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## Affirmative Action: Hypocritical Euphemism or Noble Mandate?

Theodore J. St. Antoine

*University of Michigan Law School, [tstanton@umich.edu](mailto:tstanton@umich.edu)*

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## AFFIRMATIVE ACTION: HYPOCRITICAL EUPHEMISM OR NOBLE MANDATE?\*

Theodore J. St. Antoine†

Title VII of the Civil Rights Act of 1964<sup>1</sup> was adopted in an atmosphere of monumental naivete. Congress apparently believed that equal employment opportunity could be achieved simply by forbidding employers or unions to “discriminate” on the basis of “race, color, religion, sex, or national origin,”<sup>2</sup> and expressly disavowed any intention to require “preferential treatment.”<sup>3</sup> Perhaps animated by the Supreme Court’s stirring desegregation decisions of the 1950’s,<sup>4</sup> the proponents of civil rights legislation made “color-blindness” the rallying cry of the hour.<sup>5</sup>

Today we know better. The dreary statistics, so familiar to anyone who works in this field, tell the story. Others have provided exhaustive surveys of the figures,<sup>6</sup> and I shall not review them at any length. It is enough to observe that after a decade of federally enforced nondiscrimination in employment, minorities are still twice as likely as whites not to have jobs.<sup>7</sup> The median family income of blacks as compared with that of whites has improved negligibly, from 54 percent in 1964 to 58 percent in the mid-70’s.<sup>8</sup> Minorities continue to occupy a disproportionately low percentage

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†Dean and Professor of Law, University of Michigan Law School. A.B., 1951, Fordham College; J.D., 1954, University of Michigan.

<sup>1</sup>42 U.S.C. §§ 2000e-2000h-6 (1970), *as amended* (Supp. III 1973) [hereinafter cited as CRA].

<sup>2</sup>CRA, *supra* note 1, at §§ 703(a)-703(d).

<sup>3</sup>CRA, *supra* note 1, at § 703(j).

<sup>4</sup>*Brown v. Board of Education*, 347 U.S. 483 (1954) (public schools); *Muir v. Louisville Park Theatrical Ass’n*, 347 U.S. 971 (1954) (public amphitheater); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (public parks). *See also* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 679 (1975).

<sup>5</sup>*See* text accompanying notes 54-56 *infra*.

<sup>6</sup>*See, e.g.*, L. THURLOW, *POVERTY AND DISCRIMINATION* (1969), and authorities cited in notes 7-10 *infra*.

<sup>7</sup>U.S. COMMISSION ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT - 1974*, VOL. V, TO ELIMINATE EMPLOYMENT DISCRIMINATION 407 n.1459 (1975) [hereinafter cited CIVIL RIGHTS ENFORCEMENT]; U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, *CURRENT POPULATION REPORTS, SPECIAL STUDIES, SERIES P-23, NO. 54, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES 1974*, at 1, 64 (1975) [hereinafter cited BLACK POPULATION STATUS].

<sup>8</sup>BLACK POPULATION STATUS, *supra* note 7, at 2, 25.

of the more attractive positions.<sup>9</sup> The employment situation of women in relation to white males is similarly bleak.<sup>10</sup>

If we are to secure genuine equality of opportunity for the races and the sexes in the job market within the foreseeable future, something more is plainly needed than the mere prohibition of positive acts of discrimination and the substitution of a policy of passive neutrality. "Affirmative action" of the sort that has been ordered by the federal courts and federal agencies has held out the greatest promise of success and, at the same time, has aroused the fiercest opposition. This article will focus upon the nature and the legality of this potent but controversial weapon against discrimination.

### I. AFFIRMATIVE ACTION AS A REMEDY FOR DISCRIMINATORY CONDUCT

Affirmative action takes several forms. An employer may merely attempt, through advertising and word-of-mouth publicity, to enlarge the number of minorities and women in the pool of applicants without according them any preferential treatment in the hiring decision itself. Or a union and an employer may agree to increase the percentage of minorities or women in the union's and employer's joint job-training program. Or, finally, the employer may give preferential treatment to minorities or women in the actual employment process—in hiring, promoting, or laying off. In these various instances, the affirmative action may involve setting numerical or percentage "goals" or "targets," which the employer or union will make a "good faith" effort to reach, or it may even involve fixing an absolute "quota" that must be met. Another important distinction can be drawn between (1) affirmative action required by a court as part of a remedy for proven past discrimination in violation of Title VII or of the Civil Rights Acts of 1866<sup>11</sup> or 1871,<sup>12</sup> and (2) affirmative action required under Executive Order 11246<sup>13</sup> as a condition of securing and retaining a contract from the federal government, even though the contracting party has not been shown to have violated any statutory prohibition against discrimination.

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<sup>9</sup>CIVIL RIGHTS ENFORCEMENT, *supra* note 7, at 470-72; BLACK POPULATION STATUS, *supra* note 7, at 2, 73. Yet there has been a modest betterment of minority job status, as any veteran airline traveler can attest after scanning a group of fellow passengers. From 1964 to 1974, the percentage of minorities in white collar occupations increased from 16 to 24 (the comparable percentages for whites were 41 and 42). *Id.*

<sup>10</sup>CIVIL RIGHTS ENFORCEMENT, *supra* note 7, at 470-72. The median income of full-time female workers in the early 1970's was only 60 percent that of males.

<sup>11</sup>42 U.S.C. § 1981 (1970).

<sup>12</sup>42 U.S.C. § 1983 (1970).

<sup>13</sup>3 C.F.R. 169 (1974), *reprinted in* 42 U.S.C. § 2000e app., at 281 (1970).

The first of these last two types of affirmative action obligations for employers or unions may entail hiring or accepting into membership a specific number of minority persons, or hiring or accepting blacks and whites on a fixed ratio until a certain percentage of blacks are employed or admitted to membership. Such court orders against both unions and public and private employers have been sustained under the 1866 and 1871 Civil Rights Acts,<sup>14</sup> as well as under Title VII of the 1964 Act.<sup>15</sup>

Once a particular discriminatory violation has been found, the courts have not been much troubled about using a racial preference or a fixed formula in fashioning relief. Often cited in support of this approach is the Supreme Court's school desegregation decision in *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>16</sup> where it was suggested that "mathematical ratios" may serve "as a useful starting point in shaping a remedy."<sup>17</sup> There also seems to have been quiet acceptance of the notion that the established past discrimination justifies a quota form of relief, despite the fact that the remedy will aid a victimized *group* rather than any identifiable individual discriminatees.

Another potential hurdle in Title VII cases which has been cleared is section 703(j) of the CRA.<sup>18</sup> This provision precludes an interpretation of Title VII that would require "preferential treat-

<sup>14</sup>*NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974); *Erie Human Relations Comm'n v. Tullio*, 493 F.2d 731 (3d Cir. 1974); *Vulcan Soc'y v. Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973); *Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (en banc); *Carter v. Gallaher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). The 1866 Civil Rights Act, 42 U.S.C. § 1981 (1970), has recently been interpreted to prohibit private acts of employment discrimination, but it is limited to racial cases. *Caldwell v. Nat'l Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971); *Young v. Int'l Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971). The 1871 Act, 42 U.S.C. § 1983 (1970), requires the presence of state action, but applies broadly to any deprivation of constitutional rights, including discrimination based on race, sex, or national origin. *See, e.g., the O'Neill, Bridgeport, Vulcan Society, and Tullio cases, supra.*

<sup>15</sup>*EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Rios v. Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *United States v. Masonry Contractors Ass'n*, 497 F.2d 871 (6th Cir. 1974); *United States v. N. L. Indus., Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States v. Lathers Local 46*, 471 F.2d 408 (2d Cir. 1973); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); *United States v. IBEW Local 38*, 428 F.2d 144 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970); *Heat and Frost Insulators Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969).

<sup>16</sup>402 U.S. 1 (1971).

<sup>17</sup>*Id.* at 25.

<sup>18</sup>Section 703(j), 42 U.S.C. § 2000(e)-2(j) (1970), reads in its entirety as follows:

Noting contained in this article shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. HeinOnline -- 10 U. Mich. J.L. Reform 30 1976-1977

ment" to eliminate any "imbalance" of race or sex. The courts have concluded, however, that section 703(j) was only intended to negate any obligation to engage in "preferential quota hiring as a means of changing a racial imbalance attributable to causes other than unlawful discriminatory conduct."<sup>19</sup> In cases of proven discrimination, section 706(g)'s<sup>20</sup> authorization of "affirmative action" to remedy unfair employment practices is controlling, and comprehends the power to order preferential treatment, often the most effective means of eliminating the consequences of discrimination.

Even so, Professors Harry Edwards and Barry Zaretsky, in a comprehensive study of preferential relief, have emphasized that the courts have tended to circumscribe quota orders carefully, in order to minimize the problems of "reverse discrimination" against white males.<sup>21</sup> Thus, for example, the order is almost always limited in duration, and set to expire at the end of a given period of time or upon the meeting of a specified goal.<sup>22</sup> Furthermore, preferential remedies are usually employed only when no feasible alternative means exist for offsetting the effects of the discrimination.<sup>23</sup>

An especially knotty remedial problem is the granting of retroactive seniority to discriminatees when this will adversely affect the promotional or layoff rights of innocent incumbent employees. The Supreme Court has upheld such retroactive relief in favor of identifiable job applicants who have been the victims of discrimination.<sup>24</sup> On the other hand, several federal courts of appeals have indicated that retroactive seniority inimical to incumbents should not be awarded to minorities or women who cannot establish that they themselves have been subjected to discrimination.<sup>25</sup> The Second Circuit has recently sought to enunciate some general guidelines for these cases, declaring that quota relief is proper only when there is a pattern of long-continued and egregious discrimination,

<sup>19</sup>Rios v. Steamfitters Local 638, 501 F.2d 662, 630 (2d Cir. 1974). See also the *Vogler*, *IBEW, Ironworkers*, and *Lathers* cases, *supra* note 15. See generally *Oburn v. Sharp* 521 F.2d 142 (3d Cir. 1975).

<sup>20</sup>42 U.S.C. 2000e-5(g) (1970).

<sup>21</sup>Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1, 32 (1975).

<sup>22</sup>*Id.* at 9, 32.

<sup>23</sup>*Id.* at 10, 35.

<sup>24</sup>Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). *Accord*, *Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976); *Chance v. Board of Examiners*, 11 Fair Empl. Prac. Cas. (BNA) 1450 (2d Cir. 1976); *Meadows v. Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975).

<sup>25</sup>*Kirkland v. Dep't of Correctional Services*, 520 F.2d 420 (2d Cir. 1975); *Watkins v. Steelworkers Local 2369*, 516 F.2d 41 (5th Cir. 1975); *Chance v. Board of Examiners*, 11 Fair Empl. Prac. Cas. (BNA) 1450 (2d Cir. 1976). See also *Jersey Central Power & Light Co. v. IBEW Local 327*, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded sub nom.* *EEOC v. Jersey Central Power & Light Co.*, 425 U.S. 987 (1976), *cert. denied*, 425 U.S. 998 (1976) and *Patterson v. American Tobacco Co.*, 12 Fair Empl. Prac. Cas. (BNA) 314 (4th Cir. 1976). *But see* *United States v. Navajo Freight Lines, Inc.*, 525 F.2d 1318 (9th Cir. 1975); *United States v. Time-DC, Inc.*, 517 F.2d 299 (5th Cir. 1975).

and when the impact of the quota will not be concentrated on a small, ascertainable group of nonminority persons.<sup>26</sup> None of this developing body of law is directly applicable, however, until a discriminatory violation has been found, and a court is attempting to fashion an appropriate remedy.

## II. AFFIRMATIVE ACTION AS A CONDITION OF FEDERAL CONTRACTS

The harder case involves the imposition of affirmative action hiring "goals" or "quotas" on a government contractor under Executive Order 11246, despite the absence of any demonstrated past discrimination by the employer or by any union representing the employer's employees. I shall argue (1) that the Executive Order's affirmative action in effect calls for race and sex preferences in recruitment and hiring, and that the government's occasional disclaimers or denunciations of "reverse discrimination" are disingenuous; (2) that, at least in the present stage of our long, frustrating struggle to eradicate all vestiges of discrimination, conditioning government contracts on such preferences is constitutionally permissible; and (3) that such preferences should not be held violative of Title VII, although there is obviously more doubt on this last point.

### A. *Preferential Treatment*

Revised Order 4, issued by the Department of Labor's Office of Federal Contract Compliance in 1972, implements Executive Order 11246 by setting forth "Affirmative Action Guidelines" to cover federal contractors and subcontractors in industries other than construction.<sup>27</sup> Its essence is conveyed by section 60-2.10:

An affirmative action program is a set of specific and *result-oriented* procedures to which a contractor commits himself to apply every good faith effort. . . . An acceptable affirmative program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies.<sup>28</sup>

The Equal Employment Opportunity Commission indicates that

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<sup>26</sup>EEOC v. Sheet Metal Workers Local 638, 12 Fair Empl. Prac. Cas. (BNA) 755 (2d Cir. 1976); Kirkland v. Dep't of Correctional Services, 520 F.2d 420 (2d Cir. 1975).

<sup>27</sup>41 C.F.R. §§ 60-2.1 to 60-2.32 (1976). The construction industry is covered by 41 C.F.R. §§ 60-1.1 to 60-1.47 (1976).

<sup>28</sup>*Id.* § 60-2.10 (emphasis supplied).

the success of an affirmative action program will be determined in large part by its results. Employers are told there must be a "measurable, yearly improvement in hiring, training and promotion of minorities and females in all parts of your organization."<sup>29</sup> Revised Order 4 counsels employers to have recruiting sources "actively recruit and refer minorities and women for all positions listed," and to notify "minority and women's organizations" of the company's affirmative action policy.<sup>30</sup> The Office for Civil Rights in the Department of Health, Education and Welfare, which is responsible for the enforcement of Executive Order 11246 in institutions of higher education, urges universities to seek academic personnel by using as recruitment channels women and minorities who are already in academic or professional positions.<sup>31</sup>

At the same time, however, Revised Order 4 warns employers: "Goals may not be rigid and inflexible quotas which must be met."<sup>32</sup> Even more specifically, OFCC declares: "The purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin."<sup>33</sup> According to HEW, a university is still entitled to select the "most qualified" candidate, without regard to race or sex.<sup>34</sup> Moreover, it would be a violation of the Executive Order for an academic department to prefer a woman for a post in order to meet an affirmative action goal, or to consider only blacks for an opening in a black studies program.<sup>35</sup> While all employment advertising must state that a contracting institution is an "equal opportunity employer," it would be "unacceptable" to say that "this is an affirmative action position."<sup>36</sup>

In a celebrated article supporting the Supreme Court's conclusions in the early school desegregation cases,<sup>37</sup> Professor Charles Black resorted to the philosopher's "sovereign prerogative of laughter" to dispose of the claims that the "separate but equal" doctrine had any meaning in the context of the actual conditions then prevailing in the South.<sup>38</sup> With all due respect for those who

<sup>29</sup>EQUAL EMPLOYMENT OPPORTUNITY COMM'N, AFFIRMATIVE ACTION AND EQUAL EMPLOYMENT: A GUIDEBOOK FOR EMPLOYERS (January, 1975), *quoted in* Fair Employment Practice Manual (BNA) 421:205.

<sup>30</sup>41 C.F.R. § 60.2.21(b) (1) and (3) (1976).

<sup>31</sup>Fair Employment Practice Manual (BNA) 490:60c.

<sup>32</sup>41 C.F.R. § 60-2.12(e) (1975).

<sup>33</sup>*Id.* § 60-2.30.

<sup>34</sup>Memorandum to College and University Presidents, Dec. 1974, 40 Fed. Reg. 2459, 2460 (1975).

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>See note 4 *supra*.

<sup>38</sup>Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 424 (1960).

may believe otherwise,<sup>39</sup> I think that laughter is also the most apt response to anyone who would deny that the inevitable thrust of affirmative action programs is to impel employers to prefer minorities and women in recruitment and hiring. Lip service is paid to the concept of nondiscrimination to the point where the conscientious employer or union must begin to feel schizophrenic, but in the end it is the "results" that count.

In my view, the compulsion of disparate treatment is epitomized by the official recommendations for soliciting applications from minority and women leaders and organizations. We would not countenance parallel inquiries addressed to white males concerning "the best qualified white males you know." I trust that almost no one would maintain that minorities and women are to be contacted in order to secure color-blind and sex-neutral recommendations of candidates.

Many persons draw a sharp distinction between color-conscious and sex-conscious recruitment, that is, enlarging the pool of job applicants through advertising and soliciting on the one hand, and color-conscious and sex-conscious employment decisions on the other. Surely there is an important practical difference here, and as a matter of public policy we might well decide to require or permit the one and not the other. But if there is an absolute constitutional or statutory ban on employment preferences based on race or sex, it must reach the first, often critical, stage of recruiting, as well as the later stages of hiring, promoting, and so on. In any event, there seems to be ample evidence that the government's affirmative action programs have led to race-based and sex-based hiring in industry and education.<sup>40</sup>

The question, then, is not whether affirmative action involves preferential treatment, but whether such preferential treatment is defensible as a matter of constitutional and statutory law and as a matter of sound social policy.

### B. *The Constitution*

The Constitution has been said to be "color-blind,"<sup>41</sup> but the Constitution itself says no such thing. It does not even preclude, in

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<sup>39</sup>For thoughtful defenses of affirmative action programs, within the more traditional formulation that they do not in fact involve what would or might be illegal preferences based on race or sex, see Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341, 379-82; Nash, *Affirmative Action Under Executive Order 11,246*, 46 N.Y.U.L. REV. 225, 230 (1971). See also *The Quota Controversy*, NEW REPUBLIC, Oct. 21, 1972, at 9-10.

<sup>40</sup>See, e.g., N. GLAZER, *AFFIRMATIVE DISCRIMINATION* 33-66 (1975); Seligman, *How "Equal Opportunity" Turned into Employment Quotas*, FORTUNE, March 1973, at 160; *Affirmative Action: The Negative Side*, TIME, July 15, 1974, at 86; *Discrimination in Higher Education: A Debate on Faculty Employment*, C. R. DIG., Spring 1975, at 3.

<sup>41</sup>See, e.g., Harlan, J., dissenting in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).  
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terms, disparate treatment of the races or the sexes. All that the fourteenth amendment guarantees is "the equal protection of the laws."<sup>42</sup> Fifth amendment due process incorporates similar safeguards.<sup>43</sup> The mandate of equal treatment, however, presupposes equal status or circumstances.<sup>44</sup> Whether government-sponsored preferences based on race or sex are constitutionally permissible should therefore depend upon an examination of the similarity or dissimilarity in the contemporary status and situation of minorities and women on the one hand and of white males on the other. True, the Supreme Court has declared that race is a "suspect" governmental classification,<sup>45</sup> but even racial preferences may be justified if they serve a compelling governmental interest and are the least drastic means of accomplishing an appropriate end.<sup>46</sup> Indeed, where racial classification is used for "benign" purposes, that is, to benefit rather than disadvantage a minority group, it has been argued that the less strict "rational basis" test of constitutionality should be applied.<sup>47</sup>

Moving beyond these efforts to fit the problem of race-based and sex-based preferences into the conventional framework of constitutional analysis, a major article by Professor Terrance Sandalow seems persuasive that the ultimate test of the validity of any racial or sexual classification lies in an evaluation of its implications for the kind of society we are seeking.<sup>48</sup> If preferential treatment is a necessary step toward a more fully integrated work force and toward genuine equality of employment opportunity, then no constitutional barriers should stand in the way. Professor Sandalow recognizes that this approach imposes on the courts the burden of making difficult value judgments, but he contends that "value choices . . . are inescapable if the equal protection clause is to be employed as a measure of legislative power."<sup>49</sup> Of course, this places heavy stress on judicial deference to the initial legislative

<sup>42</sup>U.S. Const. amend. XIV, § 1.

<sup>43</sup>*Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>44</sup>This concept is more fully elaborated in Sandalow, *supra* note 4, at 654-63, to which I am deeply indebted, and to which I refer anyone interested in the philosophical underpinnings of the theory I have merely sketched here.

<sup>45</sup>*McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

<sup>46</sup>*See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). *See also Edwards & Zaretsky, supra* note 21, at 12.

<sup>47</sup>Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 728-36 (1974); Edwards & Zaretsky, *supra* note 21, at 14. *See also Morton v. Mancari*, 417 U.S. 535 (1974) (employment preferences for American Indians). *Cf. Kahn v. Shevin*, 416 U.S. 351 (1974) (property tax exemption for widows but not widowers). For a strong statement that the Constitution flatly proscribes all racial classification in the distribution of benefits and costs by government, see Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1.

<sup>48</sup>Sandalow, *supra* note 4, at 653.

<sup>49</sup>*Id.* at 654.

judgment in the absence of a patent breach of established constitutional limitations, but that is wholly in keeping with our traditions of democratic decisionmaking.

Two reservations must be noted about this latter mode of analysis. First, as Sandalow and others have observed,<sup>50</sup> judicial leniency in scrutinizing the preferential policies of government is most justified in theory, and most evident in practice, when such policies bear the stamp of explicit legislative approval. Quasi-administrative action, such as that of state universities, may be subject to a more searching inquiry. Executive action, which perhaps carries the implied sanction of the legislature, falls somewhere in between. This last category would seem to include the Presidential Executive Order instituting the federal affirmative action program, and the departmental regulations implementing it.

Second, I have to concede that the Supreme Court's curious timidity in backing away from a ruling on the preferential law school admissions policy at issue in *DeFunis v. Odegaard*<sup>51</sup> raises doubts about any theory which supports racial preference. The case was declared moot on the ground the student who had challenged the special minority admissions program was about to graduate. But the Court knew of that likelihood at the time it accepted the case and heard oral argument. The conclusion seems inescapable that five Justices simply got cold feet when forced to a choice between slowing minority progress and declaring that the Constitution is not "color-blind" after all. Further uncertainty about what decision might have emerged is created by Justice Douglas' separate opinion, denouncing in absolutist terms any use of race as a criterion for governmental determination.

A number of persons who are experienced in the civil rights field have speculated that a majority of the Supreme Court will try to avoid a resolution of the constitutionality of racial preferences until the need for them is past. At that point the Court would be free to issue a ringing (but meaningless) reaffirmation of "color-blindness." I find this thought disquieting. Although I believe that race-based preferences can be squared with the Constitution, I realize that they necessarily mean that certain persons will be deprived, at least in the short run, of the very advantages the minorities acquire. If the Constitution is indeed color-blind, the

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<sup>50</sup>*Id.* at 693-703; Edwards & Zaretsky, *supra* note 21, at 15.

<sup>51</sup>416 U.S. 312 (1974) (four Justices dissenting), *vacating and remanding as moot* 82 Wash.2d 11, 507 P.2d 1169 (1973). *See also* Cramer v. Virginia Commonwealth Univ., 12 Fair Empl. Prac. Cas. (BNA) 1397 (E.D. Va. 1976) (invalidating preferential female hiring for state university faculty); Bakke v. Regents of Univ. of Cal., 18 Cal.3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 45 U.S.L.W. 3555 (1977) (invalidating preferential minority admissions for state medical schools where not shown necessary for integrating school).

Court would thus be leaving unredressed the denial of some highly important individual rights. I prefer to believe that in due course the Court will come to grips with this vital issue, and will decide it with full awareness that "equal protection" is not a mathematician's construct, but a realist's injunction to treat alike those who are, in this remarkably diverse world, truly alike.<sup>52</sup>

### C. Title VII

Section 703 of the Civil Rights Act forbids an employer or union to "discriminate . . . because of . . . race."<sup>53</sup> The leading case on the applicability of section 703 to affirmative action called for by Executive Order 11246 is *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*.<sup>54</sup> There, a challenge was mounted to the Department of Labor's so-called "Philadelphia Plan," under which federal contractors in the Philadelphia area would have to make good faith efforts to meet specific percentage "goals" for minority group employment in six construction trades. The goals ranged from 4 percent to 9 percent for 1970 up to from 19 percent to 26 percent for 1973. They were based upon such factors as the availability of minority group persons for employment in each trade, and the impact of the program on the existing labor force. The plan was upheld against constitutional attack on due process and equal protection grounds, and was found to be neither violative of Title VII nor inconsistent with the National Labor Relations Act. The court viewed the program as an appropriate requirement of "affirmative action" to remedy the lack of minority

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<sup>52</sup>The Supreme Court has granted certiorari in *Bakke v. Regents of Univ. of Cal.*, 18 Cal.3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 45 U.S.L.W. 3555 (1977), where the California Supreme Court invalidated preferential minority admissions for the medical school at the University of California, Davis.

<sup>53</sup>CRA, *supra* note 1, at § 703.

<sup>54</sup>442 F.2d 159 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971). See also *Barnett v. Int'l Harvester Co.*, 12 Fair Empl. Prac. Cas. (BNA) 786 (W.D. Tenn. 1976); *Associated Gen'l Contractors v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); *Southern Illinois Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972). *Contra*, *Weber v. Kaiser Aluminum & Chem. Corp.*, 12 Fair Empl. Prac. Cas. (BNA) 1615 (E.D. La. 1976); *Brunet v. City of Berkeley*, 12 Fair Empl. Prac. Cas. (BNA) 937 (N.D. Cal. 1975). *Cf.* *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273, 280 & n.8 (1976), where the Court said: "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes. . . . [W]e do not consider here the possibility of [an affirmative action] program, whether judicially required or otherwise prompted." For a comprehensive history of the evolution of the Philadelphia Plan, see Jones, *supra* note 39. Serious questions have been raised about the efficacy of the Philadelphia Plan and other similar "hometown plans" in the construction industry. See, e.g., Donagan, *The Philadelphia Plan: A Viable Means of Achieving Equal Opportunity in the Construction Industry or More Pie in the Sky?* 20 KAN. L. REV. 195 (1972); Edwards & Zaretsky, *supra* note 21, at 31.

tradesmen in key trades, since the Executive Order was held not limited to mere policing against positive acts of discrimination. Thus, the court expressly noted, "The absence of a judicial finding of past discrimination is also legally irrelevant."<sup>55</sup>

The court of appeals in *Contractors Association* was not deterred by the provision against preferential treatment to eliminate racial imbalance, which is found in section 703(j)<sup>56</sup> of the Civil Rights Act. The court said, "Section 703(j) is a limitation only upon Title VII not upon any other remedies, state or federal."<sup>57</sup> To the argument that "a decision to hire any black employee necessarily involves a decision not to hire a qualified white employee," the court replied, "This is pure sophistry. The findings in the September 23, 1969 order disclose that the specific goals may be met, considering normal employee attrition and anticipated growth in the industry, without adverse effects on the existing labor force."<sup>58</sup> In another part of its opinion, however, the court forthrightly conceded, "Clearly the Philadelphia Plan is color-conscious."<sup>59</sup> While I accept the logical possibility, but not the practical likelihood, that employers subject to a Philadelphia Plan will make all actual hiring decisions on a color-blind basis, that does not seem to me to end the debate. As the court apparently recognized, race must be taken into account, at least in putting together the pool of applicants. That, at the minimum, is one definite and admitted form of preferential treatment. If Title VII forbids all racial preferences in employment (except as a remedy for a proven discriminatory violation), I do not see how affirmative action programs involving numerical targets can legally survive. To argue otherwise would indeed be "pure sophistry."

Does Title VII forbid the preferential treatment that I have argued is inevitable under the Executive Order? Undoubtedly there is support in the legislative history of the original 1964 statute for the conclusion that it does. This is especially true of statements made by the proponents of Title-VII. Thus, for example, several members of the House Judiciary Committee declared, "It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty."<sup>60</sup>

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<sup>55</sup>442 F.2d at 175.

<sup>56</sup>42 U.S.C. § 2000(e)-2(j) (1970), *supra* note 18.

<sup>57</sup>442 F.2d at 172.

<sup>58</sup>*Id.* at 176.

<sup>59</sup>*Id.* at 173.

<sup>60</sup>H.R. REP. NO. 914, Pt. 2, 88th Cong., 1st Sess. 29 (1963) (Additional Views of Congressmen McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias, and Bromwell). There was no majority report of the Committee, except for the text of H.R. 7152 itself.

Senator Williams commented that "to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy."<sup>61</sup> Similarly, the floor managers of the bill in the Senate insisted that "any deliberate attempt to maintain a racial balance, whatever such balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire on the basis of race."<sup>62</sup>

Despite these assurances, however, the opponents of Title VII continued to argue that it would require preferential treatment and racial quotas. The following remarks of Senator Smathers are typical: "[E]very employer will have to have someone on his staff whose job will be to determine what percentage each minority group constitutes in the total population; and he will have to employ so many of each minority."<sup>63</sup> The debate was not laid to rest until section 703(j) was added to the bill, with its provision that "[n]othing contained in *this title* shall . . . require . . . preferential treatment."<sup>64</sup> Senator Humphrey explained:

The proponents of this bill have carefully stated on numerous occasions that *Title VII* does not *require* an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.<sup>65</sup>

One plausible explanation of section 703(j) is that it was designed to prevent "statutory overkill,"<sup>66</sup> and so merely confirmed the "color-blind" view of section 703(a)-(d) initially espoused by the provision's advocates. Yet in light of the long-running battle over the alleged preferential requirements of section 703, and the care and deliberation that went into the drafting of subsection (j),<sup>67</sup> it is also reasonable to conclude that the amendment was meant as a definitive statement concerning the effect of Title VII on preferential treatment. If it means what it says, section 703(j) does no more than negate any intention to have "this title [Title VII] . . . require . . . preferential treatment."<sup>68</sup> Other provisions of federal

<sup>61</sup>110 CONG. REC. 8921 (1964).

<sup>62</sup>110 CONG. REC. 7213 (1964) (Interpretative Memorandum of Title VII of H.R. 7152 submitted jointly by Senators Clark and Chase).

<sup>63</sup>110 CONG. REC. 8175 (1964). *See also id.* at 7778-81 (remarks of Sen. Tower).

<sup>64</sup>42 U.S.C. § 2000e-2(j) (1970), *supra* note 18 (emphasis supplied).

<sup>65</sup>110 CONG. REC. 12723 (1964) (emphasis supplied). *See also id.* at 9881 (remarks of Sen. Allott).

<sup>66</sup>Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675, 692 (1974).

<sup>67</sup>*See, e.g.*, 110 CONG. REC. 12706-07 (1964).

<sup>68</sup>42 U.S.C. § 2000e-2(j) (1970), *supra* note 18.

law and regulations, such as Presidential Executive Orders, would not be affected. As previously indicated, that was apparently the opinion of the Third Circuit in *Contractors Association*.<sup>69</sup> Had section 703(j) been intended to possess a longer reach, it would have been easy enough to provide that nothing “in this title or any other federal law or regulation shall be interpreted to require *or permit* . . . preferential treatment. . . .”

Title VII is one of those protean enactments whose meaning evolves over time. A flexible approach toward interpretation of it finds reinforcement in the courts' obvious willingness to pay far more heed to the statute's underlying objective of ensuring equal opportunity than to the draftsman's exact thoughts on how that objective should be attained. For example, as Professor James Jones of Wisconsin Law School has demonstrated in his thorough history of Title VII in the courts,<sup>70</sup> the key concept of “discrimination” has undergone a critical transformation, with the focus shifting from the intent of the actor to the effects of the act. Thus, the lack of malicious intention will not prevent a statutory violation, if an employer's hiring practices or job qualifications have a disproportionately adverse impact on minorities or women, and are not justified by business necessity.<sup>71</sup>

It is not uncommon today for the term “discrimination” to connote invidious distinctions, and not merely disparate treatment. As one of the most distinguished federal judges has remarked, “to discriminate . . . more often means, both in common and particularly in legal parlance, to distinguish or differentiate without sufficient reason.”<sup>72</sup> If we are satisfied that Title VII's basic purpose of equal opportunity can best be realized—perhaps can only be realized—through preferential treatment, including numerical standards, that would seem “sufficient reason” to interpret section 703(a)-(d) as outlawing only malign, and not benign, discrimination. In the different but analogous case of a proven statutory violation, at least one federal court of appeals has explicitly concluded that a preferential remedy embodying a numerical hiring quota was necessary to eliminate the effects of past discrimina-

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<sup>69</sup>*Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 172 (3d Cir. 1971). *Contra*, Blumrosen, *supra* note 66, at 692 n.47.

<sup>70</sup>Jones, *The Development of the Law Under Title VII Since 1965: Implications of the New Law*, pp. 3-4 (unpublished paper delivered at Rutgers Symposium on EEOC, Newark, New Jersey, November 28, 1975).

<sup>71</sup>*See, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). But an odd asymmetry now exists; apparently a discriminatory intent, and not merely an adverse effect, is necessary to establish a constitutional violation. *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>72</sup>Friendly, J., dissenting in *NLRB v. Miranda Fuel Co.*, 326 F.2d 172, 181 (2d Cir. 1963). *See also* *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 675 (1961).

tion.<sup>73</sup> Accordingly, neither section 703(a)-(d)'s general prohibition of discrimination nor section 703(j)'s specific ban on preferential treatment should be regarded as standing in the way of the Executive Order's affirmative action program, even though it may demand in effect that employment preferences be granted on the basis of race or sex.

The legislative history of the Equal Employment Opportunity Act of 1972 provides powerful support for such an approach. Senator Sam Ervin offered two pertinent amendments to the Civil Rights Act of 1964. The first, No. 829, would have provided, *inter alia*:

No department, agency, or officer of the United States shall require an employer to practice discrimination in reverse by employing persons of a particular race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges. . . .<sup>74</sup>

Speaking in favor of the amendment, Senator Ervin commented,

As a consequence of this lack of understanding of the plain and unambiguous words of the English language employed in Title VII of the Civil Rights Act of 1964, the Office of Contract Compliance on virtually every occasion has required employers seeking Government contracts to practice discrimination in reverse. The EEOC, on less frequent occasions, has haled employers before its bar to practice discrimination in reverse.<sup>75</sup>

Despite Senator Ervin's ardent advocacy of his amendment, it was rejected by a vote of 22 to 44.<sup>76</sup>

Senator Ervin's second amendment, No. 907, would have expanded the applicability of section 703(j).<sup>77</sup> He explained his proposal as follows:

It is designed to make the prohibition upon preferential treatment created by this subsection of the original act applicable not only to the EEOC, but also to the Office of Contract Compliance and to every other executive department or agency engaged, either under the statute or under any Presidential directive, in enforcing the so-called equal employment opportunity statutes.<sup>78</sup>

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<sup>73</sup>NAACP v. Allen, 493 F.2d 614, 620-21' (5th Cir. 1974). See also Rios v. Steamfitters Local 638, 501 F.2d 622, 631-32 (2d Cir. 1974); Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974).

<sup>74</sup>118 CONG. REC. 1662 (1972).

<sup>75</sup>*Id.* at 1663.

<sup>76</sup>*Id.* at 1676.

<sup>77</sup>See *id.* at 4917.

<sup>78</sup>*Id.* at 4918.

Senator Javits, speaking in opposition, declared that the effect of the amendment would be “to apply a particular provision of the Civil Rights Act of 1964 to the Executive Order in order to make unlawful any affirmative action plan like the so-called Philadelphia Plan.”<sup>79</sup> The measure was defeated 30-60.<sup>80</sup>

Whatever lingering uncertainties existed regarding the original intent of the drafters of the 1964 statute would seem to have been dispelled by the disposition of Senator Ervin’s proposed amendments. Congress was plainly informed that the federal government was practicing “reverse discrimination” through such affirmative action programs as the Philadelphia Plan, and it declined to intervene.

Employment preferences for minorities and women might be made more palatable for opponents if they could come to recognize that at present, being a minority or a woman may well be a valid “qualification” for many jobs.<sup>81</sup> There is a demonstrated need today for minority and female role models, especially in the higher status occupations. Whites and males, as well as minorities and women, stand to profit from gleaning the insights of minority and female professors, lawyers, business people, newspaper writers, and so on. More fundamentally, the whole of our society should be enriched by the opening up of a vast new spectrum of job opportunities for large segments of the population that were previously excluded. In this sense, the black who is preferred as a teacher or a pipefitter, or the woman who is preferred as an engineer or police officer, is not being favored as an individual. It merely so happens that, at this moment in history, such persons are endowed with qualities that must be distributed throughout a wide range of positions in industry and the professions if we are to solve two of our most pressing social problems. I realize such an approach is profoundly at odds with our cherished traditions of individual merit and group neutrality, but I believe it accords with the realities of the 1970’s.

### III. CONCLUSION

Ultimately, the legitimacy of affirmative action programs, including the limited use of preferential treatment for minorities and women, should turn on a judicious appraisal of the gains and losses for our society, and not on abstract concepts like “color-blindness.” Deliberate race- or sex-based preferences are danger-

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<sup>79</sup>*Id.*

<sup>80</sup>*Id.*

<sup>81</sup>*See* Sandalow, *supra* note 4, at 674; Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 961-63 (1974). *But cf.* 110 CONG. REC. 8921 (1964) (remarks of Sen. Williams) (“race is not a qualification for employment”).

ous medicine, justified only by the gravest circumstances, and they must not be allowed to become habit-forming. There is the obvious risk of estranging white ethnic males,<sup>82</sup> and of driving them into the camp of political adventurers who in normal times are taken seriously by almost no one. There is the further risk of perpetuating race or sex stereotypes that must be purged even from our subconscious. After an entire decade of devoted effort by many persons in the movement for employment equality, however, the results seem almost paltry. I must sadly conclude that for some while longer<sup>83</sup> heroic measures like affirmative action and preferential treatment, despite their very real risks, remain our one best hope.

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<sup>82</sup>See, e.g., Baroni, *EEOC Implications for the Working Class in a Pluralistic Society* (unpublished paper delivered at Rutgers Symposium on EEOC, Newark, New Jersey, Nov. 28, 1975); N. GLAZER, *AFFIRMATIVE DISCRIMINATION* 168-95 (1975).

<sup>83</sup>Professor Alfred Blumrosen has provided one of the most imaginative and practical formulas for calculating how long preferential treatment will have to be continued. He first points to studies indicating that approximately half of the income and occupational differences between blacks and whites is attributable to discrimination, with the other half attributable to such variables as education and qualifications. He then suggests:

[W]hen the minority employment rate is no longer double the white rate, but runs at one and one-half to one, when the median income levels of minorities is 80 to 85 percent rather than 60 to 70 percent that of whites, and when the occupational distribution is half as skewed as it is now, we will have squeezed out of the society the worst effects of discrimination. . . . The use of quotas will then become inappropriate.

Blumrosen, *supra* note 66, at 695.