion."[52] The Court understood that the minority business set aside was a burden on non-minority businesses. Nevertheless, the creation of a burden is not necessarily a violation of Fourteenth Amendment equal protection guarantees; especially when the program in question is narrowly tailored, as the MBE provision was found to be. In the end the Court upheld the power of Congress to invoke remedies and the notion that discrimination goes beyond individualized transactions. In effect, Congress as well as the Court "recognized the reality that past discriminatory practices have...adversely affected our present economic system."[53]

The distributive model has other implications beyond just

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50 Id. at 476.

51 Id. at 451-452.

52 Id. at 482.

53 Id. at 465.

an acceptance that discrimination can be a societal force. By rejecting compensatory principles, the distributive model avoids the necessity of identifying a victim or even a perpetrator. Without a victim or a villain distributive theorists create group based rights and define discrimination as systemic rather than individualized. According to the systemic definition of discrimination, the legacy of racism in the United States is ingrained in the structure of our society. Even selection procedures that are race neutral on the surface are tainted by the past effects of discrimination.[54] If statistical studies show a disparity in racial participation that cannot be explained, distributive theorists assume it is a result of systemic discrimination.

By defining discrimination as systemic, distributive theory forces us to reexamine the concept of merit. It is generally agreed that the United States has never been a perfect meritocracy.[55] Our society has long awarded special benefits for characteristics that have little to do with ability. For example the government compensates war veterans with special college programs, and relaxed mortgage requirements. Universities give children of alumni special consideration. "Old Boy" networks and nepotism serve as other

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[54] See generally Griggs v. Duke Power Company 401 U.S. 424 (1971), Albermarle Paper Company v. Moody 422 U.S. 405 (1975), and Wards Cove Packing Company v. Atonio 493 U.S. 802 (1989).

[55] Lipset at 57, and Kennedy at 51.

obvious examples. As Professor Wasserstrom points out it is ludicrous to assume that Henry Ford II is the CEO of Ford Motor Company simply because he is the best qualified person for the job.[56] Nevertheless, the myth of meritocracy persists in the American creed. In a survey conducted from 1983 to 1990 by the National Opinion Research Center, eighty-eight percent of Americans agreed that, "people get ahead by hard work."[57]

The distributive model dismisses any portrayal of America as a meritocracy. Merit is a malleable concept given definition by the society as a whole.[58] In the past, our societies definition of merit served to lock minorities into inferior positions and then preserve the status quo. Examples of discriminatory definitions of merit that are ostensibly race neutral include: testing requirements that have disparate impact on black employees and seniority systems that ensure minority employees are the first fired.[59]

The concept of merit as a malleable construct surfaced in the debates over the Civil Rights Act of 1991. The unsettled issue in the debate was the definition of "business necessity" as it related to testing requirements in companies challenged

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[56] Kennedy at 51.

[57] Lipset at 55.

[58] Kennedy at 51.

[59] See Griggs v. Duke Power Company, 401 U.S. 424 (1971), and Albermarle Paper Company v. Moody, 422 U.S. 405 (1975).

by Title VII claims. In Griggs v. Duke Power Company[60] the Supreme Court determined that once selection procedures exhibited a disparate impact, the employer must justify continued adherence to the standards. The burden of proof was shifted to the employee in Wards Cove Packing Company v. Atonio[61]. The employee who brought suit now had to show a discriminatory intent in the continued adherence to the challenged selection procedure. Congress overturned the Court by switching the standard of proof back to the employer. To avoid prosecution under Title VII, the employer must justify his selection procedures as being substantially related to "business necessity."[62] Congress, in effect, accepted the distributive concept of merit as a malleable construct. In fact, Congress is now willing to second guess employers who intend to use outdated definitions of merit as a means of perpetuating the status quo.

American society cannot move beyond racism without seriously reconsidering the definitions of merit. Distributive theorists argue that since merit is assumed to be subjective, it is possible to redefine merit to remedy the effects of discrimination. Progressive definitions of merit can be used both to combat discrimination and to speed integration. This means that the distributive model urges the acceptance of race

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60 401 U.S. 424 (1971).

61 493 U.S. 802 (1989).

62 Coleman and Jordan at 21.

as a plus factor in selection procedures. The clearest endorsement for the distributive model is found in Justice Powell's plurality opinion in Regents of the University of California Medical Center at Davis v. Bakke[63]. Although he struck the University's program which involved strict racial quotas, Justice Powell accepted a program similiar to that of Harvard University which stressed the consideration of race as a plus factor. In Powell's opinion, the educational benefit of a diverse student body was a compelling interest.[64] By accepting race as a plus factor, Powell redefined merit. Harvard implied that now a meritable application must include evidence of a diverse ethnic background as well as the traditional academic credentials.

By redefining merit along racial lines, the distributive model forces the enfranchisement of the social and economic victims of discrimination. In order to accomplish this redistribution, it is necessary to create group-based entitlement programs. The goal of these affirmative action programs is to force minorities into the mainstream of society. This enfranchisement serves two purposes. It breaks down stereotypes dependent on notions of racial inferiority, and provides role models for a minority community disheartened by the legacy of societal discrimination. The goal of distributive affirmative action is to reeducate society to

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[63] 438 U.S. 265 (1978).

[64] Bakke at 316-317, (Powell).

accept racial diversity as a positive goal. By forcing individuals of all races to live and work on equal terms, these programs strike at the ignorance which is believed to lie at the heart of racism. The champion of this effort is Justice Blackmun, who wrote in Regents of the University of California v. Bakke, "In order to get beyond racism we must take account of race."[65]

The Compensatory Model

The compensatory model is more consistent with traditional jurisprudence. Compensatory justice views discrimination as an illegal violation of an individual's right, not as a systemic problem. This limited definition of discrimination avoids much of the ambiguity inherent in the distributive model. Under the compensatory model, societal discrimination is too amorphous to merit judicial remedies.[66] Discrimination must harm an identifiable victim and involves a specific perpetrator. Once a finding of discrimination has been made, affirmative action may be chosen as the appropriate remedy. According to the compensatory model, affirmative action is used as a sword to punish violators whereas in the distributive model, affirmative action is used as a shield to protect minorities from further "disenfranchisement."

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[65] 438 U.S. 265, 407 (1978), (Blackmun, J.)

[66] Wygant v. Jackson Board of Education, 476 U.S. 267, 268 (1985).

The high water mark for affirmative action as a sword to punish egregious acts of discrimination can be found in United States v. Paradise decided in 1986.[67] Paradise dealt with the Alabama Department of Public Safety and its repeated hostility to all attempts at integrating the ranks of the State Troopers. Alabama excluded blacks from serving in its police forces for four decades. In 1972 the National Association for the Advancement of Colored People filed suit against the department for violating the newly strengthened Civil Rights Act of 1972. The department lost and an affirmative action remedy was ordered by the District Court.[68] In 1974 the department was again brought into Court for delaying and frustrating the affirmative action remedy.[69] In 1979 no substantial integration had been accomplished. The department entered into a consent decree promising immediate results. This commitment was not honored and a new consent decree was agreed to in 1981. Finally in 1983 the department lost in Court for the fifth time. The U.S. Supreme Court eventually ordered the Alabama State Police to hire and promote black officers in a one to one ratio with all white officers.[70] This strict remedy illustrates just how far compensatory affirmative action can reach.

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67 480 U.S. 149 (1986).

68 Id. at 149.

69 Id. at 157.

70 480 U.S. 149, 150 (1986).

Alabama challenged the Court's authority to administer such a broad remedy. The Supreme Court eventually overturned Alabama's objection, affirming the broad affirmative action program by stressing certain compensatory principles. The Supreme Court felt the one for one ratio served two compelling state interests. First, it eradicated patterns of discrimination abhorrent to our society.[71] Second, it sent a clear message that the Court system in a free society must be obeyed.[72] "Once a right and a violation have been shown, the scope of a District Court's equitable powers to remedy past wrongs is broad."[73]

Paradise exemplifies the key concepts of the compensatory model. The case identified a specific perpetrator, the Alabama Department of Public Safety, and a specific victim, black State Troopers. Ideally, "a compensatory preference requires reference to the victim or non-victim status of a person, but not necessarily their race or gender."[74] In reality, however, compensatory theory is a grudging acceptance of affirmative action by conservative factions. The danger is that;

> If Title VII is interpreted according to compensatory principle, Title VII relief

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[71] Id. at 150.

[72] Id. at 184.

[73] Swann v. Charlotte-Mecklenberg Board of Education 408 U.S. 15, 28 (1971).

[74] P. Cox, "Some Thoughts on the Future of Remedial Race And Gender Performance", 19 Valparaiso L. Rev. 801, 802 (Summer 1985).

> could be limited to make-whole relief to the identifiable victims of discrimination, and the whole concept of affirmative action could be discarded by a hostile administration.[75]

By requiring proof of discriminatory intent, compensatory justice minimizes the significance of statistical data. The distributive model assumes that, barring discrimination, resources would be distributed equally. In contrast, compensatory justice holds no such assumption. Therefore, figures which depict racial imbalance in the aggregate may not prove discrimination exists on an individual level. For example, if a business fails to hire any minorities for ten years, compensatory justice views this as hundreds of individual acts of discrimination rather than as a "pattern of practice."[76]

This repudiation of statistical data is troubling because it was through data supported litigation that Civil Rights advocates won the majority of their class action suits in the 1970's. When Justice Clarence Thomas headed the Equal Employment Opportunity Commission during the Reagan Administration, he avoided prosecuting pattern of practice and class action suits because they relied heavily on statistical proof and often led to remedies involving quotas.[77]

The Title VII definition of discrimination makes

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[75] Greene at 4.

[76] Greene at 4.

[77] Ibid.

businesses who treat employees unfairly due to their race or gender liable to prosecution. Nowhere in this definition is liability grounded in racial imbalance. Nevertheless, the Court accepts statistics indicating racial imbalance as overwhelming evidence of discrimination. Functionally then the definition of discrimination is dependent on racial imbalance.[78] Racial imbalance may or may not be related to discriminatory intent, but it does show the disparate impact of the questioned business practice. The Court seemed to be moving away from this reliance on statistical inequality in Firefighter's Local Union #1784 v. Stotts.[79] In Stotts the Court considered if an affirmative action program created in a consent decree could be modified to account for a seniority system. The Court ruled that proof of discriminatory intent must be evident before a bona fide seniority system could be overturned. The Court made it clear that simple statistical proof of racial imbalance was not sufficient.[80] However, Sheetmetal Workers v. EEOC[81] and International Association of Firefighters v. Cleveland[82] limited the application of Stotts to consent decree cases dealing with seniority systems.

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78 P. Cox, "Some Thoughts on the Future of Race and Gender Performance", 19 Valparaiso Law Review 816, (1985).

79 467 U.S. 561 (1989).

80 Id. at 563.

81 478 U.S. 412 (1985).

82 478 U.S. 501 (1985).

Although inconsistent with compensatory theory, disparate impact remains the functional definition of discrimination.

Compensatory justice limits the application of affirmative action by remedially giving compensation to identified victims. The Supreme Court institutes this strict definition of victim status as early as Teamsters v. United States.[83] In Teamsters the U.S. government proved that the Teamster Union practiced a pattern of discrimination. The Court ordered retroactive seniority relief to those employees who suffered discrimination before the passing of the Civil Rights Act of 1964. After the passing of the Act the Teamster's seniority program was protected by Section 703(h) of the Act. The minority employees who claimed injury after the Act could not be designated victims as the seniority system in question had been legally sanctioned.[84]

In Hazelwood School District v. United States,[85] the Court again tailored its remedy to compensate only a select group of victims. In Hazelwood, the Court defined the baseline for statistical comparison in disparate impact cases. For entry level jobs the baseline was the ethnic and gender makeup of the general population in question. For skilled jobs the baseline was the portion of the general population who

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83 431 U.S. 324 (1977).

84 Id. at 326.

85 433 U.S. 299 (1977).

possessed the necessary skills for the job.[86] By defining baselines the Court limited affirmative action remedies to those individuals affected. Liberal interpretation of the Hazelwood criteria in United Steelworkers v. Weber,[87] Fullilove v. Klutznik,[88] and Johnson v. Transportation Agency[89] encouraged reliance on general population statistics in all affirmative action programs.[90] The Supreme Court curtailed this expansion of the Hazelwood baseline sharply in Richmond v. Croson.[91]

The Richmond, Virginia City Council relied on general population statistics to justify its minority set aside program. The Court found this argument fatally flawed because the proper comparison should have been between the number of minority owned businesses and the number of contracts given them. Essentially, the Court ignored the jurisprudence of Weber, Fullilove, and Johnson, which showed a clear preference

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[86] M.C. Daly, "Affirmative Action, Equal Access and the Supreme Court's 1989 Term: The Rehnquist Court Takes a Sharp Turn to the Right", 18 Hofstra L. Rev. 1057, 1082 (Summer 1990).

[87] 443 U.S. 193 (1979).

[88] 448 U.S. 448 (1980).

[89] 480 U.S. 616 (1987).

[90] See generally Daly, at 1087-1093, United Steelworkers v. Weber 443 U.S. 193 (1979), Fullilove v. Klutznick 448 U.S. 448 (1980), Johnson v. Transportation Agency 480 U.S. 616 (1987).

[91] 488 U.S. 469 (1989).

for general population statistics.[92] Underlying the acceptance of general population statistics, however, is the distributive notion that discrimination is societal and thus not limited to individual transactions. By demanding strict adherence to the Hazelwood baseline, the Court in Croson assured that affirmative action remedies are limited to identified victims.

Some compensatory theorists, like Julia Segar and Bernard Boxill, argue that entire groups can be designated victims.[93] Boxill believes discrimination is a psychological crime. It need not be experienced directly to be a victim. A black, for instance, who has not been a victim of specific discrimination, may witness discriminatory actions. Segars feels this expansive definition of victim status will remove compensatory theory from the individualized transaction premise on which it rests. However, both Boxill and Segars, by awarding victim status to groups, create the same group rights promised in the distributive model. The expansive interpretation of compensatory justice advanced by Boxill and Segar is nothing more than distributive justice coached in compensatory terms. The defining characteristic of compensatory affirmative action is that it remains consistent with the American value of individualism. By repudiating this premise, Boxill and Segar cannot be considered pure

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[92] Daly at 1098.

[93] Greene at 7-8.

compensatory advocates.

The compensatory model is cautious in its approach to racial equality. The goal is to limit the use of race conscience criteria in order to create a color-blind version of racial equality. The rallying cry for compensatory theorists can be summed up with Justice Harlan's dissent in Plessy v. Ferguson, "Our Constitution is color blind and neither knows nor tolerates classes among citizens."[94] This belief leads compensatory advocates to reserve affirmative action remedies for those cases where the evidence of discrimination is irrefutable. This creates a reactive mindset very different from the proactive approach of the distributive model.

Disadvantages of the Competing Models

By framing the affirmative action debate in theoretical models some substance is sacrificed. It is understood that affirmative action can be justified without using compensatory or distributive arguments. Nevertheless, these models roughly define the right and left of the affirmative action spectrum. By grouping competing arguments together complex issues are simplified yet the potential for analysis is greatly increased.

The greatest advantage of compensatory affirmative action is that it remains consistent with American individualism.

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[94] 163 U.S. 537, 559 (1896) (Harlan J.,dissenting).

However, the stress on individual transactions leads to some shortcomings. Since individual transactions are emphasized, relief usually comes in the form of litigation. Since the compensatory model stresses litigation it downplays the significance of legislative and executive remedies. If society wishes to reform and restructure itself to reflect emerging racial realities, then the legislative branch is the appropriate body to formulate a remedy. Clearly, this is the proper function of Congress; a function that is denied by the compensatory model, which uses the judicial branch to promote racial equality.

The compensatory model does not accept the argument that discrimination can be *systemic*. The Supreme Court under Chief Justice Rehnquist has shown increased deference for this compensatory model. The proof of the Court's intent is clear in the most recent affirmative action cases. Croson and Wards Cove make the application of disparate impact studies difficult.[95] The statutory definition of discrimination advanced in Stotts is clearly a repudiation of systemic discrimination. Finally, the Court in Pullman Standard v. Swint[96] demanded proof of discriminatory intent, not disparate impact, in order to overturn a bona fide seniority system.[97] By asking for proof of discriminatory intent the

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[95] Daly at 1100.

[96] 456 U.S. 273 (1982).

[97] Id. at 274.

Court is making it extremely difficult for plaintiffs to prove a Title VII claim. Advocates applaud this compensatory approach because it is "racially-blind." However, its narrow vision of discrimination and its societal implications make the model more "history-blind."[98] Discrimination is a subtle force in society that effects the status of minorities. The extreme forms of discrimination are outright racial bigotry and disparate treatment. By concentrating on individualized transactions, the compensatory definition seems only capable of distinguishing these extreme forms.

The distributive model advances a broader definition of discrimination, but suffers from other shortcomings. Its most glaring defect is its focus on group based rights. Under the distributive model, groups that can distinguish themselves from the majority are entitled to government assistance. Affirmative action was instituted to speed the integration of minorities into the mainstream, however, to gain entitlement groups must accentuate their differences.

The pluralism inherent to the distributive argument runs counter to American individualism. Classical liberalism stresses the primacy of the individual over the group. Political theorists like Locke empowered the individual by demanding representative government. The U.S. Constitution is based on these principles. Distributive theorists argue that

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[98] L.G. Sager, "1992 Survey of Books Relating to the Law", a review of Order and Law: Arguing the Reagan Revolution, by Charles Fried, in 90 Mich. L. Rev. 1203,1290.

because large portions of the minority community were never treated as full citizens, the ideal of individualism is a myth.[99]

The distributive model has other problems as well, not the least of which is its dependence on statistical proof and racial quotas. Both of these methods are effective, however, they remain political dynamite. The public misperception is that quotas lead to a degeneration of standards. This is not necessarily the case. The distributive model attempts to reevaluate standards, not remove them. Nevertheless, the misperception remains and hampers debate.

Many successful minorities today lament the existence of *affirmative action*, because it cheapens their achievement. Minority achievement is often tainted as undeserved by the perception that affirmative action, not merit, was the direct cause. Stephen Carter calls this the, "best black syndrome."[100] Carter is constantly introduced as the "best black professor in the field." Comments such as this point to the danger of creating a pluralistic society in which group identification becomes paramount.

The final problem with distributive affirmative action is that its application may help the minorities who need it least. James Jones admits that affirmative action has done little for blue collar working minorities. He counters by

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[99] Kennedy at 51.

[100] Carter at 87.

explaining that, "Affirmative action does not address labor surplus and low wage industries because it is not designed to. Affirmative action is meant to integrate minorities into fields they are underrepresented in."[101] This means that affirmative action is very good at making middle class minorities doctors, but very bad at giving lower class minorities the economic parity they require. Kennedy argues that affirmative action need not only apply to the most victimized because all minorities suffer from discrimination.[102] Nevertheless, since affirmative action is not helping the socially and economically disenfranchised it is not fulfilling its distributive function and needs to be reexamined.

Equitable Enfranchisement; A New Model for Affirmative Action Programs

The distributive model understands the extent of American racism, but combats it at the expense of individual liberty. The compensatory model is consistent with the American liberal tradition, but is hampered by a limited definition of what constitutes discrimination. To synthesize the two competing models, the "equitable enfranchisement"[103] of disadvantaged

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101 Jones at 76.

102 Kennedy at 52.

103 Again in this context "enfranchisement" means the empowering of minorities with the full spectrum of political, social, and economic rights. "Equitable" implies that this

individuals must be emphasized. (see Appendix A.)

"Equitable enfranchisement" assumes that the history of discrimination in the United States has systemic effects even today. The worst of these systemic effects prevent minorities from entering the American mainstream. Instead, minorities occupy the economic fringes of society in disproportionate numbers. Following utilitarian logic then, it is appropriate that government seek to assist this disadvantaged class.[104] Up until now the synthesis follows a strictly distributive framework. "Equitable enfranchisement" differs in that it has a more realistic understanding of who comprises this economically disadvantaged class. "Equitable enfranchisement" does not assume that racial minorities are the only groups who suffer from socio-economic discrimination. Instead, minorities are assumed to be represented disproportionately, but not exclusively, in the disadvantaged classes. This understanding allows the equitable enfranchisement model to avoid the pitfall of creating group based rights.

The "equitable enfranchisement" model is fairly straightforward in application. For every affirmative action program that exists, remove the racial triggers and replace them with a socio-economic definition of disadvantaged. The

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empowerment will be undertaken with the understanding that not all minorities require extra assistance to achieve. By keeping this in mind the new model stresses the victim status of only those minorities who continue to suffer from societal discrimination.

[104] Rosenfeld at 105.

minority set asides at issue in Fullilove v. Klutznick[105] serve as an example. The Minority Business Enterprise provision was instituted because it was assumed minority owned businesses were new and would not have the business capital to compete with established contractors.[106] Under the "equitable enfranchisement" model the provision would be rewritten to give aid to businesses incorporated within a three year span with working capital below a minimum requirement. It is understood that most minority businesses are new and would be the overwhelming beneficiaries of this program. The key concept here is that entitlement programs can be tailored to combat years of racial discrimination without relying on race.

Congress was on the verge of instituting a policy similar to the "equitable enfranchisement" model in 1982. The Surface Transportation Assistance Act set aside ten percent of the government highway contracts for "small businesses owned and controlled by socially or economically disadvantaged individuals."[107] It appeared that this provision based a government assistance program on socio-economic factors. However, the provision based its definition of disadvantaged on the Small Businesses Act.[108] However, the Small Businesses

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105 448 U.S. 448 (1980).

106 Pub. L. No. 95-28, tit I @103, 91 Stat. 116 (1977).

107 Surface Transportation Assistance Act, Pub. L. No. 97-424, @105(f), 96 Stat. 2097 (1978).

108 Small Businesses Act, 15 U.S.C. section 637(d), (1988).

Act defined "disadvantaged" as any individual belonging to the following groups, "Black Americans, Hispanic Americans, Native Americans, Asian Americans, and other minorities."[109] Certainly this set aside was no different from the MBE provision challenged in Croson. However, the precedent is there for creating Disadvantaged Business Enterprise legislation, and it should be followed up on. If the Small Businesses Act had defined "disadvantaged" according to socio-economic characteristics rather than racial ones, a working equitable enfranchisement program would have been instituted.

The synthesis model relies on socio-economic triggers because they are more adaptive to changing social conditions. If equitable enfranchisement programs continue to display disproportionate racial impact the socio-economic triggers can be reevaluated and redefined. To take the minority set aside program one step further, assume that after two years of the new program minorities are still disproportionately represented in the construction industry. Then, the standard could be lowered to businesses with less than $250,000 worth of working capital, or some other characteristic could be defined.

The approach is overly simplified here in order to make the implications clear. "Equitable enfranchisement" is tasked with combating racial discrimination as it manifests itself in poor economic conditions for minorities. In order to

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[109] Id. at 637 (d)3(c).

accomplish this, the model invokes ostensibly race neutral characteristics. Equitable enfranchisement tries to tailor the socio-economic triggers so that minorities are disproportionately, but not exclusively represented.

The "equitable enfranchisement" model is consistent with demographic reality. Minorities are disproportionately represented in the disadvantaged classes so they have the most to gain from "equitable enfranchisement." However, minorities will not be the only beneficiaries. Non-minority individuals who fall under the model's definition of disadvantaged would also benefit. Because the program aids individuals who did not suffer discrimination does not make it invalid. On the contrary, a non-minority who suffers under the same socio-economic conditions as a disadvantaged minority is no less deserving of government assistance.

As envisioned "equitable enfranchisement" is best suited to replace affirmative action in entry level admission programs. Most colleges have affirmative action admission programs for minority applicants. The programs include special recruitment procedures, separate screening processes, and racial admission goals. The belief is that minorities need these programs to compensate for social and economic disadvantages they faced while preparing for college. These programs are not unfair to non-minorities because they do not act as an absolute bar to them. However, the equity of these programs is suspect. They claim to help disadvantaged

students, but apply to anyone who checks a minority block on the application form. Certainly it is possible that a minority student from a wealthy suburban high school could have exceptional test scores, and not need the assistance of an affirmative action program. There is no evidence to support the belief that all minorities suffer from social or economic disenfranchisement. Therefore, these programs use an inaccurate triggering device. Examples of possible triggers could be; applicants with family incomes less than $20,000, or applicants from schools characterized as twenty/forty by high school accreditation standards.[110] These characteristics are race neutral, and they tailor the programs to apply to the most needy.

The greatest advantage of the "equitable enfranchisement" model is its use of race neutral criteria. By concentrating on socio-economic characteristics, the programs emphasize the victim status of the individuals. Thus equitable enfranchisement avoids creating group rights. Some would argue that equitable enfranchisement substitutes ethnic group rights

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[110] High school officials define their schools by this common standard. The first number represents the percent of the previous years graduating class who attended a four year college. The second number represents the number of students who attended two year colleges. If the two number do not add up to one hundred percent then that remaining portion of the class did not attend post-secondary education. A twenty/forty school then had twenty percent of its student attend four year schools, forty percent attend two year schools and the remaining forty percent did not attend college. A school with these characteristics is most likely located in an inner-city or in an underprivileged rural section.

with economic group rights, but this is not the case. Equitable enfranchisement is a social program aimed at helping disadvantaged individuals. This grouping is based on a transitory economic condition.

By using race-neutral criteria the "equitable enfranchisement" model avoids strict scrutiny review under the Fourteenth Amendment. As early as Bakke, the Court emphasized that even benign racial classifications will suffer strict scrutiny when challenged under the Fourteenth Amendment.[111] This policy was made clear in Wygant v. Jackson Board of Education[112] and again in Croson.[113] These cases indicate that racial preference programs must serve a compelling state interest and be narrowly tailored to pass constitutional review.

The only exception to this rule are racial preferences instituted by Congress. Metro Broadcasting allowed for intermediate scrutiny of Congressional affirmative action

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[111] 438 U.S. 265, 289-291 (1978), (Powell, J.). note Bakke was not the first voluntary affirmative action program considered by the federal Courts. In DeFunis v. Odegaard 416 U.S. 312 (1974) the affirmative action program at the University of Washington Law School was challenged by a white student who was not accepted originally even though he had higher LSAT scores than several minority students. A District Court judge ordered the school to admit DeFunis. This decision was appealed but by the time it reached the Supreme Court DeFunis had graduated. The court put off ruling on this issue by deciding DeFunis' graduation rendered the case moot.

[112] 476 U.S. 267, 268 (1985).

[113] 488 U.S. 469, 488 (1989), also Daly at 1105.

programs.[114] This exception is understandable in light of the jurisprudence set forth in Fullilove and Croson, which distinguished the special powers of Congress. Nevertheless, for the majority of affirmative action programs strict scrutiny is a death sentence.

The "equitable enfranchisement" model could provide a welcome substitute for current affirmative action schemes. Justice O'Connor, for the majority in Croson, makes the Court's preference clear when she chastises the Richmond City Council;

> First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting.[115]

The "equitable enfranchisement" model gives the Supreme Court exactly what it is looking for in Croson. The Court is not opposed to progressive racial policies, they simply will not create group rights to achieve racial justice.

Provided socio-economic factors can be tailored to benefit minorities "equitable enfranchisement" will remedy the present effects of past discrimination. Furthermore, equitable enfranchisement accomplishes this without the use of suspect classifications. Indeed, entitlement programs based on socio-economic factors would suffer minimum scrutiny by the Court. The programs would only have to demonstrate an end rationally

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[114] 497 U.S. 547, 548 (1990).

[115] 488 U.S. 469, 507 (1988), (O'Connor, J.).

related to the government's interest. This rational basis standard is the lowest standard of review reserved for economic, social, or welfare programs.[116]

It must be stressed that the "equitable enfranchisement" model is meant to supplement existing Title VII remedies, not supplant them. If there is blatant evidence of discrimination, victims are encouraged to seek compensation through litigation. Courts may find racial preferences, even racial quotas, appropriate to remedy such blatant violations. The "equitable enfranchisement" model attempts only to replace racial preferences in entry level voluntary and government instituted affirmative action programs. Racial preferences are avoided because they are inefficient and difficult to justify.

Conclusions

The "equitable enfranchisement" model is an attempt to synthesize the best of the compensatory and distributive models. It accepts the expansive definition of discrimination found in the distributive model and marries it with the victim status approach of compensatory justice. This is accomplished through the creative use of socio-economic characterizations. By avoiding the distributive reliance on group based rights, the new model strikes a balance between egalitarianism and individualism. It is a remedy for years of societal

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[116] See United States v. Carolene Products Co, 304 U.S. 144, 152 n. 4(1938), and Bowen v. Owens, 476 U.S. 340 (1986).

discrimination, that does not step outside the bounds of a Constitution based on individual freedoms.

Equitable enfranchisement is willing to accept that even economically well-off minorities suffer from the societal effects of discrimination. If they suffer direct discrimination, then Title VII relief is appropriate. However, affluent minorities do not require the economic assistance of affirmative action. Especially when that assistance comes at the expense of the nations reliance on individual achievement. "Eliminating discrimination and providing a safety net for the truly needy constitutes the limits of what the law in the American system can do, if that system is to remain free."[117]

Equitable *enfranchisement* theorizes that social and economic disenfranchisement, not just racial hatred, is the driving force behind discrimination. Minorities continue to suffer from a lack of political power because they cannot overcome social and economic disadvantages created by a legacy of discrimination. No system of racial equality will be effective until it remedies this social and economic disenfranchisement. Current affirmative action programs increase racial representation in high visibility professional fields, but do little to redistribute resources to less economically priveledged minorities.[118] The new model attempts to alleviate racial tensions by empowering the

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[117] Abram at 44.

[118] See Jones, Supra. note 69.

disenfranchised elements of society.

The Civil Rights Movement demanded this nation live up to the promise of individual liberty founded in the Constitution. This movement is credited with destroying the last vestiges of legal discrimination.[119] Today we understand that discrimination exists in subtle forms beyond Jim Crow laws. Minorities face a range of social and economic obstacles that block their search for racial equality. The challenge faced by the modern Civil Rights Movement is to recognize this economic discrimination and combat it with proactive social policies. If racial equality is to be achieved, it must begin with economic parity. This quest for enfranchisement must remain consistent with King's dream of a society where, "a man is not judged by the color of his skin." It is possible to empower disadvantaged groups without violating principles of individual freedom. The key is to remain focused on those forces which affect minorities directly. The "equitable enfranchisement" model focuses on alleviating the problems of the socially and economically disadvantaged, as a first step on the road to racial equality.

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[119] Kennedy at 47.

Bibliography

Abram, Morris B. "Persuasion and Distrust; A Comment on the Affirmative Action Debate." in Racial Preferences and Racial Justice: The New Affirmative Action Controversy, edited by Russel Nieli. Washington D.C.: Ethics and Public Policy Center, 1991.

Botts, Sherman. "Has the Court Put the Fire Out on Court Ordered Affirmative Action," 18 Creighton Law Review 737 (1985).

Carter, Stephen. Reflections of an Affirmative Action Baby. New York, N.Y.: Basic Books Inc. 1991.

Cohen, Carl. "Justice Debased," Commentary, September 1979.

Cox, Paul. "Some Thoughts On The Future of Remedial Race and Gender Performance," 19 Valparaiso Law Review 801 (1985).

Daly, Mary, C. "Affirmative Action, Equal Access and the Supreme Court's 1989 Term: The Rehnquist Court Takes a Sharp Turn to the Right," 18 Hofstra Law Review 1057 (Summer 1990).

Fiscus, Ronald. The Constitutional Logic of Affirmative Action. edited by Stephen Wasby. North Carolina: Duke University Press, 1992.

Glazer, Nathan. "Affirmative Discrimination: For or Against," in Ethnic Dilemmas 1964-1982, edited by Harvard University Press. Cambridge, MA: Harvard University Press, 1983.

Glazer, Nathan. Affirmative Discrimination: Ethnic Inequality and Public Policy. New York: Harper Collins, 1975.

Goldner, Bruce. "Speech and Democracy," review of Illiberal Education: The Politics of Race and Sex on Campus, by Dinesh D'Souza. 90 Michigan Law Review 1291, (May 1992).

Greely, Kevin, B. "Metro Broadcasting v FCC: The Constitutionality of Federally Mandated Minority Preference Policies," Congressional Research Service Report for Congress, October 2, 1990.

Greene, Kathanne. Affirmative Action and Principles of Justice. Westport, CT: Greenwood Press, 1989.

Jones, James, E. "The Genesis and Present Status of Affirmative Action in Employment; Economic, Legal, and Political Realities," 70 Iowa Law Review 901 (May 1985).

Kennedy, Randall. "Persuasion and Distrust; A Comment on the Affirmative Action Debate," in Racial Preference and Racial Justice: The New Affirmative Action Controversy, edited by Russel Nieli. Washington D.C.: Ethics and Public Policy Center, 1991.

Krauthammer, Charles. "Why We Need Race Consciousness," The New Republic, 1985.

Lipset, Seymour, Martin. "Affirmative Action and the American Creed," Woodrow Wilson Quarterly, Winter 1992.

Loury, Glenn. "Beyond Civil Rights," a speech given to the National Urban League Jan 23, 1986. in Racial Preferences and Racial Justice: The New Affirmative Action Controversy, edited by Russell Nieli. Washington D.C.: Ethics and Public Policy Center, 1991.

Mitchell, Paul ed. Race Riots in Black and White. Englewood Cliffs, NJ: Prentice Hall, 1970.

Nieli, Russell. "Ethnic Tribalsism and Human Personhood," This World, Fall 1987, pp12-23.

Rosenfeld, Michael. Affirmative Action and Justice. New Haven, CT:Yale University Press, 1991.

Rosenfeld, Michael. "Affirmative Action, Justice, and Equality; A Philosophical and Constitutional Appraisal," 46 Ohio State Law Journal 845 (1985).

Sager, Lawrence, J. "The Courts and the Constitution: Memoirs of a General in the Inglorious Revolution," review of Order and Law: Arguing the Reagan Revolution: A First Hand Account, by Charles Fried. 90 Michigan Law Review 1203, (May 1992).

Savage, David. Turning Right: The Making of the Rehnquist Supreme Court. New York, NY: John Waley and Sons Inc., 1992.

Sedler, Robert, A. ""Race in America; Employment Equality, Affirmative Action, and the Constitutional Political Consensus," a review of A Conflict of Rights: The Supreme Court and Affirmative Action, by Melvin I. Urofsky. 90 Michigan Law Review 1315, (May 1992).

Cases Cited

Albermarle Paper Company v. Moody,
422 U.S. 405 (1975).

Board of Education v. Harris Secretary of HEW,
444 U.S. 130 (1979).

Brown v. Board of Education of Topeka, Kansas,
347 U.S. 483 (1954).

Brown v. Board of Education of Topeka, Kansas,
394 U.S. 294 (1955).

Bushey v. New York Civil Service Commission,
469 U.S. 1117 (1985).

City Council of Richmond, Virginia v. Croson,
488 U.S. 469 (1989).

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

Firefighters Local Union #1784 v. Stotts,
467 U.S. 561 (1989).

Franks v. Bowman Transportation Co.,
424 U.S. 747 (1976).

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

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

Guardians v. Civil Service Commission of New York,
463 U.S. 582 (1983).

Hazelwood School District v. U.S.,
433 U.S. 299 (1977).

International Association of Firefighters v. Cleveland,
478 U.S. 501 (1985).

Johnson v. Transportation Agency of Santa Clara County,
480 U.S. 616 (1987).

Lorance V. A.T. and T.,
490 U.S. 900 (1989).

Martin v. Wilkes,
490 U.S. 755 (1989).

Metro Broadcasting v. Federal Communications Commission,
497 U.S. 547 (1990).

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

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989).

Pullman Standard v. Swint,
456 U.S. 273 (1982).

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

Sheetmetal Workers v. EEOC,
478 U.S. 412 (1985).

Swann v. Charlotte-Mecklenberg Board of Education,
402 U.S. 1 (1971).

Teamsters v. United States,
431 U.S. 324 (1977).

United States v. Paradise,
480 U.S. 149 (1986).

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

Wards Cove Packing Co. v. Atonio,
493 U.S. 802 (1989).

Wygant v. Jackson Board of Education,
476 U.S. 267 (1985).

Compensatory Model

-"Our constitution is color blind" (Harlan, J.)
- d e f i n e s discrimination as an i n d i v i d u a l i z e d transaction
-concentrates on victim status of individuals
-requires proof of discriminatory intent
-avoids statistical proof
-reactive in its approach

Distributive Model

-"To get beyond racism we must first take account of race" (Blackmun, J.)
- d e f i n e s discrimination as systemic
-concentrates on quotas, goals, timetables, and racial preferences
-requires proof of disparate impact
-creates group rights
-proactive in its approach

Equitable Enfranchisement

-"Eliminating discrimination and providing a safety net for the truly needy constitutes the limits of what the law in the American system can do, if that system is to remain free" (Morris Abram)
-concentrates on enfranchising disadvantaged individuals
-uses socio-economic data as triggers for entitlement programs
-hopes to benefit minorities disproportionately by adapting socio-economic triggers
-avoids strict scrutiny
-understands discrimination to be mostly economic
-remains proactive in its approach

The following cases were analyzed concurrently with this study. They represent every major decision the Supreme Court has made on Affirmative Action. A cursory understanding of this case law is crucial to any consideration of affirmative action. In light of this, a brief synopsis accompanies each case cite.

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

Duke Power Company required its employees to have a high school diploma or pass an intelligence test. This requirement adversely effected black employees, and was struck down by the court under section 703(a) of the Civil Rights Act of 1964. The court did not eliminate all testing requirements, only those with adverse impact which did not give a reasonable measure of job performance.

Swann v Charlotte-Mecklenberg Board of Education 402 U.S. 1 (1971)

A district court had enforced a desegregation plan on the Charlotte school system after several findings of systemic discrimination. The plan, written by an expert, called for a range of remedies including the busing of students and implementation of affirmative action hiring programs for faculty. The supreme court affirmed all of the remedial measures holding that Title VII of the Civil Rights Act of 1964 does not strip the courts of their broad remedial powers. The district court's use of racial ratios (i.e. not quotas) was found to be within its equitable discretion.

Albermarle Paper Company v Moody 422 U.S. 405 (1975)

Black employees of the Albermarle Paper Co. brought suit to challenge the companies seniority system, employment tests, and backpay policy. The court stuck to its adverse impact definition of discrimination and found the tests to be invalid. The court also awarded the backpay as it had obvious connections with the purposes of Title VII. The court saw a dual purpose behind Title VII. 1.) Make-whole relief to victims of discrimination 2.) insure the removal of discriminatory system itself by offering employees a catalyst for voluntary action.

Franks v Bowman Transportation Co. 424 U.S. 747 (1976)

A district court found discriminatory practices in Bowman's hiring of over the road drivers. Black petitioners were given jobs, but not granted seniority status retroactive to their application dates. The court held that section 703(h) of the 64 Act did not bar seniority relief as a remedy, indeed the granting of seniority is appropriate under section 703(g).

Teamster v United States 431 U.S. 324 (1977)

The U.S. proved a pattern of practice suit against the Teamsters. The court ordered retroactive seniority relief to employees who suffered post-Act discrimination. The court would not award this relief to pre-Act victims because the bona fide seniority system was protected by section 703(h) and applied equally to all races.

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

First case to provide a framework for equal protection challenges to affirmative action programs. Also the first case dealing with voluntary affirmative action programs. The entire court reinstates Bakke and invalidates the California admission system, but protects California's right to take race into account.

-Powell feels racial classifications must suffer strict scrutiny. The California system serves a compelling interest, but is not narrowly tailored.

-Brennan, White, Marshall, and Blackmun also hold this racial classification to strict scrutiny, but feel the California system passes and should be upheld.

-Stevens, Burger, Stewart, and Rehnquist do not want to reach on the equal protection issue. Bakke's rights under Title VII were violated and the remedy could be found within the same act.

Untied Steelworkers v Weber 443 U.S. 193 (1979)

The United Steelworkers Union had made an agreement with Kaiser Aluminum insuring 50% of employees selected for advanced skill craft training programs would be black until the number of black skilled workers matched their number in the general workforce. Weber was a white employee not selected who filed a claim of discrimination, indicating that the affirmative action program violated section 703(s) and (d) of the 64 Act. The court, relying on the legislative history of the Act, held that sections (a) and (d) can not be interpreted as a prohibition against voluntary race conscious affirmative action. Since the plan was in keeping with the spirit of the Act and did not unnecessarily trammel the interests of white employees the court let it stand.

Board of Education v Harris Secretary of HEW 444 U.S. 130 (1979)

The Emergency School Aid Act withheld federal funds from school systems that had in place any policy that, "results in the disproportionate demotion or dismissal of minority personnel." The Health Education and Welfare Department denied these funds to New York based on evidence flowing from a Title VII compliance investigation. New York petitioned the court to reinstate these funds. The court held that the wording and history of the ESAA clearly indicate a

disparate impact test for compliance. By failing this New York left itself open for denial. Furthermore, the court believed a properly run statistical study could stand as prima facie evidence of disparate impact.

Pullilove v Klutznick, Secretary of Commerce 448 U.S. 448 (1980)

The Minority Business Enterprise provision of the Public Works Employment Act of 1977 set aside 10% of all government contracting fees to be given to minority businesses. Businesses injured by this practice brought suit under the 5th and 14th amendments equal protection guarantees. The court held that the 1977 Act did not violate the constitution as it was a legitimate exercise of the Congressional Spending power under Art. I sec. 8 c.11. Indeed this program fulfills the special mission granted congress in the enforcement clause of the fifth and fourteenth amendments. Furthermore, the program is neither under nor over-inclusive. The ethnic criteria was found to be a valid means of accomplishing a desirable objective. There is no requirement that the congress act in a color blind fashion.

Guardians v. Civil Service Commission of New York 463 U.S. 582 (1983)

Black and Hispanic police officers were hired and placed in a seniority system according to their scores on an entrance exam. Subsequent lay-offs had an adverse impact on these minority groups. The group filed a suit under Title VI and VII of the 64 Act. The court granted affirmative action relief under Title VII but denied the relief sought under Title VI including retroactive seniority and backpay. The holding stipulates that Title VII relief is granted on a finding of discriminatory effect, while Title VI relief is limited only to cases of proved discriminatory intent.

Firefighter Local Union No. 1784 v Stotts 467 U.S. 561 (1979)

A consent decree entered into by the union with its minority members had failed to integrate blacks into the union when a seniority system called for their dismissal. The District Court then modified the decree so the seniority system was taken into account. The court held that the District Court overstepped its bounds. As in Teamsters, a bona fide seniority system is protected by section 703(h) until it is found by a trial court to be discriminatory. There was no such finding in Stotts so the modification should have stayed within the "four corners" of the original decree.

Pullman Standard v Swint 456 U.S. 273 (1982)

Black employees brought suit against Pullman Standard alleging that its seniority system violated Title VII. The District Court found no evidence of discriminatory intent and therefore held the seniority system was protected by section

703(h). The Appeals Court reversed relying on evidence of disparate impact. The Supreme Court reversed again holding that under section 703(h) a finding of disparate impact is not enough to invalidate a *bona* fide seniority system, rather as in Teamsters there must be proof of intent.

Wygant v Jackson Board of Education 476 U.S. 267 (1985)

A collective bargaining agreement between the school board and its teachers union insured that if lay-offs were to occur minority teachers with less seniority would be protected. White teachers subsequently fired brought suit. The District court held that the school board could set racial preferences in order to remedy societal discrimination. The Supreme Court reversed holding the affirmative action program to strict scrutiny. Without a judicial finding of discrimination the board could not institute race conscious remedy. "Societal discrimination...is too amorphous a basis...for imposing racially classified remedy."

Sheet Metal Workers v EEOC 478 U.S. 412 (1985)

The Sheetmetal Union was found guilty of violations of Title VII. Subsequent to this finding an affirmative action program was set up and an administrator appointed. After not complying the Union was charged with contempt. The court upheld the affirmative action program and the contempt charge. The holding stipulated that section 706(g) did not prohibit the courts from instituting affirmative race conscious belief. Furthermore, nowhere in the legislative history of Title VII was the relief limited only to identifiable victims of discrimination. The court emphasized that Stotts was a consent decree case dealing only with a seniority system. It can not be properly read to prohibit any kind of court ordered affirmative relief.

International Association of Firefighters v Cleveland 478 U.S. 501 (1985)

The Vanguards, an association of minority firefighters, filed suit against the City of Cleveland under Title VII. Rather than litigate, a consent decree was signed initiating several affirmative action programs in the promotion of firefighters. The court upheld this decree stating that section 706(g) does not preclude entry of consent decrees, even when those decrees may benefit people who were not the actual victims of discrimination. Again, this limits the definition of discrimination applied in Stotts to a minor role in seniority cases.

United States v Paradise 480 U.S. 149 (1986)

The Alabama Department of Public Safety systemically excluded blacks from all ranks in their police department. They were found in violation of Title VII and subsequently ignored the orders of the District Court and four consecutive

consent decrees. Finally in 1983 the District Court ordered a one for one hiring program. The Supreme Court upheld this strict program even noting that it met the limits of strict scrutiny. It served a compelling interest and was narrowly tailored.

Johnson v Transportation Agency, Santa Clara California 480 U.S. 616 (1987)

The Santa Clara County Transportation Agency voluntarily adopted an affirmative action plan. The plan set no specific quotas, but did seek an annually measurable improvement in minority representation. After the adoption of the plan, a female was promoted to the position of road dispatcher from a pool of seven qualified employees. One of the effected males filed suit. The court held the voluntary plan to be effective and well administered. So as not to discourage voluntary plans the court held that businesses need only point to conspicuous imbalance not outright discrimination to justify affirmative action programs. As the plan did not set quotas, nor unnecessarily trammel the rights of nonminorities it was found to be consistent with Title VII.

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

The city of Richmond instituted a minority set-aside program similar to that created by congress in the PWE Act of 1977. The lower courts upheld the plan using the precedents set in Fullilove. After a remand in light of Wygant the Appellate Court overturned the program. The Supreme Court affirmed emphasizing that the federal plan was more narrowly tailored and was justified under the enforcement clause in the fifth and fourteenth amendments. State governments do not have this special power. Richmond then can not claim to remedy societal discrimination as a whole without a substantial finding of specific discrimination.

Price Waterhouse v Hopkins 490 U.S. 228 (1989)

Hopkins failed to make partner at the Price Waterhouse firm and was subsequently fired. She then filed charges of sex discrimination against the firm. The lower courts found evidence of discrimination and forced Waterhouse to prove by clear and convincing evidence that they would have made the same decision concerning Hopkins even without the discriminatory motives. A plurality of the court remanded the case indicating that the burden pf proof properly rested with the employer, but need only show by a preponderance of the evidence.

Martin v Wilkes 490 U.S. 755 (1989)

The NAACP sued Birmingham Alabama under Title VII. The result was a consent decree creating affirmative action programs in the hiring and promotion of minority employees in

the police and fire departments. Nonminority members then filed suit claiming the subsequent layoffs resulted from a consent decree that violated their rights. The District Court felt the petitioners were unable to challenge a consent decree they were not a party to. The Supreme Court reversed holding that outside parties are not precluded from challenging employment decisions taken pursuant to a consent decree.

Lorance v A.T. and T. 490 U.S. 900 (1989)

A.T.& T's seniority system was based on years of plantwide service. In 1979 this rule was changed making seniority job specific. This change adversely impacted female employees who recently achieved status in the skilled "tester" positions. The women filed suit, but were denied by the court for not filing in time pursuant to section 706(e) of Title VII. The court also reemphasized Pullman's holding that seniority systems are not invalidated by findings of disparate impact.

Wards Cove Packing Co. v Atonio 493 U.S. 802 (1989)

The unskilled positions at the Wards Cove plant were predominantly held by minority workers. These workers filed a Title VII suit against the plant, claiming certain hiring and promotion procedures kept them out of the skilled "non-cannery" jobs. The Court of Appeals accepted a statistical study as prima facie evidence of disparate impact and forced the packing company to show the business necessity of its actions. The Supreme Court reversed, remanding the case for a more accurate statistical study and switching the burden of proof in disparate impact cases to the employees.

Metro Broadcasting v Federal Communications Commission 497 U.S. 547 (1990)

The FCC awards an enhancement to minority owned businesses when considering applications for license. Furthermore, the FCC has a "distress sale" policy where a station owner found in violation of the law can sell his license to a minority enterprise rather than face criminal charges. Adversely effected communication companies filed a suit. The Supreme Court validated both policies giving deference to the congressional mandate and the obvious first amendment values served. The court applied intermediate scrutiny to this benign race conscious measure. The policies serve the important government interest of broadcast diversity and they are substantially related to that goal as experience shows that minority owned stations do offer more alternative programming. Note this logic rests on the argument in Fullilove. Croson was distinguished and reconciled.