



1993

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Recommended Citation

James E. Jones Jr., *The Affirmative Action/Quota Issue: Back to the Future in the Year 2000? (The Ben J. Altheimer Lecture)*, 15 U. ARK. LITTLE ROCK L. REV. 361 (1993).

Available at: <https://lawrepository.ualr.edu/lawreview/vol15/iss3/2>

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THE AFFIRMATIVE ACTION/QUOTA ISSUE: BACK TO THE FUTURE IN THE YEAR 2000? (THE BEN J. ALTHEIMER LECTURE)*

James E. Jones, Jr.**

I. INTRODUCTION

Periodically, for more than twenty years academic debate and debate in the media has been dominated by the affirmative action or quota issue. Although affirmative action as a remedial concept is as old as equity, and it has been part and parcel of remedial power in labor legislation since at least the early 1930s,¹ the "modern" debate did not emerge until late 1969 or early 1970.² The principal triggering event was the issuance by the U.S. Department of Labor, pursuant to Executive Order 11246, of the revised Philadelphia Plan establishing certain goals and timetables for jobs on federally assisted construction in the Philadelphia area.³ Although the affirmative action obligation had been a requirement of government contractors since 1961, it was largely ignored.

Subsequently, the Department of Labor made concepts embodied in the Philadelphia Plan applicable to all contractors doing business with the federal government. This effort became a focal point of vigorous debate in 1971 leading up to the revisions of Title VII of the Civil Rights Act of 1964, which deals with employment. After lengthy de-

* Delivered at the University of Arkansas at Little Rock School of Law on November 19, 1992. The following piece is a manuscript of the lecture itself rather than the more traditional adaptation in article format.

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1. See, e.g., *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

2. See, e.g., James E. Jones Jr., *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341; Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972); Prof. Hill has listed some of the vast body of comment on the subject expressing views both pro & con in "Herbert Hill, Race and Ethnicity in Organized Labor: The Historical Sources of Resistance to Affirmative Action, 12 J. INTERGROUP REL. 5 (1984)."

3. That executive order, which in substance remains in effect today, was issued by then President Lyndon Johnson. It was a revision of two previous orders which had been issued by President John F. Kennedy in 1961.

bate over the constitutionality and legality of the Department of Labor's affirmative action requirement, Congress rejected a proposal to ban it and enacted a provision into law which made clear its acceptance of the fundamental concepts.⁴ Despite what seemed decisive action by Congress, or perhaps because of it, the controversy over the legality of affirmative action, epitomized by the concept of goals and timetables, continued to fuel the debate over "quotas."

Affirmative action took on a larger meaning beyond the arena of employment, particularly in admissions to professional schools. Any program, public or private actions which provided or sought to provide opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups, brought forth the attack that they were preferential treatment and reverse discrimination. They were quotas and, therefore, immoral, illegal, and unconstitutional. For more than twenty years now these arguments have continued, fueled each season by a new factual pattern.

In 1989, in *City of Richmond v. J.A. Croson Co.*,⁵ the Supreme Court invalidated the city's program requiring a percentage set-aside of city contracts or subcontracts for minorities or women. Also in 1989, the Supreme Court issued a series of cases which narrowly interpreted the employment discrimination protections in federal laws, particularly Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.⁶ The cases of 1989-90 so drastically revised interpretations of the existing

4. 42 U.S.C. § 2000e-17 (1982) provides:

SEC. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: *Provided*, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: *Provided further*, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government of the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

5. 488 U.S. 469 (1989).

6. 42 U.S.C. § 1981 is a reconstruction era civil rights statute. In a series of cases beginning in 1968, the Supreme Court had resuscitated its applicability to employment discrimination. *Cf.* *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

statutes that Congress was motivated in 1990 to pass a bill reversing all of them. Congress also provided additional relief to classes of persons protected by these civil rights laws. Despite the lack of a shred of credible evidence linking quotas to interpretations of the Civil Rights Act of 1964 and the fact that the 1990 Civil Rights Bill passed Congress by a larger margin than the action authorizing Desert Storm, President Bush vetoed the Bill. The effort to override the veto in the Senate failed by only one vote.

David Duke, an allegedly reformed leader of the Ku Klux Klan who had been elected to the Senate of the State of Louisiana after a racially divisive campaign, was in attendance in the gallery of the Senate at the vote to override. He claimed that the results indicated that the nation and Congress had received his message. Senator Jesse Helms, in such political difficulty as to be an underdog in his re-election bid in the State of North Carolina that year, utilized the quota issue in a negative campaign which was credited with defeating his challenger Harvey Gant, a black Democrat. The word was put out that the quota issue was a hot one for the upcoming 1992 presidential campaign.

The focus of these attacks rests on the unstated premise that the executive order of the President and the action of the Congress in passing civil rights legislation were primarily for the benefit of blacks. The general population, which receives most of its information (it seems) from television, seemed unaware of the scope of the protections of these civil rights laws. Not only is discrimination on the basis of race and color prohibited, but also discrimination on the basis of sex, religion, ancestry, and national origin. Everyone has a race, color and sex. Most fit, or will fit, in other protected classes, such as age or handicap. The Civil Rights Bill was vigorously attacked by its opponents, and the justification given by the President for his veto was that the requirements of the law would lead to the adoption by employers of quotas. The requirement at issue had been in the law since its inception in 1964. It related to the use of tests and other neutral procedures which have a disparate impact on a protected class when the employer cannot prove that the test is related to ability to do the job. In *Watson v. Fort Worth Bank & Trust*,⁷ the Supreme Court made clear that the standard was applicable to subjective criteria primarily used in upper level jobs, such as managerial and executive. Because of the educational advances

7. 108 S. Ct. 2777 (1988).

made in the last twenty years by women, the overwhelming majority of the jobs which would be at issue in subjective criteria cases are those in which a larger portion of highly educated white females would be affected. In addition, improvements made in the law with regard to damages for harassment benefit mostly women who are subject to sexual harassment. These laws provide protection for virtually the entire U.S. workforce — the majority of which is still white.

After some cosmetic changes, negotiated primarily between Senator John Danforth of Missouri and Senator Edward Kennedy of Massachusetts, the Bill was passed yet again. Although the offensive language allegedly resulting in quotas remained substantially unchanged, the President declared victory and signed the Bill. These are brief accounts of affirmative action quota debates of 1989-91.

In 1992, *suddenly*, there is a strange absence from the scene dominated again by shrill thirty second sound bites, frequently negative and dirty, of references to affirmative action. At the conventions—or at least television coverage of them—I only remember hearing the term once (I think) from the Democratic nominees and not at all from Vice-President Quayle or President Bush. President Bush, in his acceptance speech, referred to the quota issue, but only to boast of vetoing the 1990 Civil Rights Bill and forcing Congress to send him one that did not require quotas.

The latest “splash” in the legal academic area was last year’s *Reflections of an Affirmative Action Baby*⁸ by Professor Stephen Carter of Yale Law School. Professor Carter, a young black (or African American which seems to be the term of choice this year), is a professed liberal unlike Thomas Sowell,⁹ a black conservative economist, and Justice Clarence Thomas. He has received “tons of ink” because of his criticism and rejection of affirmative action, as did Sowell and Thomas in years past. We found eight cases at the appeals court level, including cases on contract set-asides or race specific scholarships.¹⁰ As

8. STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1984). See also Kathleen M. Sullivan, *City of Richmond v. J. A. Croson: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609 (1990); Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267 (1992).

9. THOMAS SOWELL, *PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE*, (1st ed. 1990).

10. See *Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992); *Billish v. City of Chicago*, 962 F.2d 1269 (7th Cir. 1992); *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992); *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992); Northeastern Florida Chapter of the Associ-

I reviewed it in preparation for this speech, there were three cases on the Supreme Court's docket this year which raised the affirmative action or quota issue. Before I arrived here, however, the Supreme Court denied review in all of them.¹¹ Maybe the debate is over, affirmative action is dead, and I failed to note its passing, or maybe the conflict went underground in the wake of the Los Angeles riots and Hurricane Andrew. But, I think not.¹²

What I do know is that the fundamental problem of underutilization of women, blacks, and other people of color in the workforce has not gone away and that the statistics of disparity on all the social indicators of well-being continue to disfavor these groups.

Now more than ever we need to assure the availability of affirmative action programs to address these current and future problems. And while this messenger is tired, it is still necessary to deliver the message to our future leaders who must solve these problems or face the consequences of a past generation's failure to resolve them.

While the recent national debates focused on mindless arguments about the existence or nonexistence of quota provisions in the Civil Rights Act of 1991, the implications of a study by the Hudson Institute commissioned by the U.S. Labor Department on Workforce 2000 were largely ignored. The study issued in 1987 was entitled *Workforce 2000: Work and Workers for the Twenty-First Century*.¹³ The Hudson Institute is a *conservative* think-tank. This study was commissioned by the Reagan Administration. What it shows is that by the year 2000 only fifteen percent of the net new workers will be white males. Forty-two percent of the net new workers will be women, seven percent will be native nonwhite men, and thirteen percent will be native nonwhite women. The other twenty-two percent is expected to be immigrant men and women. Other demographics reveal that the population in the workforce will grow more slowly than at any time since the 1930s, the average age of the workforce will rise, and the pool of young workers

ated Gen. Contractors v. City of Jacksonville, 951 F.2d 1217 (11th Cir. 1992); O'Donnel Construction Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992).

11. See Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992); Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100 (6th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3257 (1992); Ellis v. Skinner, 961 F.2d 912 (10th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3301 Oct. 1992, *sub. nom.* Ellis v. Card.

12. See generally Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267 (1992).

13. WILLIAM B. JOHNSTON & ARNOLD E. PACKER, HUDSON INSTITUTE, *WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY* (1987).

entering the labor market will shrink. More women will enter into the workforce, minorities will be the largest share of new entrants into the labor force, and immigrants will represent the largest share of the increase since the first World War. Between now and the year 2000, minorities will make up twenty-nine percent of the workforce.

Of the six policy issues the Hudson Institute suggested deserved attention, three relate to activities which are in tension with anti-affirmative action initiatives. Important suggested initiatives involved improving the dynamism of an aging workforce; reconciling the demands of women, work, and family; integrating blacks and Hispanics fully into the workforce; and improving workers' education and skills.

We have recently seen the successful enactment of protections available for older workers. We also saw the passage of a revolutionary bill protecting the rights of the disabled. The effectiveness of that law was delayed for two years, but it went into effect fully July 26, 1992. In view of this seeming recognition by the government that effective protections for the aged and the disabled to participate in the world of work are needed, attacks on equal employment for the rest of society, misfocused as it has been on the black issue, are doubly disturbing.

The majority of the key items which the Workforce 2000 study identified as critical to a healthy economy are directly threatened by the attacks on affirmative action and equal employment. A follow-up study on Workforce 2000, *Competing in a Sellers Market: Is Corporate America Prepared*, was a survey prepared by the Hudson Institute and Towers Perrin, an internationally known management consulting firm. This study suggested that the Workforce 2000 phrase would be more apt if we talked about Workforce 1990. Many employers in the survey group were struggling with the implications of recruiting and managing a workforce composed less and less of white males. Minorities already comprise from twenty to twenty-six percent of the companies surveyed, and such companies are already concerned about cultural diversity. Although they are aware of the needs of female employees, relatively few of these companies reported any concern about the aging of their workforce. In response to demographic shifts, many companies were formulating new approaches, exploring different ways to structure the work day or week, and to manage diversity, and employing sophisticated recruitment and training tactics to address the gaps in skills.

In a *Business Week* report of a survey of 404 senior executives at

corporations drawn from the Business Week 1000,¹⁴ corporate executives insisted they did not need anyone twisting their arms to hire more women and minorities. Sixty-five percent of those polled insisted that business will open up its hiring and promotion practices without affirmative action laws. That may be because corporate America feels that the marketplace is already forcing companies to end discrimination in employment. Executives point to the shifting composition of the labor supply and the benefits of a diverse workforce as bigger spurs to affirmative action than fears of government or private lawsuit. Even so, more than half say their companies need to do a better job of hiring minorities, and forty-four percent are unsatisfied with their progress in hiring women. Another weakness is failure to promote women and minorities into top management.¹⁵

It does not take a genius to realize that with demographic shifts in the offing and the increasing need for skilled and well-trained workers in order to operate our complicated society in the future, what we need are programs that *promote the utilization of all of our diverse human resources*. What we are getting is the chilling of affirmative action by the posturing of the government and the weakening of the laws that keep the momentum going at the time when our best projections of our future needs dictate just the opposite behavior. Despite the assertion of some corporate executives that the market will take care of the problem, the facts are that until affirmative action came on stream in the late 1960s, there was no indication that the market was responsive. Granted the demographics were not the same, but minorities and women who were qualified and available were being wasted except in times of war and critical shortages of labor.

Needed now, perhaps even more, are government efforts to improve the education and training of minorities. Females seem to be doing rather well on the education and training level in many areas, despite less than parity in job penetration in the various activities heretofore considered nontraditional. High student loans adversely affect the job choices of even the best students. Government cuts in fi-

14. *Race in the Work Place: Is Affirmative Action Working?*, BUSINESS WEEK, July 8, 1991 at 50-63.

15. Congress seems to have taken note of this last problem with the vigorous support of the Bush Administration. The 1991 Civil Rights Act which was passed and signed by the President has a whole separate section on the glass ceiling problem particularly focused on women and affirmative action efforts to penetrate the glass ceiling, an initiative which seems strangely at odds with the persistent vocalization of opposition to affirmative action which involves numbers.

nancial aid, government attacks on minority scholarships, government support for the ending of desegregation orders even though schools remain segregated by race (and some even by sex) — all go counter to the needs documented in Workforce 2000 and other such demographic analyses.

It is clear that individuals without skills cannot do jobs even if they get one. Without education they cannot be trained for high-tech jobs. The major initiative of government seems to be pushing for the building of more jails to house increasing majorities of nonwhite inmates and to provide them with mind-dulling tasks and longer jail terms. It takes more money to keep an inmate in a cell for a year than to send one to Harvard. At least, we should take the schools to prisoners and perhaps, consider a requirement of a meaningful educational or training plateau as a condition for release.

That study of Workforce 2000¹⁶ noted that the surveyed employers were literally in the midst of a sea of change. The average workforce of the companies in the study is already one-half female. Minorities now compose up to twenty percent of the workforce at just under sixty percent of the companies and more than twenty-six percent of the employees at almost one-fourth of the companies surveyed. Most of the employers were aware of and concerned about their demographic destiny, cultural diversity being the paramount concern, with just under three-quarters noting some level of management focus on the hiring and promotion of minority employees. Sixty-eight percent expressed concern about the special needs of female employees, but only a relatively few were concerned about the aging of the workforce, even though employees over the age of forty made up thirty-five percent on average of the workforces of the companies surveyed.

The Towers Perrin survey report closed with this telling declaration:

A Strategic Focus. Demographic realities are bringing human resource issues to the forefront of management consciousness. That seems clear from the high levels of management concern reported by our respondents. And there is a growing recognition that the changes require a new style of management, one that places as much strategic emphasis on human resources as it does on financial or other resources.¹⁷

16. TOWERS PERRIN, HUDSON INSTITUTE, *WORKFORCE 2000: COMPETING IN A SELLER'S MARKET: IS CORPORATE AMERICA PREPARED?* (1990).

17. *Id.* at 19.

As a clear indication of the impact of recent demographic realities, most employers are now referring to what used to be the personnel departments as human resources management. Indeed, many business schools throughout the country have changed the label to reflect the human resources emphasis, and professional associations so labeled have begun to emerge.

These employers will be the major clients of the law firms you hope to join or form. What will or should be the role of law and the lawyers in a transition period where corporate management has finally recognized that human resources are as important as financial or other resources?

II. IF DEMOGRAPHICS ARE DESTINY, THE EMERGING JURISPRUDENCE ON AFFIRMATIVE ACTION IS ON A COLLISION COURSE WITH THE IMPERATIVES OF WORKFORCE 2000

George Santayana said, "Progress, far from consisting of change, depends upon retentiveness. . . . Those who cannot remember the past are condemned to fulfill it."¹⁸ If one wishes to find an example of this aphorism, one only needs examine closely the modern debates over affirmative action and then look back at the debates surrounding the passage of the Fourteenth Amendment in connection with the efforts of Congress to provide targeted aid for the newly emancipated slaves.

It is useful to keep in mind that affirmative action, particularly in employment, has been constitutionally tested and generally upheld in two contexts in the last two decades. The first context involves court orders or remedy after adjudication of the issue of discrimination or after the parties consent to a decree. A remedy so crafted might require the defendant to grant particular benefits to identified victims of discrimination operating *retroactively*. It might also require certain race specific conduct for nonidentified victims that would operate *prospectively*. Thus, an offending employer may be required to adopt an affirmative action hiring plan for future job openings or a plan for future promotions.

The second context involves *programs* that an appropriate public authority has legislatively or administratively determined to be necessary.¹⁹

18. GEORGE SANTAYANA, *LIFE OF REASON*, vol. I, ch. XII, *Flux and Constancy in Human Nature*, (1905-06) quoted in OXFORD DICTIONARY OF QUOTATIONS (1979).

19. The First Circuit Court of Appeals discusses this succinctly in *Associated Gen. Contrac-*

A. Affirmative Action as *Program* in the Supreme Court

As one scholar points out,

While the scholarship includes vigorous debate and disagreement over the scope of the Fourteenth Amendment the one point on which historians of the Fourteenth Amendment agree, and, indeed, which the evidence places beyond cavil, is that [it] was designed to place the constitutionality of the Freedman's Bureau and civil rights bills, particularly the latter, beyond doubt. . . . The doubt related to the capacity of the Thirteenth Amendment to sustain this far-reaching legislative program.²⁰

Over the past two decades, the scholarly community has been mired in ideological and philosophical dialogue contributing little to the resolution of the real problems which we face.

Except to deny review of numerous employment cases, the United States Supreme Court did not enter the debate until *DeFunis v. Odegaard*,²¹ a law school admission case that the Supreme Court accepted for review and then dismissed as moot. Justice Douglas dissented in *DeFunis* and, in the guise of a dissent, wrote a raging argument as to why benign race-based programs were unconstitutional. It was not until *Regents of the University of California v. Bakke*²² that the Court addressed the substantive question of benign programs requiring classification by race. That case added fuel to the fire and inundated us with advocacy, but provided neither enlightenment nor resolution. The decision has been referred to as a four-one-four decision, and even today, the Supreme Court has provided less than satisfactory jurisprudential guidance with regard to affirmative action programs.²³ The opinion in the *Bakke* case which garnered the most attention was written by Justice Powell, who agreed that it was not per se unconstitutional to use race in affirmative action programs when the programs were appropriately crafted. However, he concluded that the particular program offended the law. The issue was a quota consisting of a number of places

tors, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974).

20. JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION* (1983); JACOBUS TENBROEK, *EQUAL UNDER LAW* 201 (rev. ed. 1965); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). See also Note, *The Thirteenth Amendment and Private Affirmative Action*, 89 YALE L.J. 399 (1979).

21. 416 U.S. 312 (1974).

22. 438 U.S. 265 (1968).

23. For a discussion of some of these ideas, see James E. Jones, Jr., *The Origins of Affirmative Action* 21 U.C. DAVIS L. REV. 383 (1988).

in a medical school admission program reserved exclusively for non-whites. However, nonwhites could also compete with whites for the other open positions.

In the next case, *United Steelworkers of America v. Weber*,²⁴ the Supreme Court approved an affirmative action program over the protest of a white male employee who alleged reverse discrimination. The company and the union had voluntarily entered into the program through collective bargaining to correct what they perceived to be a manifest imbalance in the participation of their black employees in better jobs. The plaintiff's claim of reverse discrimination under Title VII was rejected by the Court, which held that the Act did not prohibit voluntary action by parties to correct past discrimination by utilizing a program that provided for one-to-one black or white participation. The program did not involve layoffs, but rather involved opportunities for participation in a training program that the parties had established. The Court did not address the constitutional issue, but it did provide standards which affirmative action programs should follow to avoid unnecessarily trammeling the rights of innocent workers.

In *Fullilove v. Klutznick*,²⁵ the Supreme Court examined a program, attacked as an unconstitutional quota, which Congress had established to provide for a ten percent set-aside of certain federal contracts for minority contractors. Congress had acted because a long-standing program established by the President under executive order had proved ineffective. The Court sustained the constitutionality of this set-aside program by a six to three vote, though the multiplicity of opinions failed to provide us with any dependable jurisprudence.

Still later in *Wygant v. Jackson Board of Education*,²⁶ the Supreme Court addressed an issue left open in *Weber* regarding voluntary adoption of affirmative action plans by public employers. The city and its union had negotiated a collective bargaining agreement that not only provided for affirmative action in hiring, but protected minority teachers from layoffs. A majority of the Court concluded that the lay-off provision was unconstitutional because it was not sufficiently narrowly tailored and it maintained levels of minority hiring that had no relation to remedying past employment discrimination. Here again, there was a multiplicity of opinions creating more confusion than con-

24. 443 U.S. 193 (1979).

25. 448 U.S. 448 (1980).

26. 476 U.S. 267 (1986).

sensus. The Court did seem to support the conclusion that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals. However, its opinion raised the confusing question of the factual predicate necessary to support such action.

In *Johnson v. Transportation Agency*,²⁷ the Supreme Court addressed the issue of voluntary affirmative action by a state entity challenged as a violation of Title VII of the Civil Rights Act of 1964. In *Weber* the actors were a private company and its trade union. In *Johnson v. Transportation Agency*, a state had established an affirmative action program which was challenged by Johnson, who had claimed he was denied a promotion because of his sex. The promotion was granted to a woman under the agency's unilateral voluntary affirmative action plan. The plan did not set quotas in any job classification, but established a long-range goal to attain a workforce whose composition in all major job classifications approximated the distribution of women and minorities and handicapped persons in the county labor market. The plan specified no past discriminatory practices, but merely stated that women had been traditionally underrepresented in the relevant job classification. No woman held any of the agency's 238 skill craft positions. The Supreme Court sustained the county's plan, applying the standards it had enunciated in *Weber*. The Court found that it was plainly reasonable for the agency to consider sex as one factor in making its decision. The plaintiff did not raise any constitutional issues.

Justice Scalia thundered in dissent that this case was worse than *Weber* and that a statute designed to establish a color-blind and gender-blind workplace had been converted into a powerful engine of racism and sexism, not merely permitting intentional race and sex discrimination, but often making it, through operation of the legal system, practically compelled.²⁸

As mentioned earlier, in 1989 the Supreme Court in *City of Richmond v. J. A. Croson Co.*²⁹ struck down a minority business enterprise requirement enacted by the City of Richmond requiring prime contractors awarded city construction contracts to subcontract at least thirty

27. 480 U.S. 616 (1987).

28. *Id.* at 675-76 (Scalia, J., dissenting).

29. 488 U.S. 469 (1989).

percent of the dollar amount to one or more minority business enterprises. Although this case is only indirectly related to affirmative action in employment, its Olympian pronouncements potentially affect almost all affirmative action programs. For the first time, a Supreme Court majority specifically adopts the strict scrutiny standard for any state mandated plan requiring classification by race. Strict scrutiny requires that a state or local government program that classifies individuals on the basis of race may do so only if the classification is justified by a compelling state interest and the means employed are narrowly tailored to effect that interest.³⁰

While the Supreme Court concluded that as a matter of state law the City of Richmond had requisite authority to use its spending powers to deal with the discrimination, it held that the city had not established a sufficient factual predicate of past discrimination to authorize race-based relief under the Fourteenth Amendment. There was also discussion, at least in a plurality, that the plan was not sufficiently narrowly tailored because it did not reflect a determination that race neutral or less intrusive alternatives were unavailing.

In its most recent affirmative action case, *Metro Broadcasting, Inc. v. FCC*³¹ the Court seems to have adopted a different level of scrutiny for those affirmative action programs that are mandated by an act of Congress. The Court held,

[B]enign race conscious measures mandated by Congress — even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination — are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.³²

The Court seemed to rely on *Fullilove* to justify utilizing this midlevel scrutiny. Also relied upon to make this distinction is the fact that the Fourteenth Amendment, Clause 5, gives Congress authority to effectuate the purposes of the Amendment, and states are given no such authority. Again there were dissents, and importantly, the dissents would have applied strict scrutiny to the act of Congress just as was applied in the case of state action in *Croson*.

This issue has not yet been laid to rest. I fear the cases in the

30. *Id.* at 472.

31. 110 S. Ct. 2997 (1990).

32. *Id.* at 3008-09.

pipeline will bring this matter back to the Supreme Court for yet another go. Justices Brennan and Marshall, in the majority in *Metro*, retired. Justice Souter's views are not known, and Justice Thomas is a declared foe of affirmative action.

B. Affirmative Action as Remedy in the Supreme Court

The second context in which the constitutionality of affirmative action has been addressed in the Supreme Court has been those cases in which the remedy, either by consent decree or by order of the court, has included goals and timetables based on race or sex.

Although in one sense all affirmative action programs are remedial in purpose in that they attempt to deal with a problem, the second context involves remedy post-adjudication. Therein lies the essential difference. On the one hand, the parties have joined issue in the court and, either by conceding defeat or adjudication of guilt, the party subject to the act has a penalty imposed. The fact that the penalty may be for the benefit of persons who have not yet arrived on the scene and could not be identified as victims in the usual tort sense, which is considered prospective relief for the benefit of a third party, is nothing new in our jurisprudence. In fact, most injunctive mandates operate in the future.

The Department of Justice in the Reagan-Bush Administration took the position before the Supreme Court that even injunctive relief was restricted to identified victims of discrimination and that under Title VII, prospective relief would not lie. The Court has rejected that "crabbed" reading of the remedy provision of Title VII of the Civil Rights Act of 1964 (and its own dicta in a previous case);³³ however, the number of dissenters on the issue clouds the continued validity of the principle.

The principle cases in which the Supreme Court has addressed affirmative action as remedy are *Local 93, International Ass'n of Fire Fighters v. City of Cleveland*,³⁴ *Local 28 of the Sheetmetal Workers' International Ass'n v. EEOC*,³⁵ and *United States v. Paradise*.³⁶

The *Local 93* case involved a challenge to the legality of an affirmative action consent decree that provided hiring preferences to black

33. See *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

34. 478 U.S. 501 (1986).

35. 478 U.S. 421 (1986).

36. 480 U.S. 149 (1987).

fire fighters who were not actual victims of the city's discriminatory practices. The Supreme Court concluded that whatever limits might be involved in section 706(g) of Title VII of the Civil Rights Act of 1964, which sets forth the remedial authority of the federal court, those limits were not implicated in a voluntary agreement as it determined the consent decree to be.

In *Local 28 of the Sheetmetal Workers' International Ass'n v. EEOC*, the Court clearly rejected the U.S. Department of Justice's strained interpretation of the scope of the statute by concluding that district courts have the power to order affirmative, race-conscious relief when necessary to counteract egregious discrimination.³⁷ This case involved a union that had been cited for discrimination as early as 1964. It was ultimately found to be in contempt of federal court and placed under the jurisdiction of an administrator to carry out the goals of the affirmative action program which had been imposed upon it. The program sought to establish a nonwhite membership of twenty-nine percent in this sheetmetal local. The majority determined that the membership goal which was part of the remedy the lower court imposed was subject to examination regarding its permissibility under the equal protection component of the Fifth Amendment. It also concluded that the requirements necessary for affirmance had been met. This case too is replete with a multiplicity of opinions, perhaps the critical one being Justice O'Connor's, who considered the membership requirement to be an unjustified quota under the statute and takes pains to detail the difference between acceptable goals and timetables and a quota.

United States v. Paradise involved an affirmative action remedy after adjudication of discrimination in an egregious situation. In litigation extending back as far as 1972, the Department of Public Safety of the State of Alabama had been repeatedly found guilty of discrimination against blacks. After many attempts to obtain compliance and numerous consent decrees, the case finally reached the Supreme Court on the constitutionality of the remedy. The district court had required the Department to hire one black trooper for each white trooper until blacks constituted approximately twenty-five percent of the staff. Of significance in the case was whether the court had the power to order the hiring relief and whether the one black-one white promotion scheme was permissible under the equal protection guarantee of the Constitution. Again, the U.S. Department of Justice intervened, main-

37. *Local 28*, 478 U.S. at 447-48.

taining that race-conscious relief ordered in the case violated the Constitution. Again the Supreme Court rejected this position. It also rejected the government's attempt to show that even if the conduct provided a compelling state interest the relief was not sufficiently narrowly tailored to meet the standards that the Court had previously endorsed. Again there were dissents. This time O'Connor, Scalia, and Rehnquist objected that the district court did not consider available alternatives in fashioning relief; and therefore, it was not acting consistently with the strict scrutiny standard requirement that relief be narrowly tailored. If the facts of *Local 28* and *Paradise* don't justify the most far-reaching remedy, it is hard to imagine what facts would satisfy the dissenters.

III. WHAT SEEMS TO BE THE EMERGING JURISPRUDENCE IN THE MAJORITY OF THE SITTING COURT DOES NOT WITHSTAND "STRICT SCRUTINY"

In my opinion, the Supreme Court's performance in the employment discrimination area over the last decade has been nothing short of shameful. The Justices have engaged in almost spiteful, ideological bickering, treating us to a multiplicity of excessively long concurring and dissenting opinions, and leaving the bar and the bench below frequently less well served by the Court having decided a case than we would have been if they left the matter to the warring views of the appellate courts.

On the one hand, I suppose, taking a cynical view, lawyers should react with glee. It being virtually impossible to get any clear guidance from the cases, clients can be scared out of their bloody wits by the uncertainty. And the legal fees charged as a result thereof can continue to skyrocket. For those of us in academia, especially those of us who occasionally produce teaching materials for the legal community, the task of editing voluminous cases and dissents is a daunting one. Despite our best efforts to shorten them, they keep expanding and it drives the cost of the casebooks ever higher — as well as the length of assignments.

I would like to suggest to the incoming President that he get a bill introduced in Congress that requires all sit-down desks to be removed from the judges' chambers. They must stand up and write their own opinions and dissents and provide them no law clerks. Perhaps we should even require they write them out by longhand on yellow pages. I can guarantee you that the length of the opinions would be drastically

reduced by such measures.

The Chief Justice has disclaimed any responsibility in the Court to provide us with clear guidance:

Justice Brennan's dissent takes us to task for "tend[ing] merely to obfuscate, rather than inform, our understanding of the meaning of rights under the law. . . . Were this Court constituted to operate a national classroom on "the meaning of rights" for the benefit of interested litigants, this criticism would carry weight.³⁸

With due respect to the Justice's view, I submit that it is the obligation and duty of the Court to resolve disputes not create greater ones, and to consider what is necessary and useful to help maintain peace and tranquillity in the country. I also would suggest that in the interest of collegiality the Justices should put aside their ideological stances. I fear that the very integrity of the Supreme Court and of the entire judicial process is at risk.³⁹ It is increasingly difficult to convince new generations of law students that the process is driven by the search for truth and justice and marked by practices conducted with integrity.

Some members of the Court still insist that the United States Constitution is color-blind. There can be no fair reading of history that would support such a proposition. The United States Constitution was itself crafted in such a way that guaranteed the southern states would remain in the federation by enabling them to continue slavery and to count at least two-thirds of a slave for purposes of determining the state's representation in the Congress of the United States. It is true, however, that the founding fathers did not use the word blacks or Negroes in the original documents, although they did refer specifically to Indians. I cite the Supreme Court of the United States in *Dred Scott v. Sanford*⁴⁰ as authority for the real color of the United States Constitution. Moreover, I cite the *Civil Rights Cases*,⁴¹ and *Plessy v. Ferguson*,⁴² to help my listeners appreciate the long-standing color taint in the United States Constitution.⁴³

38. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 476 n.13 (1982).

39. And I cite as illustrations academic movements such as the Critical Legal Studies movement, the feminist movements, and the critical race theorists. All of these movements project suspicion, some bordering on disrespect, of the bona fides of the judicial process.

40. 60 U.S. (19 How.) 393 (1857).

41. 109 U.S. 3 (1883).

42. 163 U.S. 537 (1896).

43. For some enlightenment on the myth, see generally Neil Gotanda, *A Critique of 'Our Constitution is Color Blind'*, 44 STAN. L. REV. 1 (1991); DONALD E. LIVELY, *THE CONSTITUTION*

Despite the passage of the Fourteenth Amendment, it was not until the Warren Court formulated broad antidiscrimination principles that the nation began to move toward a democracy in which people of color were even theoretically allowed to participate equally. The march of statutory enactments at the national level, beginning with the 1964 Civil Rights Act and continuing until today, (as well as at the state and local levels) are driven by politics much less than by ideology or philosophy. Affirmative action has become a political football, and code words like "law and order," "crime in the streets," and even "family values and welfare" are laden with racist overtones. It is disingenuous for a majority of the Court to hide behind myths of a color-blind constitution to justify prohibiting state and local governments, and severely limit the federal government, in their effort aggressively to deal with the deprivations which come from racial discrimination — directly and indirectly. For centuries in this country, discrimination by law and in fact was directed at groups. Restricting remedial efforts to individual victims denies to society an adequate tool to "get beyond racism."

It is disingenuous for the Court to intone "strict scrutiny" as a justification for frustrating these modest efforts as if strict scrutiny were invented on the mountain and etched on the tablets of stone which Moses allegedly brought down. Or at the very least written on the back of the parchment but which the founding fathers somehow forgot to include in the document which the Court claims to be "color-blind." Or if not that, perhaps it's written somewhere on the back of the Fourteenth Amendment or the Thirteenth or the Fifteenth, where?

The fact of the matter is that it comes from a *footnote* in a 1938 Supreme Court case which had nothing at all to do with invidious discrimination based on race or other such considerations. In *United States v. Carolene Products Co.*,⁴⁴ a case involving regulation of filled milk products, Justice Stone, a former law professor, posed some limits on judicial review as a way to slow the Court's overreaching in striking down various economic regulations. To maintain the role of the Court in intervening when governments were abusing "discrete and insular minorities," the Justice posed a higher level of scrutiny to justify the continuance of programs directed against minority groups and fundamental rights.

AND RACE (1992).

44. 304 U.S. 144, 152 n.4 (1938).

It was not until 1942 that this case was ever referenced.⁴⁵ Ironically, in the Japanese internment case,⁴⁶ lip service was given to the strict scrutiny standard and compelling interest found and the constitutionality of the government's program sustained. Years later we have found out that there was no such compelling interest and reparation efforts were made through an act of Congress.

It seems that this Supreme Court has set its face against civil rights advancement, as well as other advancements that protect individuals against state overreaching. It is not for want of alternative respectable jurisprudence, but rather it seems the Court is bent on acting out its version of constitutional protections in a diverse democracy.

On the race based benign program efforts of state and local governments, just as a professor "invented" strict scrutiny in the first instance back in the 1930s, professors have tendered a sliding scrutiny standard to the Court at least for the last fifteen years. Rejecting the effort to make sex a suspect class, the Court has adopted the sliding scale of scrutiny in gender discrimination cases.⁴⁷ In fact, a majority of the Court in *Metro* indorsed it in a race case involving affirmative action by the federal government.⁴⁸ A relaxed standard of scrutiny would be a perfectly respectable jurisprudential choice to permit states to help eliminate problems which they helped to create over the last 400 years.

It is not just that the current jurisprudence puts a cloud on what the state and local governments can do, it clouds the whole area of affirmative action by the private entrepreneur. Leading representatives of corporate America have realized that our future depends on effective and efficient utilization of all of our human resources. The demographic projections suggest there will be a majority of nonwhites and females in the workforce in the not too distant future. The government, however, led by an ideologically fixated emerging Court majority, is busy crafting legal constructs which will make it difficult if not impossible for employers to meet the future challenges. It is also apparent that the employers cannot do it alone, as our entire system of education will need to be altered to reflect the impending demographic shifts.

45. See *Skinner v. Oklahoma*, 316 U.S. 535, 544 (1942) (Stone, J., concurring).

46. *Korematsu v. United States*, 323 U.S. 214 (1944) Cf. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

47. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). Gerald Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

48. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

IV. DEMOGRAPHICS ARE DESTINY

The only resource a nation has of substantial dependability is the creative energies of its people. Any program or initiative that in fact contributes to or exacerbates the waste of human resources should be discontinued. Given the demographics as they are portrayed to us, and even factoring in a fairly substantial margin of error, we may already be too late to avoid a crisis by the year 2000. Each year we fail to educate and train that year's crop of young people adds to the stream of the unprepared being spilled into the population. I say spilled into the population because if they are unprepared there will be little room for them in the workforce. Each year we stifle the aspirations of those who enter the workforce, the aspirations for meaningful participation, we not only underutilize their talents but send a message of futility to those who are waiting in the wings. The Supreme Court's madness in suggesting in *Wygant v. Jackson Board of Education* that the establishment of role models is not a compelling government interest is more counterproductive than its claim that, rather than obey the law which prohibits invalid tests which do not predict job success, employers will violate the law by resorting to quotas.

While affirmative action in employment in the past generation might have been a morality play, efficient utilization of our human resources for tomorrow is a matter of economic survival. If we are not to become a third world nation in the near term, we must address the demographic realities. Ideological posturing about a color-blind United States Constitution that never existed will not deal with the fact that before too long the majority of the participants in the workforce will be women and minorities. Unless we are going to replicate a society like South Africa's where the best jobs are reserved for a precious few, a society they are painfully dismantling, we had best be about equipping all our people to take their places in the productive side of our economic, social, and political activities. Tomorrow may be too late. The crisis is *now*!

Teaching is the most optimistic of professions. The product is in the projection of knowledge into the future through our students. It is impossible to teach effectively if all we project is gloom and doom. Last fall the people of this nation sent a most powerful message on the issue of diversity. There are more women, blacks, and other people of color in the Congress than ever before in this nation's history. For the first time, there is a black woman and a Native American man in the United States Senate. Although they are less than their proportion of

the population by far, as women and minorities constitute the majority of our people, the increase in their participation in the face of twelve years of benign neglect, if not malignant opposition from the government, seems a clear message from the people that diversity is the future. The election of Governor Clinton and Senator Gore, who ran on a campaign theme of bringing all our people together, is rejection of government by division and exclusion. We have reason for renewed optimism and hope. I believe "together we can do it."

