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Affirmative Action: A Rose by Any Other Name

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Affirmative Action or Reverse Discrimination: Policies in Transition

Affirmative Action: A Rose By Any Other Name

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Affirmative action has become an increasing focus of public-policy discussion. Although relatively uncontroversial when it exists in the form of "outreach" activities, affirmative action that takes the form of preferences has always been controversial. Despite the public's general disapproval of race and sex preferences, such preferences have insinuated themselves into virtually all of our important institutions. Yet, for much of its existence the issue of preferences has maintained a relatively low profile.

How can it be that what is today viewed as such a "hot button" issue has managed to smolder beneath the surface for so long with so few eruptions? The answer to the question is undoubtedly complex, but a large part of the answer seems to be that preferential programs were relatively invisible. At least in their early years, it was primarily bureaucracies and courts — the least politically responsible branches of government — that sponsored such policies.[1] Although Congress has in recent years created many programs containing race and sex preferences, they are usually small parts of large bills and attract little attention.[2]

When Congress has been forced to deal with affirmative-action issues in a highly visible way, it has been much less enthusiastic. For

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1. *See* Kingsley R. Browne, *Liberty vs. Equality: Congressional Enforcement Power under the Fourteenth Amendment*, 59 DENV. L.J. 417, 452-53 (1982); Philip B. Kurland, *Ruminations on the Quality of Equality*, 1979 B.Y.U. L. REV. 1, 18 (1979).

2. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 345 (2d ed. 1988) (noting

example, although much of the opposition to the nomination of Clarence Thomas to the Supreme Court was based upon concern over his views on preferences,[3] few questions in his confirmation hearings touched on the subject.[4] Similarly, during the pendency of the Civil Rights Act of 1991, the practice of "race norming" came to the public consciousness.[5] That practice, which involves reporting of test scores as percentile scores within racial groups, was widespread at the time. With little publicly expressed opposition by individual congressmen, a provision outlawing race norming was included in the Act. Interestingly, there was very little discussion about why race norming was any worse than many other forms of preference.

Another reason for the lack of vocal opposition to preferences is the absence of an organized constituency to oppose them. Government agencies, civil rights organizations, and corporate employers all line up in support of preferences, while the primary victims are, as Justice Scalia noted in his dissent in *Johnson v. Transportation Agency*,[6] "predominantly unknown, unaffluent, [and] unorganized." As Justice Scalia noted, amicus briefs of employers filed in *Johnson* uniformly supported the legality of preferences.[7]

The absence of an organized constituency can have a substantial effect, as demonstrated by the course of the California Civil Rights Initiative, which would prohibit state-sponsored preferential policies. Although it now appears that the initiative will appear on the ballot in November 1996,[8] its future just a few months ago was not so bright.[9] Despite widespread popular support for the initiative, it appeared that its sponsors were unlikely to be able to garner enough signatures to get the measure on the ballot. The movement became revitalized only when the state Republican party and the Republican National Committee took over the signature-gathering effort.[10]

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that the minority set-aside examined in Fullilove v. Klutznick, 448 U.S. 448 (1980), was adopted as a floor amendment "without any congressional hearings or investigation whatsoever"); Drew S. Days, Fullilove, 96 YALE L.J. 453, 465 (1987) (noting that the *Fullilove* set-aside was enacted into law without hearings or committee reports, and with only token opposition).

3. *See* Linda Greenhouse, *Who's Judge Thomas? For Now, It Depends on Who You Are*, N.Y. TIMES, Sept. 8, 1991, § 4, at 4.

4. *See* W. John Moore, *Like Souter, Thomas Left Few Ripples*, 23 Nat'l J., 2274 (Sept. 21, 1991).

5. *See* Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of* Griggs, *a Partial Return to* Wards Cove, *or All of the Above?*, 43 CASE W. RES. L. REV. 287, 379 n.387 (1993) (collecting sources).

6. 480 U.S. 616, 677 (1987) (Scalia, J., dissenting).

7. *Id.*

8. B. Drummond Ayres, Jr., *Foes of Affirmative Action Claim California Ballot Spot*, N.Y. TIMES, Feb. 22, 1996, at A14.

9. B. Drummond Ayres, Jr., *Efforts to End Job Preferences Are Faltering*, N.Y. TIMES, Nov. 20, 1995, at A1.

10. B. Drummond Ayres, *Foes of Affirmative Action Are Gaining in Ballot Effort*, N.Y. TIMES, Feb. 6, 1996, at A14.

Yet another reason for the lack of public debate — and perhaps the most shameful one — is that many opponents of preferences have been reluctant to take a stand against preferences because of a realistic fear that they will be labeled racists for doing so. Recently, however, the opposition to preferences has become much more visible, possibly because a critical mass of vocal opponents, many of them minorities and women, has developed, so that arguments that they are all motivated by racism become implausible.

Although many blame a "white male backlash" for the current unpopularity of preferential policies, the fact is that there has been no recent major shift in public opinion. Instead, over the last decade there has been consistent opposition to preferences.[11] The slight increase in opposition that has occurred has been across the board: among males and females; whites, blacks, and hispanics; Republicans, Democrats, and Independents.[12] In part, the growing publicly expressed disaffection with preferences may be a result of an accumulating sense that what was viewed a quarter of a century ago as a temporary measure has become a ubiquitous feature of daily life showing no signs of abatement.[13]

Whatever the reason, political opposition to preferential policies is more visible now than it has been in the past. One measure of that visibility is the Equal Opportunity Act of 1995,[14] currently pending in Congress. That bill, introduced by Congressman Charles Canady in the House and Senator Robert Dole in the Senate, would prohibit the federal government from employing preferences in its own activities and from requiring private employers to do so as well.

Very little of the opposition to the bill has consisted of a frank defense of preferential policies. Instead, the opposition has consisted primarily of denials that the federal government requires preferences and denials that preferences are widespread. By relying on their own definitions of terms such as "affirmative action," "reverse discrimination," and "quotas," opponents of the bill have largely based their arguments upon obfuscation.

What follows is testimony submitted to the House Committee on Economic and Educational Opportunities, Subcommittee on Employer- Employee Relations, on February 29, 1996.[15] The statement had several purposes: (1) to show how failure to agree on the meaning of critical terms serves the disingenuous and makes productive debate

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11. Jack Citrin, *Affirmative Action in the People's Court*, 122 PUB. INTEREST 39, 42-45 (Winter 1996).

12. *Id.*

13. *See generally* HERMAN BELZ, EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION (1991) (describing the history of affirmative action).

14. S. 1085, 104th Cong., 1st Sess. (1995); H.R. 2185, 104th Cong., 1st Sess. (1995).

15. This statement is a somewhat revised version of a statement that was submitted to the House Judiciary Committee, Subcommittee on the Constitution, on December 7, 1995.

impossible; (2) to explain how "goals and timetables" lead ineluctably to preferences; (3) to comment briefly on the possible effect of the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*[16] on the enforcement activities of the Office of Federal Contract Compliance Programs (OFCCP), and; (4) to suggest how the OFCCP's enforcement mission should be modified.

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16. 115 S. Ct. 2097 (1995).

Statement of Kingsley R. Browne
Associate Professor
Wayne State University Law School
Before the House Committee on
Economic and Educational Opportunities
Subcommittee on Employer-Employee Relations
February 29, 1996

Mr. Chairman and Members of the Subcommittee:

My name is Kingsley Browne. I am a law professor at Wayne State University in Detroit, where I specialize in employment discrimination law. Prior to joining the faculty at Wayne State, I practiced labor and employment law in San Francisco.

I appreciate very much the opportunity to address you concerning the Equal Opportunity Act of 1995, which is an important step toward the race- and sex-blind world of work that many want. You have heard much testimony concerning the policy arguments for and against certain forms of affirmative action, and I will not focus heavily on those issues. Instead, I would like to direct my remarks to some slightly more technical aspects of current affirmative action programs and attempt to refine the focus of the debate.

As I set out more fully below, it is critically important to understand the way that numerical objectives, such as those implemented by the OFCCP and used by the federal government in its own employment, have shifted the focus of decision-making from the relevant criterion of merit to the irrelevant criteria of race, sex, and ethnicity. Whether or not that was the intention, it most assuredly has been the consequence.

I. Summary of Testimony

The central purpose of the Equal Opportunity Act of 1995 (H.R. 2128) is to prohibit the federal government from granting preferential treatment on the basis of race, sex, or ethnicity and from requiring or encouraging the use of such preferences by federal contractors. The bill is a sensible, moderate, and necessary means of achieving that end, while at the same time preserving the ability of the federal government to engage in vigorous outreach activities in its employment and contracting practices and to require the same of government contractors.

The debate over "affirmative action" has been less productive than it might have been, because partisans to the debate often talk past each other rather than with each other, with one side using quite different definitions of terms than the other side uses. Terms like "affirmative action," "goals and timetables," "reverse discrimination," and "quotas" are often used without a shared understanding of their meaning. But substance is more important than labels, so the critical question in considering this bill is "what kinds of actions would be permitted and what kinds of actions would be prohibited"?

The core of H.R. 2128 is to prohibit "preferences," meaning the conscious use of race or sex in making decisions, whether as "tie breakers," "plus factors," or "rigid quotas." The bill embodies the salutary principle that race- and sex-blind decisions should be the norm.

H.R. 2128 goes no farther than necessary to eliminate preferences. By its terms, it defines as a "preference" "any use of a quota, set-aside, numerical goal, timetable, or other numerical objective." If preferences are to be eliminated, it is necessary to eliminate all of the above-enumerated practices.

Some argue that while quotas and set-asides truly involve preferences, goals and timetables do not; instead, they merely establish realistic targets for the employer's work force and require only good-faith efforts at satisfaction. This is an unrealistic view of the real-world effects of goals and timetables.

Numerical goals necessarily impose pressure to be race- and sex-conscious. The notion that one can simultaneously attempt to satisfy a numerical goal and maintain a race- and sex-blind selection process is an illusion. In the cases that matter, when the time comes, the decision-maker will be guided *either* by qualifications *or* by race or sex. If both criteria point in the same direction, the goal has no effect; qualifications are sufficient. Instead, goals have an impact primarily in those circumstances where qualifications indicate one course of action and the goals indicate another. Which is to control? This bill would eliminate that dilemma.

Others argue that "mere preferences" should be permissible, but that "rigid quotas" should not be. However, the dichotomy between preferences and quotas is illusory. First, the meaning of the term "quota" is often *so* rigid — involving hiring of persons without regard to whether they are even minimally qualified — that to disclaim quotas is to disclaim something that never happens. Second, the effects of preferences on both the favored group and the disfavored group are largely indistinguishable from the effects of quotas: both quotas and preferences stigmatize the favored group by implying that its members could not compete against others on an equal footing, and both quotas

and preferences exclude members of the disfavored group from opportunities on the basis of race or sex.

Properly understood, the current scheme of OFCCP enforcement contravenes the spirit, if not the letter, of the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Pena*,[1] by requiring contractors to engage in race- and sex-conscious hiring. Whether or not the OFCCP system is constitutional, however, it is poor policy. A legislative solution to a problem does not depend on its being of constitutional magnitude.

In recent years, the OFCCP seems to have largely redefined its mission. It has become an antidiscrimination enforcement agency whose functions largely duplicate those of the EEOC. Consequently, its enforcement of the discrimination laws should be transferred to the EEOC, and the OFCCP should concentrate on assisting employers in their outreach activities.

Anyone who opposes preferences should favor this bill. Its moderate approach would eliminate government-sponsored preferences but at the same time leave the Federal Government free to engage in (and require) efforts to increase the diversity of the applicant pool, as well as leaving private contractors free — within the limits of current law — to engage in preferential policies.

II. How should the relevant terms be defined?

One of the most difficult problems impeding productive discussion of affirmative action is that — whether through inadvertence or design — parties to the debate often use the same words to mean different things. The terms "quotas," "goals and timetables," "affirmative action," "reverse discrimination," and "preferences" seem to mean different things to different people. These labels and their sometimes shifting meanings should not be allowed to obscure the fact that what is important at bottom is what kind of behaviors are required or encouraged by current law and what kinds of behaviors are forbidden or discouraged.[2]

In order to situate the discussion, it would be instructive to define some of the terms that are commonly used in this debate.

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1. 115 S. Ct. 2097 (1995).

2. Because the area of my primary specialization is employment, most of my specific observations are directed toward the employment implications of H.R. 2128. However, the principles that I discuss are fully transferrable to other areas, such as preferences in contracting.

A. Quotas: The term "quota" is often defined by proponents of strong forms of affirmative action as something like:

> a fixed number or percentage of persons of a particular race, color, religion, sex, or national origin which must be attained, or which cannot be exceeded, regardless of whether such persons meet necessary qualifications for the job.

Everyone is against quotas when defined this way, but that is largely academic, since even the most aggressive affirmative-action program does not require the hiring of the utterly unqualified.

However, there is a less extreme kind of plan that many would label as a "quota," though it does not fall within the above definition. In the seminal case of *United Steelworkers of America v. Weber*,[3] for example, the Supreme Court upheld a training program in which 50% of the slots were reserved for minorities.[4] Brian Weber sued because he was denied entry into the program. He had been excluded from consideration for half the slots in the training program, slots that were filled by minorities having less seniority than he had. The minorities who were selected for the training program did not lack the minimum qualifications for the program; they simply had less seniority than Weber and other whites and did not have to compete against whites for those slots. I would venture to say that most laymen would view this as a "quota" — a racial entitlement to not less than 50% of the training-program slots — but the narrow definition of the term described above allows proponents of such plans to deny that quotas are involved.

B. Outreach: One form of affirmative action that just about everyone endorses is "outreach": attempts by the employer to "cast a wider net" to increase the diversity of the applicant pool. Outreach efforts may take the form of advertising in publications having a high female or minority readership, participation in job fairs, or other practices to encourage applicants who would not be reached by more traditional methods. Outreach efforts by themselves do not involve "preferences," since after obtaining the broader pool, the employer may make its selection in a race- and sex-blind fashion.

C. Preferences: The term "preferences" is at the heart of the proposed legislation, because the operative provision prohibits the federal government from "grant[ing] a preference," which is defined to mean "use of any preferential treatment and includes but is not limited

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3. 443 U.S. 193 (1979).

4. Although the current bill would not amend Title VII or alter the scope of permissible affirmative-action programs, the facts of Title VII and Equal Protection cases are used for illustrative purposes, because that is the context in which affirmative-action programs typically come to the attention of the legal system.

to any use of a quota, set-aside, numerical goal, timetable, or other numerical objective."

I believe that what is meant by the words "preference" and "preferential treatment" (and what most laymen would take these terms to mean) is race- or sex- conscious selection decisions that deviate from the employer's ordinary merit-based, or at least race- and sex-neutral, selection criteria. The preference may or may not take the form of a "quota." There are two conceptually related forms of preferences: "tie breakers" and "plus factors."

1. Use of Race or Sex as a "Tie Breaker": This is a form of preference in which the employer uses sex or race after its traditional merit-based selection procedures have produced multiple candidates who are equally qualified. This may be a common or uncommon form of preference, depending upon how closely the employer scrutinizes qualifications. In circumstances in which the employer carefully examines the background, skills, abilities, and experience of candidates, it is relatively uncommon for candidates to be judged exactly equal. On the other hand, if the employer merely looks for minimum qualifications and treats all applicants having the minimum qualifications as equal, then tie breakers would be frequently used. Ordinarily, employers do not use the latter form of selection, preferring instead to find "the most qualified candidate" rather than "a qualified candidate." However, if preferences are permitted to break ties, an employer that wishes to employ preferences may declare candidates equally qualified to take advantage of its ability to use race or sex as a tie breaker.

An example of the use of sex as a tie breaker is found in the case of *United States v. Board of Education of the Township of Piscataway*.[5] In that case, the school district had to lay off a teacher in the high school's business department. There were two teachers — one white and one black — who were deemed equally qualified and who had equal seniority. The school district's normal practice in such circumstances would be to flip a coin to decide which teacher would be laid off. However, the school district — which had not engaged in prior discrimination and which already had a higher percentage of black teachers than the availability in the local market — selected the white teacher, Sharon Taxman, for layoff based upon a "diversity" rationale. The Clinton administration supports the school district's right to lay Ms. Taxman off because she is white.[6]

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5. 832 F. Supp. 836 (D.N.J. 1993).

6. The lawsuit was initially pursued on Ms. Taxman's behalf by the Justice Department, with Ms. Taxman being a plaintiff-intervenor. After the Justice Department prevailed at trial, the Department sought to switch sides and support the racial preference. The Third Circuit recently rejected its efforts to do so, and in effect ordered the Justice Department out of the case. *United States v. Board of Educ. of the Township of Piscataway*, 69 Fair Empl. Prac. Cas. (BNA) 448 (3d Cir. 1995).

2. Use of Race or Sex as a "Plus Factor": This is a broad category of preference that also includes use of race or sex as a tie breaker. When race or sex is used as a tie breaker, it has only enough weight to tip scales that are in equipoise. However, race or sex may be given more weight than that. The challenged action in *Johnson v. Transportation Agency*[7] would fall within this definition. In *Johnson*, the employer passed over a male candidate for promotion in favor of a somewhat less qualified female. Although the employer stated that the decision was based upon a combination of qualifications and "affirmative action matters," the district court found that sex was the determining factor in the decision. Thus, here is a case in which the person selected was clearly qualified for the job but nevertheless received the job only because sex was a "plus factor" in the decision.

In *Johnson*, sex was given only a relatively small amount of weight, since the woman selected was rated as almost as qualified as the man rejected. In other cases, the employer may give it even more weight, resulting in the selection of employees who are substantially less qualified, but still at least "minimally qualified." The Supreme Court in *Johnson* did not limit its approval of preferences to circumstances in which the candidates are equal or almost equal in qualifications.

D. Goals and Timetables: The OFCCP requires federal contractors to establish "goals and timetables" for remedying "underutilization" of women and minorities.[8] The level of the goals should be "the results which could reasonably be expected from [the contractor's] putting forth every good faith effort to make its overall affirmative action program work."[9] The regulations further provide that these goals should not be "rigid and inflexible quotas which must be met."[10]

Goals do not necessarily and by definition involve "preferences," as defined above. However, affirmative action programs may "in design and execution . . . be race, color, sex, or ethnic 'conscious.'"[11] It thus appears that the enforcement agencies do not themselves have a preference for preferences; they will be perfectly satisfied if the goals can be satisfied without preferences. For those who favor selection based upon merit, rather than status, the concern with goals is not that they by definition embody preferences, but that in operation they almost inevitably do. That is why it is critically important that goals and timetables be included within the prohibited practices under this bill. I will address this issue in Section IV, below.

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7. 480 U.S. 616 (1987).
8. 41 C.F.R. 60-60.2(b) (1995).
9. 41 C.F.R. 60-2.12(a) (1995).
10. 41 C.F.R. 60-2.12(e) (1995).
11. 41 C.F.R. 60-3.17(3) (1995).

E. Reverse Discrimination: This term, like the term "quotas" is largely a label applied to policies that the speaker does not like. For example, President Clinton declared his support for "affirmative action" except when it turns into "reverse discrimination."[12] The term "reverse discrimination" can be used in two ways. In its narrow sense, it refers to "preferences" — as defined above — that are illegal. It is this sense of the term that Professor Alfred Blumrosen used in the report on reverse discrimination that he prepared for the Department of Labor.[13] He concluded that reverse discrimination is rare based upon his finding that few discrimination charges are filed by white men complaining that they have been victimized by affirmative action and that lawsuits brought by such plaintiffs are generally found to lack legal merit.[14] From this, he concluded that "reverse discrimination" is not a problem.

Others (including, I would venture to guess, most laymen) use a far less restricted definition of reverse discrimination. Under the broader view, "reverse discrimination" would be largely congruent with "preferences," as defined above: denying an employment opportunity to a person because of race or sex in order to advantage a member of an historically disfavored group. The "reverse" in reverse discrimination refers not to illegality but simply to the fact that the victim is a white or a man, instead of a minority or a woman. Thus, when a white woman is denied a job because she is white, that is reverse discrimination; when she is denied a job because she is a woman, that is "garden- variety" discrimination.

Whether "reverse discrimination" is rare or common depends upon which of the above definitions is adopted. Both *Weber* and *Johnson* involved reverse discrimination under the broader definition, a form of discrimination that is quite common. On the other hand, Professor

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12. In his statement on affirmative action, President Clinton stated that he was in favor of "affirmative action," but that he did not favor "the unjustified preference of the unqualified over the qualified," "numerical quotas," or "rejection or selection of any employee . . . solely on the basis of race or gender without regard to merit." Todd S. Purdum, *President Shows Fervent Support for Goals of Affirmative Action*, N.Y. TIMES, July 20, 1995, at A-1.

13. Alfred W. Blumrosen, *Draft Report on Reverse Discrimination Published by Labor Dep't: How the Courts Are Handling Reverse Discrimination Claims, reprinted in* DAILY LAB. REP. (BNA) No. 147 (Aug. 1, 1995), *available in* LEXIS, Labor Library, DLABRT file, Doc. No. 1995 DLR 147 d43.

14. The conclusion that there are few meritorious claims seems somewhat inconsistent with the data contained in the report. Of 21 cases involving individual claims of discrimination, Blumrosen reported that the plaintiff prevailed in 6 (or 28%). Of cases challenging affirmative-action programs, 12 cases upheld them, while 6 invalidated or modified the plans, and in an additional 2 cases, the courts ruled that the programs had met their goals and should be dissolved. Thus, in 40% of these cases, the affirmative action plans were in one way or another found to be unjustified. The logic of the Blumrosen report would suggest that a finding that plaintiffs prevail in only 1/3 of reported Title VII cases would justify repeal of the statute.

Blumrosen concluded that reverse discrimination is rare, because his definition focused on illegality.[15] His report, and much of the use that has been made of it, is extremely disingenuous. Despite the rhetorical use of his study, it was not the rarity of victims of preferences that led to his conclusion. Instead, what led to his conclusion was the general legality of preferences in the private sector under the Supreme Court's permissive standards in *Weber* and *Johnson*. Successful lawsuits alleging reverse discrimination are rare because race and sex preferences that disadvantage white men are usually not illegal in the private sector, just as prior to 1965 successful lawsuits alleging racial discrimination were rare, not because racial discrimination was rare, but because it was not illegal.

Despite the laxity of the standards set forth in *Weber* and *Johnson*, there is substantial question whether some affirmative action plans under the Executive Order are valid. In both *Weber* and *Johnson*, the Court held that preferences were permissible to remedy "manifest imbalances" in "traditionally segregated job categories." However, affirmative action plans are required under the Executive Order to remedy "underutilization" in any job category, "underutilization" being defined as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability."[16] It is not clear that "underutilization" is as strict a standard as "manifest imbalance." More significantly, under the Executive Order, underutilization must be remedied in all job categories, not just in "traditionally segregated" ones. Moreover, underutilization must be remedied as to all racial groups, not just ones that have been historically subjected to discrimination in the particular industry.

In *Johnson*, Justice Brennan emphasized that the "traditionally segregated job category" requirement is intended to have meaning:

> The requirement that the "manifest imbalance" relate to a "traditionally segregated job category" provides assurance . . . that race and sex will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination . . . .[17]

Thus, *Johnson* suggests that employers who attempt to "remedy" "underutilization" without regard to whether the job category is a

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15. Most of the cases in which reverse-discrimination plaintiffs prevailed were brought against governmental employers, which are governed by the stricter constitutional standards.

16. 41 C.F.R. 60-2.11(b) (1995).

17. 480 U.S. at 632. *See also* United Steelworkers of America v. Weber, 443 U.S. 193, 212 (1979) (Blackmun, J., concurring) (noting that a job category is "'traditionally segregated' when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within the category").

traditionally segregated one, violate Title VII by doing so. Yet this kind of activity is encouraged by the OFCCP rather than prohibited.

F. Affirmative Action: Perhaps the most meaningless phrase in this entire discussion is "affirmative action." Affirmative action can be racial quotas or outreach activities or anything in between. The amorphousness of the phrase has contributed a great deal to the misunderstanding (or obfuscation) of this debate. As a case in point, pollster Louis Harris has criticized Republicans for attempting to cause the American people to equate affirmative action (which most Americans favor) and preferential treatment (which most Americans oppose).[18] Harris presented a sample with the following language from the California Civil Rights Initiative:

> The state will not use race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the state's system of public employment, education, or public contracting.

Harris reported that about 80 percent of respondents favored the proposition as worded. He then asked respondents if they would vote for the proposition "if it outlawed all affirmative action programs for women and minority groups." He reports that support for the initiative plummeted and that many people interviewed were angry after being told that the California Civil Rights Initiative would end all affirmative action. They felt that they had been duped.

Before Harris told respondents that the Initiative would outlaw all affirmative action, he asked respondents what "affirmative action" meant. Sixty-eight percent of whites said it referred to "programs intended to help women and members of minority groups who had not had equal opportunities in education and employment."

It is hardly surprising that the respondents felt duped. They were shown language that would outlaw discrimination and preferential treatment, and they were then told that the initiative would "really" eliminate all "programs intended to help women and members of minority groups." The respondents were indeed duped, but it was Harris, not the sponsors of the initiative, who duped them.

Public support for affirmative action seems to be limited to kinds of affirmative action that do not amount to preferences. Polls that ask whether respondents support affirmative action or whether they favor measures to aid women and minorities generally show high levels of support (a result that calls into question the frequent assertion that our society is pervaded with sexism and racism). However, when respondents

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18. Louis Harris, *Affirmative Action and the Voter*, N.Y. TIMES, July 31, 1995, at A13.

are asked more specific questions, which go to the issue of exactly what kinds of affirmative action they favor, polls consistently show that they do not think that employers should take race or sex into account in making individual employment decisions. For example, a 1991 New York Times/CBS News poll asked respondents, "Do you believe that where there has been job discrimination against blacks in the past, preference in hiring or promotion should be given to blacks today?" Sixty-one percent of respondents answered "no," while only 24% said "yes."[19] A Washington Post/ABC News poll produced similar results, with 80% of all respondents opposed to racial preferences in jobs even when "there are no rigid quotas."[20] A recent Los Angeles Times poll found that although a majority favored "affirmative action" for women and minorities, only 22% believed that "qualified minorities should receive preference over equally qualified whites" and only 25% believed that "qualified women should receive preference over equally qualified men."[21] Thus by about a 3:1 margin, Americans oppose the most moderate form of preference — the tie breaker. Only slightly fewer Americans (21%) favor affirmative action that uses quotas, suggesting that the American people are not convinced that there is much difference between "preferences" and "quotas."

III. The Focus Should Be on what Behaviors Are Involved, not the Label That Is Placed on them.

Because of the shifting definitions of relevant terms, debate should focus more clearly on what behaviors are permissible rather than on what labels are used. For ease of discussion, I will use the term "affirmative action" to include all conscious efforts made by an employer to increase the racial, ethnic, or sexual diversity of its applicant pool or work force, whether or not the means chosen involve "preferences" and whether or not they are legal. Using this definition, virtually all parties agree that some affirmative action should be permitted and some should be forbidden.

The real question here is what kinds of behaviors are the federal government as employer and the OFCCP as enforcer permitted to

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19. Robin Toner, *Symbolic Justice; Capturing an Era's Racial Conflicts and Ironies*, N.Y. Times, July 7, 1991, § 4, at 1.

20. Tom Kenworthy & Thomas B. Edsall, *Whites See Jobs on Line in Debate; Some Chicagoans Fear Reverse Bias*, Wash. Post, June 4, 1991, at A1.

21. Cathleen Decker, *The Times Poll: Most Back Anti-Bias Policy but Spurn Racial Preferences*, L.A. Times, Mar. 30, 1995, at A1.

engage in or encourage. Since all agree that strict quotas are bad, and all agree that outreach activities are good, the critical ground lies in the middle. *The central issue is whether the federal government in its employment, contracting, and regulatory practices is permitted to engage in or encourage race- and sex-conscious preferences, whether in the nature of "plus factors," as in* Johnson, *or racial set-asides, as in* Weber.

Some believe that the federal government should not — and private employers should not be forced or encouraged to — grant preferences on the basis of race or sex. Nonetheless, they believe that employers should be encouraged to attempt to increase their workforce diversity through non-preferential means. H.R. 2128 is a balanced attempt to respond to both of those policy preferences, because it prohibits quotas and set-asides while at the same time preserving outreach activities. However, the question remains whether this bill goes beyond discouraging preferences by its elimination of goals and timetables and other numerical objectives. For reasons set forth below, I do not believe that it is possible to retain goals and timetables and eliminate preferences. Therefore, one who is opposed to preferences should also oppose goals and timetables.

On the other hand, others believe that preferences that do not involve quotas should be permissible, even though quotas should not be. This raises the question whether there is a principled distinction between the two. As set forth below, they both raise largely the same issues, so a principled stand against quotas leads to a rejection of preferences as well.

IV. Goals and Preferences

A. If "goals and timetables" do not necessarily and by definition involve "preferences," why should someone who opposes preferences oppose goals and timetables? Put another way, why do goals and timetables lead almost inevitably to "preferences"?

The OFCCP maintains that preferences are radically different phenomena from goals and timetables. In a July 26, 1995, statement, Shirley Wilcher, Deputy Assistant Secretary for Contract Compliance, explained: "Unlike preferences and quotas, numerical goals recognize

that persons are to be judged on individual ability, and are, therefore, consistent with the principles of merit hiring and promotion."[22] According to this statement, in order to achieve its goals, an employer "is never required to . . . hire a less qualified person in preference to a more qualified person." Furthermore, "[a] contractor's compliance is measured by whether it has made good faith efforts to meet its goals" and "[f]ailure to meet goals is not a violation of the Executive Order." According to Secretary of Labor Robert Reich, the purpose of most affirmative action laws is simply to get employers to "cast a wider net" to find qualified applicants.[23]

In one sense — but a trivial one — it is true that neither the Executive Order nor the OFCCP formally imposes a requirement that employers engage in preferential hiring. Rather, employers are to establish goals and devote their utmost effort to achieving them. *How* they achieve these goals is up to them. The OFCCP would presumably be just as happy if the employer could achieve its goals through race- and sex-blind hiring.

But what about those many circumstances where the employer cannot achieve its goals without giving preference to women or minorities? The formal position of the OFCCP is that failure to satisfy goals is not by itself a violation of the regulations and that as long as the employer is making good-faith efforts to achieve the goals, the employer is in compliance.

But what about the reality? What are the practical consequences of failure to achieve numerical goals? In order to understand those consequences, one must compare the situation of an employer that satisfies its goals and one that does not.

In determining whether and how extensively to conduct a compliance review of a contractor, the OFCCP examines the extent to which the contractor is achieving its goals. Contractors with "good numbers" are often given a relatively cursory examination if they are reviewed at all.[24] However, contractors that are not making fast enough progress toward their goals are given a much more extensive

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22. Memorandum from Shirley J. Wilcher, Deputy Assistant Secretary for Federal Contract Compliance, Dep't of Labor, to Compliance Officers (July 26, 1995), *reprinted in OFCCP Notice Reaffirming Affirmative Action Goals in Light of* Adarand *Decision, Administration Review*, DAILY LAB. REP. (BNA) No. 155 (Aug. 11, 1995), *available in* LEXIS, Labor Library, DLABRT file, Doc. No. 1995 DLR 155 d22.

23. *After 10 Years, Debate Resurfaces Over Merits of Affirmative Action*, DAILY LAB. REP. (BNA) No. 147 (Aug. 1, 1995), *available in* LEXIS, Labor Library, DLABRT file, Doc. No. 1995 DLR 147 d26.

24. *See* GENERAL ACCT. OFFICE, REP. NO. GAO/HEHS-95-177, EQUAL EMPLOYMENT OPPORTUNITY: DOL CONTRACT COMPLIANCE REVIEWS COULD BETTER TARGET FEDERAL CONTRACTORS (1995) (letter report).

review, a review that can last months or years.[25] Because failure to satisfy goals is taken to be evidence of discrimination, much of the compliance review involves requiring the employer to justify its hiring, promotion, and compensation of white men, with the agency in many cases substituting its own judgments of qualifications for the employer's. The pressure is enhanced by the fact that the OFCCP measures its own success by how many "victims" of discrimination it finds and how much money it recovers for them.[26] Not surprisingly, the OFCCP usually "finds" discrimination in its compliance reviews.[27]

How does an employer avoid a lengthy compliance review, the imposition of sanctions by the OFCCP, and the attendant bad publicity? By achieving its affirmative action goals, since failure to meet goals is taken as evidence that the employer's efforts were not in good faith.[28]

The de facto pressure to satisfy numerical goals is analogous to the following hypothetical IRS enforcement strategy. Suppose the IRS had an enforcement policy under which anyone who claimed deductions that brought his tax below a particular percentage (X) of his gross income would be subjected to a thorough and time-consuming "lifestyle" audit, similar to the kind of audit that the Service was recently contemplating.[29] It would require the taxpayer to justify every jot and title on his return, producing marriage licenses, property

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25. *Id.* Approximately 84% of establishments selected for review come from a ranked list of "flagged" contractors. These contractors are identified on the basis of their "average utilization rate" of minorities and women. *Id.*

26. *See OFCCP Obtained Record Settlements in Fiscal Year 1994, Wilcher Says*, DAILY LAB. REP. (BNA) No. 212 (Nov. 4, 1994), *available in* LEXIS, Labor Library, DLABRT file, Doc. No. 1994 DLR 212 d6. Of course, when the numbers are down, then one should not look "strictly at the numbers" in evaluating the OFCCP's accomplishments. *See OFCCP: Wilcher Deems 1995 a Success; Expects Major Changes in 1996*, DAILY LAB. REP. (BNA) No. 13 (Jan. 22, 1996), *available in* LEXIS, Labor Library, DLABRT file, Doc. No. 1996 DLR 13 d19.

27. *See* GAO REPORT, *supra* note 24 (noting that the OFCCP found "violations" in 74% of its compliance reviews in 1994, with a substantial majority of those violations being "major" ones).

28. In other contexts, the pressure may come from elsewhere. For example, even in the absence of external enforcement, if an employer sets goals and then ties managers' compensation to how well the manager furthers the company's affirmative-action goals, as the Glass Ceiling Commission has recommended, the same pressure for the manager to engage in race- or sex-conscious decisions would exist, even if the formal policy of the employer was to make decisions purely on the basis of merit.

29. *See* David Day Johnston, *IRS Retreats; The Tax Audit from Hell is Sent Packing*, N.Y. TIMES, Oct. 29, 1995, §4, at 2 (describing the Service's reversal of its plan to engage in detailed random audits); Alex Pham, *Auditing Lifestyles of not so Rich or Famous; IRS Randomly Targeting 4,000 in Mass.*, BOSTON GLOBE, Apr. 15, 1995, at 1 (describing audit under which randomly selected taxpayers will be "asked about their hobbies, their cultural backgrounds, the types of cars they drive, where they went on vacation, the neighborhoods they live in and a whole host of other personal information right down to the type of furniture they own").

deeds, etc. Any deduction that could not be supported with extensive documentation would be disallowed and the government would routinely assess interest and penalties in these cases. Although under the code, paying at below the targeted percentage is completely legal, the IRS justifies its policy on the ground that anyone who has that many deductions must be cheating.

Now, one could say that the government in the above scenario does not sanction taxpayers for paying less than X% of their gross income in taxes; instead, it sanctions them only for claiming deductions that they cannot support. However, the predictable effect of the enforcement policy is going to be that many taxpayers will "voluntarily" forego claiming deductions that would reduce their taxes below the critical threshold. Just as the OFCCP says that it does not find violations simply because of failure to satisfy goals, the IRS would say that it does not impose penalties simply for paying less than X% in taxes. Nonetheless, in both cases, the enforcement policies impose substantial pressure for the regulated individuals to alter their behavior to conform to the numerical expectations of government.

The entire OFCCP enforcement system is oriented toward ensuring that employers make race- and sex-conscious decisions. Although the OFCCP insists that most of what it does is ensure that employers "cast a wide net," very little of its enforcement effort goes into reviewing outreach and development programs.[30] If the OFCCP were truly primarily interested in the breadth of the employer's net, that is what it would focus on in compliance reviews; instead, it focuses on the employer's "numbers."

It is true that goals and preferences are formally different. Under this reasoning, however, *quotas* and preferences are formally different also. Just as a goal does not formally require preferences, neither does a quota; both *might* be satisfied without preferences. Goals and quotas establish the ends; preferences are often a necessary means to achieve those ends.

B. If goals are keyed to "availability," how can they pressure employers to engage in preferences?

One of the arguments for why goals do not lead to preferences is that since goals are based upon "availability," there is no pressure

30. As the regulations point out, "[a]n affirmative-action program is a set of specific and *result-oriented procedures* to which a contractor commits itself to apply every good faith effort." 41 CFR § 60-2.10 (1995). Thus, despite what some might say, the focus of the compliance program is not on process but on results.

to reduce standards. That is, if the goal is equal to the proportion of qualified women and minorities in the labor pool, then there is no reason that the employer would have to reduce its standards in order to hire the appropriate number of women and minorities. This is the position of the OFCCP, which has explicitly argued that satisfaction of goals does not lead to preferences because "numerical benchmarks are realistically established based on the availability of qualified applicants in the job market or qualified candidates in the employer's work force."[31]

That reasoning is flawed, because its factual premise is wrong. The assumption that within the labor pool, however defined, productivity-related traits are randomly distributed with respect to race and sex is quite often simply not correct. As Professor Douglas Laycock has observed, the assumption that but for discrimination the employer's work force would mirror the composition of the labor force from which it is hired:

> is a powerful and implausible assumption: the two populations are assumed to be substantially the same in their distribution of skills, aptitudes, and job preferences. Two hundred and fifty years of slavery, nearly a century of Jim Crow, and a generation of less virulent discrimination are assumed to have had no effect: the black and white populations are assumed to be substantially the same. All the differential socialization of little girls that feminists justifiably complain about is assumed to have had no effect; the male and female populations are assumed to be substantially the same.[32]

The fact that productivity-related traits are not randomly distributed underlies the business-necessity defense under the disparate-impact theory. If these traits were randomly distributed, valid employment requirements would never have a disparate impact other than a random one; therefore, a disparate impact by itself would be evidence that the requirement was not valid. Instead, however, employment requirements with a disparate impact are *often* valid.[33]

Availability statistics are not an accurate measure of job qualifications. They are generally computed based upon broad occupational categories, and they reflect at best only minimum qualifications for the job and more commonly merely aggregations of jobs that have

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31. *See* Memorandum of Shirley J. Wilcher, *supra* note 22.

32. Douglas A. Laycock, *Statistical Proof and Theories of Discrimination*, 49 LAW & CONTEMP. PROBS. 97 (Autumn 1986).

33. That was the basis for the turmoil over "race norming" of scores on the General Aptitude Test Battery (GATB) that resulted in the outlawing of that practice in the Civil Rights Act of 1991, § 106, 42 U.S.C. § 2000e-2(l) (1994). The GATB yielded gross racial disparities, yet, according to a National Academy of Sciences study, is a valid predictor of job performance.

some superficial similarity but that are in fact quite different. They in no sense reflect a homogeneous pool of equally qualified (or equally interested) persons.[34]

It should be noted that if productivity-related traits *were* randomly distributed with respect to race within the available pool, goals and timetables would not increase the representation of underrepresented groups in the occupational category. Instead, they would only reshuffle them among employers. It is the fact that minorities, and to a lesser extent women, have less of these traits than white men that goals and timetables have the effect of drawing women and minorities up to higher levels of employment than they would achieve without race- and sex-conscious hiring. One who truly believes that qualifications are equal within the pool should oppose goals and timetables as unnecessary and insist on a simple policy of nondiscrimination.

It might be instructive to consider an example of the effect of lack of homogeneity of the applicant pool. To take an easy example, assume that a corporation is seeking to hire a number of recent law graduates for its legal department, and it wants to hire the best possible candidates. On what basis is availability of minorities calculated? It would probably be based upon either the proportion of recent law graduates who are minorities or the proportion of practicing lawyers who are minorities. Assume, for purposes of discussion, that availability is calculated based upon recent law graduates, which would yield a higher availability figure than the pool of practicing lawyers because increasing numbers of minorities are attending law school. Assume also that market conditions are such that the employer can be quite selective in its hiring decisions.

What will be the effect of race-blind selection? In selecting among applicants, the employer would generally place a very high emphasis on academic record, including both the reputation of the law school and the grades of the applicant. Keying the goal to the availability figures assumes that the racial composition of the top group of

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34. *See, e.g.*, Catlett v. Missouri Highway & Transp. Comm'n, 828 F.2d 1260 (8th Cir. 1987) [sic], *cert. denied*, 485 U.S. 1021 (1988). In *Catlett*, which involved allegations of a pattern-or-practice of sex discrimination in hiring of highway maintenance workers, the court used two alternative availability pools: (1) "that group of persons . . . who are in the civilian labor force . . . in the job categories of sales, blue collar, farm, service and clerical, but excluding managerial, technical and professional workers, and who are between the ages of eighteen and seventy years and who have a driver's license and an eighth-grade education"; or (2) "that group of persons . . . who are in the civilian labor force . . . in all job categories except managerial, technical, professional and clerical workers and who are between the ages of eighteen and seventy years and who have a driver's license and an eighth-grade education." There is no sense in which members of these highly disparate groups would likely be the same in either qualifications or interest.

students is the same as the racial composition of the remainder of the pool — that is, that qualifications within the entire pool of recent law graduates are randomly distributed with respect to race. This would clearly be an incorrect assumption. Instead, it is quite predictable, as described below, that the top portion of the pool would be disproportionately white. Therefore, race-blind selection — that is, selection based purely on measures that predict productivity and without regard to race — will produce a group of hires that does not have as many minorities as the goal would call for.

Why will the top portion of the pool be disproportionately white? Because educational achievements of blacks and whites are not equal, as Secretary William Coleman pointed out in his testimony before the Subcommittee on the Constitution in October. Secretary Coleman acknowledged that, without race consciousness, parity in outcomes will not occur anytime soon:

> It would take the skill of one who could reproduce Beethoven's Ninth Symphony on the head of a pin to devise a system which would eliminate the effects of centuries of racial and gender discrimination without taking race and sex into account in the process.[35]

While people of good will can — and should — debate whether race-conscious programs are good policy, there is simply no room for argument that in the absence of race- conscious policies all non-discriminating employers would achieve goals based upon "availability." This fact demonstrates the error of two related assumptions: (1) that tying goals to availability eliminates pressure to engage in preferences; and (2) that failure to satisfy goals is suggestive of discrimination.

Educational achievements of white and minority applicants for our hypothetical corporate law position are likely not to be equal. One primary reason is that because of affirmative-action in law school admissions, minority law students must compete against students whose educational background is stronger than their own. At the University of Texas, for example, the Law School set targets for black (5%) and Mexican-American (10%) students in the entering class that were consistent with the percentages of black and Mexican-American college graduates.[36] This percentage was considered the "availability pool."

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35. *See Abolishing Government Race or Gender Preferences: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (statement of William T. Coleman, Jr.), *available in* LEXIS, Legis Library, CNGTST file.

36. *See* Hopwood v. Texas, 861 F. Supp. 551, 571, 574 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), and *cert. denied*, 116 S. Ct. 2581 (1996).

If, within the pool of college graduates, credentials were randomly distributed with respect to race and ethnicity, there would have been no need for Texas to set a target. Instead, mere nondiscrimination would have been sufficient, since race-blind admissions would yield an appropriately diverse student body. However, credentials are not randomly distributed. In fact, had the Law School decided solely on the basis of Law School Admissions Test (LSAT) score and grade-point average (GPA), the entering class would have included, at most, 9 blacks and 18 Mexican-Americans; instead, 41 blacks and 55 Mexican-Americans were admitted.[37] Since LSAT scores and GPAs do in fact predict law school performance — that is, after all, the reason that law schools use them[38] — it is predictable that minority law students admitted under affirmative action programs will not perform as well as students admitted solely on the basis of their credentials. Indeed, that seems to be the experience of many law schools.

In sum, our corporate employer has a choice when making hiring decisions. It can hire in a race-blind fashion, in which case it will not meet its goals. Or it can deviate from its merit-based system by using race-conscious selection criteria and meet its goals. It cannot simultaneously be race blind and satisfy its goals.

C. *Is there any way of separating goals and preferences? Can we retain goals but disapprove preferences?*

One response to the entwining of goals and preferences is to make clear that goals are not to lead to preferences. That is, employers could be told that they should attempt to satisfy their goals but that they are not permitted to employ preferences to achieve them. In fact, this seems to be what the OFCCP implies is their policy. For example, in its July 26, 1995, memorandum, the OFCCP stated that "[t]he numerical goals component of affirmative action programs is not designed to be, nor may it properly or lawfully be interpreted as, permitting *unlawful* preferential treatment and quotas"[39] and that its

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37. Although in discussions of the *Hopwood* case it is often asserted that without affirmative action those extra minority students would not have been able to go to law school, that is probably not the case. The University of Texas is one of the nation's premier law schools. Even though many of the minority students would not have gotten into Texas if admissions decisions were race blind, they probably would have gotten into a lower-tier law school on the strength of their objective qualifications.

38. The court in *Hopwood* noted that use of LSAT and GPA had not been *specifically* validated for black Students at the Texas Law School; however, they are generally valid predictors of academic success.

39. Emphasis added.

regulations "specifically prohibit discrimination and the use of goals as quotas." The OFCCP states that it will take "quick action" "whenever evidence is revealed to OFCCP that a contractor has implemented a quota or *unlawful* preference . . . in the same manner as if the contractor has violated the Executive Order in a different way."[40]

The word "unlawful" is the critical term. Under *Weber* and *Johnson*, many preferences are legal, at least in the private sector. Thus, although the general thrust of the statement is to deny the existence of preferences, in reality it merely denies the imposition of illegal ones. Moreover, it should be noted that the statement of the OFCCP says that it will take action against illegal preferences and quotas "whenever evidence is revealed to" it; it does not say that it affirmatively looks for such evidence. In fact, while the OFCCP commonly requires employers to justify the hiring of white men, it almost never requires them to justify the hiring of women or minorities.

In her testimony before the Senate Labor and Human Resources Committee, Ms. Wilcher went beyond denying that the OFCCP will not tolerate "unlawful" preferences. Rather, she stated that "[t]he numerical goals approach . . . is not based on racial or gender preferences" and that under OFCCP regulations, "*selections for employment or promotion must be made without regard to race or gender.*"[41] With all due respect, this is simply not true. It was not true in *Weber*, for example, when Kaiser set aside 50% of the slots in a training program for minorities under pressure from the Office of Federal Contract Compliance.[42] It does not seem to be the position of the Justice Department, which supported the right of the Piscataway School District to select Sharon Taxman for layoff because she is white. It does not seem to be the position of Assistant Attorney General Deval Patrick, who is on record as supporting race and sex-conscious decisions — what he calls "'affirmative consideration' where race, ethnicity, or gender is a factor, but is not necessarily dispositive

40. Emphasis added.

41. *Affirmative Action and the Office of Federal Contract Compliance: Hearing Before the Senate Comm. on Labor and Human Resources*, 104th Cong., 1st Sess. 4 (1995) (statement of Shirley J. Wilcher, Deputy Assistant Secretary for Federal Contract Compliance, Dep't of Labor) (emphasis added). Although Ms. Wilcher then went on to note that this was "consistent with Title VII of the Civil Rights Act," she did *not* say that selections for employment or promotion must be made without regard to race or gender *unless it would be legal under the Civil Rights Act to grant preferences. Id.*

42. See Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 226 (5th Cir. 1977) (noting that "the district court found that the 1974 collective bargaining agreement reflected less of a desire on Kaiser's part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts").

in evaluating qualified candidates."[43] There is simply no evidence that the OFCCP or any other enforcement agency ever challenges the use of plus-factor type preferences.

In fact, employers know that the OFCCP expects them to grant preferences and that it will not take action against them if they do. For example, Honeywell Space Systems Group in Clearwater, Florida, is a government contractor that was faced with the need to lay off part of its work force.[44] The manager of training, development, and affirmative action described Honeywell's performance-based layoff system as follows:

> We considered first the skills we needed to do the work, the level of performance reflected in the (individual's) personnel file, and then length of service. So it was not a seniority- based process. It was a performance-based process with length of service as the tie-breaker.

However, sometimes the performance-based process did not provide the "right" numbers. In those cases, according to the manager, "We'd *massage the numbers* to make sure there wasn't a disproportionate representation of females and minorities in the bottom of the relative ranking." It should be noted that this is not a disgruntled manager complaining about being forced to grant preferences. She made these statements with pride, stating that "[w]hen you have a diverse work force, the potential is endless."

In sum, it is not practically possible to retain "goals and timetables" but jettison "preferences." Constantly keeping one eye on the "bottom line" means that the other eye will always be on race and sex. As long as employers are under pressure to achieve goals, preferences will be a part of the system.

V. PREFERENCES VERSUS QUOTAS

Is there a principled difference between the use of race and sex as "plus factors" and their use as "quotas"?

Some people distinguish between using "goals" or "plus factors" and using quotas. That seems to be what Assistant Attorney General

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43. *Civil Rights: Patrick Defends Affirmative Action in American Bar Association Address*, DAILY LAB. REP. (BNA) No. 152 (Aug. 8, 1995), *available in* LEXIS, Labor Library, DLABRT file, Doc. No. 95 DLR 152 d19.

44. *See Honeywell Group Keeps Commitment to Affirmative Action Plan*, DAILY LAB. REP. (BNA) No. 147 (Aug. 1, 1995), *available in* LEXIS, Labor Library, DLABRT file, Doc. No. 1995 DLR 147 d35.

Deval Patrick was referring to when he said that he supported using race or sex as a factor but not one that is "necessarily dispositive in evaluating qualified candidates."

There are two primary reasons why this dichotomy is meaningless: (1) under the strict definition of "quota," no such animal exists in nature; it is just a straw man; and (2) the perceived evils of quotas are present in non-quota preferences.

As described above, quotas in the narrow sense — hiring blindly according to the numbers and without regard to the existence of even minimal qualifications — simply do not exist. These are the quotas that are typically described as being illegal, but being against quotas in this sense has as much real-world effect as being against goblins. Quotas in the broader sense, such as the set-aside in *Weber*, do not seem to be included in the usual condemnation of quotas. Thus, the *Weber* preference seems to fall onto the "non-quota preference" side of the line, even though it clearly set aside a certain number of positions for blacks, just as the University of California had done in its affirmative- action plan that was struck down in *Bakke*.[45]

More fundamental, however, is the issue of principle. As a matter of principle, it is not clear why one should draw such a sharp line between quotas and "plus-factor" preferences. As Justice Powell noted in his opinion in *Bakke*, the "semantic distinction [between 'goals' and 'quotas'] is beside the point [because] the special admissions program is undeniably a classification based on race and ethnic background."[46] Judging from the poll results described above, the American people similarly do not seem to draw much distinction between quotas and preferences.

In thinking about whether the "quota/preference" distinction is meaningful, one should consider carefully just why it is that racial quotas are viewed as being wrong. Usually, two reasons are given: one focusing on the beneficiaries of the quota and one focusing on the victim.

As to the group benefited by the quota, it is often said with some justification that the quota stigmatizes. It implies that members of the favored group cannot make it on their own and are not to be judged by the same rigorous standards that other individuals face. The very existence of the quota, therefore, is a badge of inferiority. The persons most harmed, of course, are those members of the group that could have made it on their own, for they are forever subjected to the false, but well-founded, suspicion that they did not do so.

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45. Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).
46. *Id.* at 289.

This kind of harm exists irrespective of whether there was a "flexible goal" or a "rigid quota." The fact that selections are not made on a race- and sex-blind basis in either case means that the stigma is present. Whether it was a thumb on the scale or a fist, the badge of inferiority that comes with preferential treatment will always be present.[47]

From the perspective of the direct victim of the quota — typically a white man — the distinction between "preferences" and "goals" and "quotas" seems utterly irrelevant. He did not get the job because of his sex and/or race; another candidate got the job because of his or her sex and/or race. This man derives no comfort from knowing that he was not the victim of a "rigid quota" but rather of a "flexible goal." Whether the successful candidate was slightly less qualified, only marginally qualified, or even unqualified, the harm to the rejected victim is the same. Indeed, the economic injury he suffers is no different from that suffered by a black or a woman who has been discriminated against.

Some people express support for preferences when race or sex is just "one of many" factors as opposed to being the "sole factor," but this also is a distinction without a difference. President Clinton thus objected to rejection or selection "solely on the basis of race or gender" and Assistant Attorney General Patrick supported use or sex when it is "a factor, but is not necessarily dispositive." However, whenever a preference is granted, race or sex *is* dispositive and the decision itself is in reality based solely on race or sex. The employer in *Johnson*, for example, would have selected Johnson on the merits, but *solely because of sex*, it selected a woman instead. Sex was the "dispositive factor"; the *only* reason that Johnson did not get the promotion was that he was a man.

Some people simply deny the existence of these victims of affirmative action. That was the thrust of the Blumrosen report, but, of course, that report went only to the existence of victims of *illegal* affirmative action. In some sense, of course, all affirmative action, even the most benign, can harm the nonbeneficiaries. If the employer had not cast a wide net, A would have been hired, but because the net was wider, B was in the pool and he was more qualified than A.

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47. It is sometimes argued that other people have gotten various kinds of preferences without any badge of inferiority being associated with it. An example that is sometimes given is nepotism, the practice of favoring kin for positions. One should not blithely assume that there is no associated badge of inferiority. One of the frequently recurring figures in books and movies is the son, or perhaps more commonly the nephew, of the business owner who lacked qualifications for the job but obtained a position of authority because of his relationship. This person is generally portrayed as a figure of ridicule.

Therefore, when the employer relied on merit in selecting from the wider pool, B got the job and A did not. Although such a decision would be "because" of affirmative action in some sense, few people are troubled by this kind of process. After all, A and B were competing on equal terms, and B was more qualified than A.

Preferences are a different matter. If A and B are in the pool together, and A is more qualified (whether because of educational qualifications, prior experience, job performance, seniority, etc.) yet B is hired or promoted because of race, A is quite clearly a victim of a racial preference. Most hiring and promotion decisions are zero-sum; you cannot provide the job to B without at the same time denying it to A. A is harmed; A is a victim of racial preferences. To say that this kind of intentional harm is permissible because the underlying motivation is not to harm A but to help B makes little more sense than it would to mitigate the wrong of the crazed tennis fan who attacked Monica Seles on the ground that he was motivated not by a desire to harm Ms. Seles but rather by a desire to help Steffi Graf.[48]

Preferences are not victimless phenomena. Paul Johnson was harmed by the sex preference: he did not get his promotion. Brian Weber was harmed by the racial preference: he did not get admitted into the training program. Sharon Taxman was harmed by the racial preference: she got laid off instead of having the opportunity to have the layoff decision be determined by chance; actuarially, she lost only half a job, but she lost nonetheless.[49] Johnson, Weber, and Taxman are all flesh-and-blood victims.

VI. THE EFFECT OF *ADARAND* ON THE EXECUTIVE ORDER PROGRAM

In addition to considering the wisdom of affirmative-action policy, this Committee is also considering the effect that the *Adarand* case had on the constitutionality of OFCCP enforcement activities. Because of the surreptitious nature of the preferences involved, there is no easy answer to that question.

In *Adarand*, the Supreme Court reviewed the federal government's practice of presuming that subcontractors who are "Black

48. *See* Ferdinand Protzman, *Seles, No. 1 Tennis Player, Is Stabbed During a Match*, N.Y. TIMES, May 1, 1993, §1, at 1.

49. As the Supreme Court observed in Northeastern Fla. Contractors v. Jacksonville, 508 U.S. 656, 666 (1993), "the 'injury in fact' in an equal protection case . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."

Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities" are "socially and economically disadvantaged individuals." Because prime contractors received additional compensation if they used subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals," the effect of the presumption was to make it harder for non-minority subcontractors to bid successfully. The subcontractor in *Adarand* had submitted the low bid on a guardrail project but lost the contract to a minority business that had benefited from the presumption of disadvantage.

The Supreme Court held that even though the racial classification may have been "benign" — in the sense that it was motivated by a desire to assist minorities rather than to oppress them — it would comply with the Fifth Amendment's equal-protection principle only if it satisfied the "strict scrutiny" standard. Under that standard, both the means and the ends of the classification are examined: "such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests." The Court did not apply the strict-scrutiny standard to the program at issue in *Adarand*, instead directing the lower courts to do so.

Predicting how the Court would apply *Adarand* to the OFCCP enforcement scheme is difficult, because of the somewhat indirect way that the OFCCP requires preferences. However, if the Court were willing to look beyond form to substance, there seems little doubt that the contracting regulations would be held unconstitutional.

Assume, for sake of discussion, that the program were formally structured to require directly what it now requires indirectly. Suppose the OFCCP regulations explicitly informed employers that: (1) they must adopt affirmative action plans that contain "goals" for women and minorities; (2) if necessary to satisfy these goals, employers must give preference to women and minorities; and (3) if employers fail to satisfy their goals, they will face governmental sanctions.

Would such a scheme satisfy the strict-scrutiny standard? Is it narrowly tailored to serve a compelling governmental interest? The only compelling governmental interest that the Court has identified for "benign" racial discrimination in employment is the remedying of prior intentional discrimination.[50] The Court has rejected such justifications as "societal discrimination," "role models," and "outright racial balancing." If the government's purpose is merely to

50. United States v. Paradise, 480 U.S. 149 (1987); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *Adarand*, 115 S. Ct. at 2097.

increase the number of women and minorities in particular jobs, that would seem equivalent to the University of California at Davis' desire to have more black medical students or doctors, an interest that Justice Powell described in *Bakke* as "facially invalid . . . discrimination for its own sake."[51]

It seems clear that the OFCCP program cannot be justified as a response to past discrimination. Affirmative action goals are imposed on *all* federal contractors, not just those for whom evidence of prior discrimination exists. A demonstration that there has been prior discrimination against women and minorities in the labor market as a whole is insufficient to justify nationwide preferences for all federal contractors.[52] As the Supreme Court observed in *Croson*, "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[53] As now-Solicitor General Drew Days wrote in a 1987 law review article, "it is essential that state and local agencies also establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions."[54] The critical question in *Croson* was whether there had been discrimination in contracting in the City of Richmond, and the Court rejected the notion that findings of discrimination could be "shared" from jurisdiction to jurisdiction.[55] Because there is not even an attempt to discover whether an individual federal contractor (or like businesses operating in the same market) has ever engaged in discrimination, no plausible argument can be made that the preferences under the Executive Order are justified as a response to discrimination.[56]

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51. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, at 307 (opinion of Justice Powell).

52. *See* Memorandum from Walter Dillinger, Assistant Attorney General of the United States, to General Counsels (June 28, 1995), *reprinted in Justice Department Memorandum on Supreme Court's* Adarand *Decision*, DAILY LAB. REP. (BNA) No. 125 (June 29, 1995), *available in* LEXIS, Labor Library, DLABRT file, Doc. No. 1995 DLR 125 d33 ("Given the nation's history of discrimination, virtually all affirmative action can be considered remedial in the broad sense. But as *Croson* makes plain, that history, on its own, cannot properly form the basis of a remedial affirmative action measure under strict scrutiny.").

53. 488 U.S. at 498.

54. *See* Drew Days, Fullilove, 96 YALE L.J. 453, 480-81 (1987).

55. 488 U.S. at 505.

56. The *Croson* Court also found that extension of the benefits of its set-aside program to Hispanics, Orientals, Indians, Eskimos, and Aleuts called into question the City's justification of the program as a remedy for historical discrimination against blacks. The Executive Order takes an equally broad-brushed approach in identifying the beneficiaries of the program, extending both to women and an extremely broad array of "minorities." *See* 41 C.F.R. § 60-4.3(a)(1)(d) (1995):

'Minority' includes: (i) Black (all persons having origins in any of the Black African

Many proponents of preferences cite the interest in having a "diverse" work force. However, Justice O'Connor's opinion in *Croson* seems to suggest that such forward- looking justifications are impermissible and that affirmative action must be "strictly reserved for the remedial setting."[57] Other Justices, most consistently Justice Stevens, have argued that nonremedial interests, such as "diversity," may justify *some* affirmative action programs.[58] However, as the Justice Department memorandum on affirmative action states, "it is clear that to the extent affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective, beyond the mere achievement of diversity itself."[59] Whatever argument for diversity that might be made for teachers, students, and police officers is unlikely to extend as well to plumbers and accountants. Moreover, it is far from clear that the government's interest in ensuring the diversity of each private employer's work force is of as great a magnitude as its interest in ensuring the diversity of its own work force.

Because there is no plausible compelling interest supporting across-the-board OFCCP-mandated preferences, it is not necessary, or even sensible, to address the question of narrow tailoring. As the Supreme Court observed in *Croson*, "it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." However, the Court did make two observations concerning the Richmond plan that are equally applicable to the federal-contractor program. First, the Court noted that there seemed to have been no consideration of the use of race-neutral means to increase minority participation, and second, the percentage goal rested "upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."[60]

In sum, an explicit Federal program requiring contractors to engage in preferential hiring would not satisfy the dictates of *Adarand*

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racial groups not of Hispanic origin); (ii) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race); (iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and (iv) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

It is hard to understand what "wrong" justifies a remedy for a recent immigrant from Bangladesh, for example, or why such an immigrant would have a greater claim than an immigrant from Afghanistan.

57. 488 U.S. at 493.

58. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 314 (1986) (Stevens, J., dissenting).

59. *See* Office of Legal Counsel Memorandum, *supra* note 52.

60. 488 U.S. at 507.

and *Croson*. The remaining question is whether a program is saved from unconstitutionality by its indirect and covert nature.

As described previously, there is a formal distinction between goals and preferences, but in practice goals lead inexorably to preferences. The OFCCP takes the position that if federal contractors are employing preferences in an attempt to satisfy their compliance obligations, they are going beyond anything that the government requires. As a result, it would argue, the "private" actions of the contractors are not subject to constitutional scrutiny.

It is difficult to predict how the Supreme Court would apply its constitutional decisions to the Executive Order program. Wholly voluntary preferences by private employers would raise no constitutional issue, so the question is whether the Court would look beyond form to substance. There is certainly support in Supreme Court case law for the proposition that federal pressure to engage in preferences is subject to constitutional limitation even if the pressure stops short of strict compulsion. As the Court observed in *Norwood v. Harrison,* a case involving the constitutionality of a state's provision of textbooks to racially discriminatory private schools, "[i]t is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."[61]

The uncertainty of the Supreme Court's approach to the OFCCP program makes congressional action all the more imperative. Congress may act based upon its judgment concerning the wisdom of the policy; it need not confine its inquiry to the policy's constitutionality. For some reason, much of the rhetoric surrounding these issues starts from the assumption that if a particular program is constitutional, then it is "good" and should survive. However, that inverts the proper analysis. The proper analysis is to decide whether a policy is wise and then to ask whether there are constitutional barriers to its implementation. Whether or not the OFCCP enforcement regime is constitutional, it is not good policy. Thus, no prognostications concerning the applicability of *Adarand* are necessary antecedents to passage of H.R. 2128.

VII. Possible Modification of the Mission of the OFCCP

This Committee is also considering whether some modification of the mission of the OFCCP might be in order. Certainly, as

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61. 413 U.S. 455, 465 (1973) (quoting Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)).

described above, the OFCCP should get out of the business of requiring preferences. However, the problem with the OFCCP goes beyond that. The OFCCP has transformed itself into a full-fledged anti-discrimination enforcement agency, largely duplicating the functions of the EEOC without the built-in safeguards against arbitrary agency action that Title VII provides.

When the OFCCP conducts compliance reviews, it focuses on employers whose "numbers" are not right and often conducts exhaustive (and exhausting) reviews of the employers' hiring and promotion activities looking for "discrimination." Compliance officers second-guess the employers' employment decisions, and when they decide that in their opinion an unsuccessful woman or minority should have been hired, the agency will often order the employer to provide a remedy. The agency is thus both prosecutor and judge. The fact that the EEOC may have already found "no cause" in the case does not prevent the OFCCP from insisting on a remedy.[62] One can easily understand the unfairness to employers that follows from the fact that when the agency seeks to demonstrate how important it is, it touts the volume of settlements that it has obtained from contractors.[63] It therefore has a tremendous incentive to label employers "discriminators"; if it finds no discrimination, it is not "doing its job."

In an era of "reinventing" and streamlining government, it makes little sense for the OFCCP to be duplicating the function of the EEOC. It is the EEOC that was charged with enforcing Title VII. In fact, Congress declined to give the EEOC the kind of enforcement authority that the OFCCP has taken upon itself.

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62. The OFCCP is about to begin a compliance review of the Los Alamos National Laboratory to investigate allegations of race discrimination in layoffs. *See* Keith Easthouse, *U.S. Labor Department Will Probe Layoffs*, SANTA FE NEW MEXICAN, Feb. 10, 1996, at B1. A number of Hispanic employees had alleged that a major layoff of employees was intentionally racially discriminatory because the Laboratory targeted its nonscientific support staff (who are disproportionately minority) for layoff rather than its overwhelmingly Anglo male scientific staff. On its face, that is an improbable claim, since it would mean that the Laboratory either would have preferred to lay scientific staff off or would have been indifferent to whether scientific staff or support staff were laid off, except for the fact that support staff were disproportionately minority. Given that in a scientific lab the scientific staff are the "producers" and the nonscientific support staff are the "overhead," there is nothing suspicious on its face in the Laboratory's choice. Indeed, claims of racial discrimination had earlier been dropped for lack of evidence from a lawsuit by laid-off employees. *See* Keith Easthouse, *Racial Issues Dropped from Suit Against Lab*, SANTA FE NEW MEXICAN, Nov. 7, 1995, at B2. This case appears to demonstrate two points: (1) that employers should ensure that there is proportional representation in their employment decisions if they want to avoid trouble from the OFCCP; and (2) that the OFCCP expends a great deal of effort in activities that could be, and should be, performed by the EEOC.

63. *See supra* note 26.

This is not to say that there is no legitimate function for the OFCCP. The outreach activities that the OFCCP says are the heart of its affirmative-action concerns are not required by Title VII, and the EEOC therefore ordinarily has no jurisdiction over a claim that an employer did not "cast the net widely enough." The OFCCP could provide its expertise to employers to assist them in seeking to enhance the diversity of its applicant pool.

VIII. Conclusion

The notion that one can have a merit-based system that is sex- and race-conscious is an illusion. Goals and timetables (or other numerical objectives) create an inexorable pressure to engage in preferences. The decision-maker can make decisions based upon the goals or upon race- and sex-neutral criteria; it simply cannot do both. H.R. 2128 is a sensible step toward a system of race- and sex-neutral decision-making.

The question whether *Adarand* does or does not invalidate the Executive Order program is a diversion that need not impede legislative attempts to prevent the Federal Government from requiring that its contractors employ preferences. Indeed, a conclusion that *Adarand* would spare the program makes congressional action all the more necessary, since if it is unconstitutional the courts will eventually invalidate it.

Once the OFCCP is out of the business of enforcing a system that effectively mandates preferences, the question is whether it has any remaining proper function. Although its activities as an anti-discrimination agency largely overlap with the jurisdiction of the EEOC, and for that reason should be eliminated, the OFCCP may still perform a useful function in assisting federal contractors in their outreach activities.

If the ideal is to move toward a system in which individuals are judged according to their own distinctive qualities, it is time to move beyond the currently preference- ridden system. Some believe that Justice Blackmun's statement in *Bakke* that "[i]n order to get beyond racism, we must first take account of race" and that "in order to treat some persons equally, we must treat them differently" is profound. Their belief is only half right; Justice Blackmun's statement is *profoundly wrong*. H.R. 2128 is an important step toward recognition of that fact.