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MODERNIZING AFFIRMATIVE ACTION

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ABSTRACT

This article addresses the topic of affirmative action. The authors contend that the available information suggests that many of the broad-based notions that underlie current AA concepts are obsolete because decades of legislative and judicial remedies to combat overt discrimination have had positive results. This article argues that affirmative action policies may need to shift from their traditional emphasis on broad racial/gender characteristics to focus directly on economic disadvantage.

Affirmative action (AA) has been an integral part of our national fabric for nearly four decades and may be the most divisive public policy issue of our time. Within the U.S. Supreme Court, a heated debate on the merits of AA has developed over the past two decades, reflecting the sharply divided opinion of the general public. In particular, Justice Clarence Thomas has harshly criticized the majority of the Court for endorsing the use of race-based preferences to remedy past employment discrimination.

The majority of the Supreme Court reasons that outlawing existing discrimination is not an adequate response to a historical legacy of racial bias. After initial uncertainty, the majority now holds there is a compelling state interest in *fully* addressing a history of discrimination. Consequently, race-conscious

remedies are permissible as long as they can survive the highest level of constitutional analysis, "strict scrutiny." In employment discrimination cases the Court has, therefore, allowed AA remedies that mandate racial preferences, including even hiring quotas in particular industries [1].

It is interesting to compare the Supreme Court's AA jurisprudence in the employment area with the approach the Court has developed with regard to racial preferences in the field of admissions to graduate and law schools. In the 2003 decision in *Grutter v. Bollinger* the Court rejected the use of quotas in admissions to law schools, but it allowed schools to identify and admit a "critical mass" of minority students to further their efforts to obtain a diverse student body [2]. The Court insisted that this critical mass is not a quota system because it did not contemplate a fixed goal, or even a target, on minority student admissions. In seeking this critical mass, admission decisions are to be individualized and, in addition to considering an applicant's race, may include such race-neutral factors as socioeconomic background and geography.

Importantly, the Court pointed out in this context that since the purpose of the Fourteenth Amendment was to rid the nation of intentional race discrimination, race-conscious AA policies should be limited in time [2]. The Court made clear its expectation that the use of racial preferences in employment, academic admissions, and all other aspects of society will be phased out over the coming quarter-century [2].

In sharp contrast, Justice Clarence Thomas wrote a scathing dissent in *Grutter,* demanding that African Americans be allowed to make their way in American society without the paternalistic assistance of AA [2]. He believes that AA programs do far more harm than good in terms of African-American self-esteem and societal perceptions of the African-American race. His constitutional criticism of the majority opinion is based on the simple proposition that under the Fourteenth Amendment, *all* racial discrimination is unconstitutional. Justice Thomas called for an "immediate end to mandated racial preferences of any kind" [2, at 2351].

While Thomas makes compelling emotional and legal arguments, we suggest that rather than abruptly ending remedies for historic employment discrimination, a gradual solution to the AA dilemma may be found in the "critical mass" approach the Court used in the educational context. Such an approach takes a broad view of an entire organization (whether it be a university or a company) and allows considerable flexibility when that organization, in good faith, seeks an appropriate mix of students or employees. The appropriateness of the mix can involve racial, cultural, and socioeconomic factors in the attempt to create the most-effective organization possible while granting opportunities to those who might otherwise have been left out.

This approach would require a fundamental restructuring of the concept of AA to focus on socioeconomic factors rather than race or gender. This approach also assumes that existing employment trends, which we perceive to reflect

race-neutral hiring practices, will continue to develop and eradicate the last vestiges of discrimination that may still lurk in the dark corners of society. We contend, therefore, that the trust the Court in *Grutter v. Bollinger* placed in university admissions committees may be safely extended to most program administrators, CEOs, and human resources executives in the attempt to address racism and sexism in the workplace.

BACKGROUND

The first AA programs in the Kennedy and Johnson eras were based on the principle of nondiscrimination [3]. Those early policies emphasized recruitment efforts that focused on attracting women and minorities to organizations in ways that were more consistent with the objective of nondiscrimination than the previous practices. But once individuals were recruited into a pool of applicants, they were screened for actual selection on the basis of merit. It wasn't until the Nixon administration that goals and timetables were formally required as part of AA in employment [3]. This changing emphasis has led to the contentious notion of employment preferences in the hiring process.

The Supreme Court has upheld the constitutionality and legality of goals, timetables, and even quotas in special circumstances as long as the AA remedy is temporary—lasting just long enough to remediate past discriminatory practices [4]. In fact, the Supreme Court stated in 1989 that all race-conscious AA plans must come to an end at some point to assure all citizens "that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary measure taken in the service of the goal of equality itself" [5, at 510].

From Limits to Obsolescence

As the Court has struggled with AA, it has placed doctrinal limits on the use of certain remedies for past discrimination. The requirement of "narrow tailoring" is one such constraint. Narrow tailoring requires that remedial classifications be limited to what is actually necessary to redress the discrimination at issue. Narrow tailoring, like the requirement that courts use the least restrictive alternative in implementing AA remedies, involves the recognition that AA remedies do exactly that which AA is intended to prevent: they require disparate treatment. Justice Thomas, however, disagreed. He contended that two wrongs do not make a right. He even asserted that the Equal Protection Clause of the Fourteenth Amendment prohibits all discriminatory racial classifications, whether those classifications are intended to benefit minorities or not [2, at 2141].

In determining whether race-conscious remedies such as hiring quotas are constitutionally permissible, the court has required, among other factors, a time duration [5]. A remedy may last only long enough to redress the specific wrong that the case considers. Thus, it may be argued that the larger public policy of

AA should be continued only long enough to address the specific discrimination that made this public policy necessary. In other words, when reliable statistics indicate that AA has brought about approximate racial proportionality in employment, the court should not hesitate to abandon its remedy.

As Justice Thomas maintained, the text of the Fourteenth Amendment simply does not allow the use of disparate treatment based on race, even for good or remedial reasons. Thomas also provided a compelling second reason for eliminating AA: the damage that the AA mentality inflicts on the self-esteem of African Americans. AA presumes that African Americans are unable to compete in the employment arena and artificially enhances their opportunities to obtain certain jobs. While this undoubtedly results in higher employment numbers, it also demeans those who obtain jobs on their own merits. Thomas "suggests that AA policies stamp minorities with a "badge of inferiority," that may lead to the development of dependency or to an attitude that African Americans are entitled to preferences and cannot compete without them" [6, at 214].

The question then becomes: How much longer should AA be a major instrument of government policy? Writing for the narrow 5-4 majority in *Grutter,* Justice O'Connor said, "We expect 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" [2, at 2347]. This assertion is based on the assumption that racial and gender discrimination remains, at least today, a chronic, influential force throughout the society, including the American workforce. But do objective statistics support this assumption?

RECONSIDERING AFFIRMATIVE ACTION

Our reading of the aggregate statistical data complied by the U.S. government to measure a discrimination-free workplace suggests that discrimination in employment has, with some exceptions, generally dissipated (see Tables 1 and 2). Whites, African-Americans, Latinos, Asians (including Pacific Islanders), as well as males and females, are broadly represented, perhaps even randomly distributed, across the employment spectrum. Historic practices of systematic discrimination suggest that there should be an overwhelming preponderance of minorities and females in the least-preferred job classifications, with the opposite being true of whites and males. This is not the case. Evidence of a pattern of systematic discrimination does not emerge from the Equal Employment Opportunity Commission Occupational Employment data summarized in Table 1.

In fact, Asian/Pacific Islanders and African Americans either mirror their population density or are represented at rates higher than their population representation in five job classifications, and they also participate in the workforce at an even higher rate than their availability in the population would predict. In contrast, whites are above their population representation in only four job categories and do not exceed their population representation in the workforce. Women exceed their representation in the population and surpass male

Table 1. Selected Demographics 2000

U.S. Population Demographics 2000

	% of Population
White	75.1
African-American	12.3
Latino	8.0
Asian/Pacific	3.6
Other	1.0
Male	49.1
Female	50.9

Source: U.S. Census: Profile of General Demographic Characteristics: 2000 [7].

Workforce Composition

	Work-force	Officials/ Managers	Prof.	Tech.	Sales	Clerical support	Craft	Opera-tives	Laborer	Service workers
White	70.8	85.6	81.0	75.7	73.2	69.8	77.4	64.6	52.5	53.9
African-American	14.0	6.4	6.8	11.5	14.0	17.1	9.9	17.3	19.5	24.2
Latino	10.3	4.5	3.8	6.5	9.2	9.0	9.7	13.5	23.9	17.4
Asian/ Pacific	4.3	3.1	8.1	5.7	3.1	3.6	2.3	3.9	3.3	3.8
Male	52.9	66.2	48.8	55.3	43.6	19.7	87.1	70.8	64.7	42.7
Female	47.1	33.8	51.2	44.7	56.4	80.3	12.9	29.2	35.3	57.3

Source: Occupational Employment in Private Industry by Race/Ethnic Group/Sex and by Industry EEOC Workplace Statistics for 2000 [8].

Educational Attainment
(over age of 18 and attained at least level indicated)

	High school	Associate degree	College degree	Masters/Prof. degree	Doctorate
White	88.5	36.8	28.0	9.2	1.2
African-American	85.5	25.9	17.1	4.8	.6
Latino	62.3	16.4	10.8	2.7	.3
Asian/Pacific	91.8	55.9	48.1	15.6	3.3
Male	86.6	35.6	27.9	9.5	1.7
Female	90.1	37.0	27.1	8.3	.7

Source: U.S. Census, Earnings Educational Attainment United States, March 2000 [9].

Table 2. Poverty and Salary Data by Race for 2000

	Population (in millions)	
	Below poverty line	% of population
White	22.7	9.9
African American	8.1	22.7
Latino	8.0	21.4

Note: Persons of Latino origin may be of any race.

	Salary (in thousands of dollars)			
	Median salary males	Salary as % of whites	Median salary females	Salary as a % of whites
White	29.8		16.1	
African American	21.3	71.5	15.9	98.8
Latino	19.5	65.4	12.3	76.4

Source: World Almanac 2003: Income by Sex, Race, Age, and Education, 2000-2001, Persons Below the Poverty Level, 1960-2001, and Median (Source: Bureau of the Census, U.S. Dept. of Commerce) [10].

representation in the valued "professional" job category, which is also the gateway to the officials and managers job classification.

Table 1 also reveals that there are significantly higher representations of African Americans and Latinos at the lower end of the job spectrum and correspondingly lower representation of these groups in such upper-level job classifications as "officials/managers," and "professionals." Females are also significantly underrepresented in several job classifications. However, beyond the simple explanation offered by racial and gender discrimination, these discrepancies may be influenced by many factors, including measurement problems, age, location, educational achievement, interest, culture, and ability [11, p. 42].

FACTORS AFFECTING WORKFORCE REPRESENTATION RATES

Measurement Problems

Evidence of a discrimination-free society is difficult to quantify [11, p. 53]. "The mere fact that some group is x percent of the population but only y percent of the employees is taken as a weighty presumption of employer discrimination" [11,

p. 53]. But this does not, in and of itself, prove the existence of racial or gender discrimination. It may be argued that if exactly proportional racial and gender representation does not exist among all job categories then some inequality of opportunity must have intervened [11, p. 54]. However, "there are serious statistical problems with this approach, quite aside from the substantial group differences in age, education, and cultural values" [11, p. 54]. In a random universe one would *not* expect representations to mirror their population availability exactly. To do so would violate the laws of random probability. Besides, a host of other factors may be affecting workplace representation rates that are unrelated to racial or gender discrimination.

Age

There are important disparities in age distribution and employment achievement among racial groups. If one accepts that through decades of legislative and judicial intervention there has been some degree of remediation of long-standing racial and gender discrimination, then only a single, younger generation of minorities and females has grown up with the realistic expectation that any and all job categories might be open to them. While white job seekers have, across the generations, aspired to and been groomed for the most desirable jobs, relatively few minority and female applicants sought out executive, management, or professional positions. Thus, there exist disproportionately more white candidates with the age, experience, and qualifications to fill those upper-level jobs. But as the beneficiaries of the myriad of AA remedies, the younger generations of African Americans and females become increasingly qualified for the most desirable jobs, and they obtain an increasing number of these positions.

Indeed, if the carefully crafted judicial remedies that the courts have so diligently pursued over the past 40 years are having their intended effect, more women and minorities will move into the most desirable job categories. However, because differences remain in the quantity of work experience and in the eligibility of members of different age groups for advancement to the most desirable jobs, it simply takes time for such groups to attain the education and experience levels necessary to be able to perform effectively in professional and managerial positions.

For example, it took decades for women to reach the point where they outnumbered men in the "professional" job category. The lag stemmed, at least in part, from the time required for women to 1) develop interest in fields formerly closed to them; and 2) attain sufficient levels of education and experience to hold such positions.[1]

[1] Cultural factors may enter in as well. Women are not yet well represented in the officials and managers category. This lack may, in large part, be traced to their unwillingness to trade having or raising a family for high-powered jobs, rather than discrimination [12].

As stated by Sowell, "very different age distributions prevent minorities from being equally represented in colleges, jails, homes for elderly, the armed forces, sports, and numerous other institutions and activities that tend to have more people from one age bracket than from another [11, p. 2]. One must take into account the time lag between the implementation of legal remedies for discrimination and their effect, as well as the effect those remedies have on each generation.

Geographic Distribution

Minority populations are not evenly distributed across the country. While most Latinos are concentrated in the Southwest, Puerto Ricans are found mostly in the Northeast. At least half of all African Americans live in the South, while disproportionate numbers of Asian Americans reside in California and Hawaii [11, p. 44]. Because minority populations are not evenly distributed across the country and because income levels vary considerably in different regions of America, geographic distributions may skew the income and employment levels of those minority populations. An example of the effect of these geographical differences can be seen with regard to income. As indicated, at least half of all African Americans live in the southern states where income levels are the lowest in the country [13].

An African American in Alabama earning $40,000 would exceed the median household income for the state, while falling below the national median household income [13]. Since there are greater concentrations of minorities in relatively less-wealthy areas of the country, the income (as well as other employment-related factors) of those minorities may reflect parity in their geographic region while falling below national averages.

Education

Higher levels of education and training are the normal prerequisites for obtaining better jobs (see Table 1, Part Two). The statistics demonstrate that African Americans graduate from high school at about the same rate as whites, but they graduate from all higher educational levels at substantially lower rates. Although aptitude tests are far from perfect predictors of academic or professional success [14], African Americans consistently score below whites on these tests [15, 16]. There is also evidence that African-American lawyers and doctors pass their respective certifications at substantially lower rates than their white counterparts [17] and that they do not do as well in school once they are accepted, as demonstrated by lower grades and higher dropout rates [15, 18].

These factors, when combined, suggest that something other than racism or culturally biased tests is the culprit. Further indicators that this disparity is not entirely attributable to discrimination are that females and Asians/Pacific Islanders possess educational credentials beyond high school that either meets or exceeds their male or white peers. Furthermore, as one might expect, their

representations in job classifications that require advanced education and credentials are substantially higher.

However, African Americans are today represented in a number of desirable professions at higher levels than ever. They are employed as lawyers, judges, and engineers at a rate four times greater than they were in 1978, and there are two-and-one-half times as many Black physicians over the same period [19]. At least one study has found that after correcting for IQ and age via regression Blacks, whites, and Latinos all earned the same annual income of around $26,000 [20, p. 371]. Also, "most researchers have found that, for youth with similar levels of family income and educational achievement, Blacks' educational attainment is at least as high as whites" [21, p. 6]. This is hardly evidence of broad-based employment discrimination.

Serious questions have been raised about the validity of certain standardized tests. Yet research reveals that while income is related to lower test scores for both whites and African Americans, the test results of whites still exceed African Americans at every income level [17]. But these inequities, as well as the workforce representation they influence, illustrate a complex socioeconomic problem rather than simple racial discrimination.

There is little doubt that many African-American students attend many elementary, middle, and high schools that are inferior to those attended by white students. Decades of the most drastic desegregation remedy-forced busing of African-American students to white schools and vice versa—failed to equalize the quality of the public schools. Indeed, most judicial attempts to overcome ingrained geographical, cultural, and economic disparities by manipulating public school attendance have been abandoned. The reality is that economically disadvantaged students, including African American, white, and other minorities, attend schools that are often inferior to those attended by students with wealthy parents. It is this disparity, rather than simple racial discrimination, that better accounts for the performance indicators listed above and for the disparity in educational achievement that is partially reflected in minority workforce representation.

Furthermore, it is unlikely that simplistic solutions, such as desegregation and the prevailing notions of AA, can ever resolve these problems. As the Supreme Court has implicitly recognized in *Gratz v. Bollinger* [22], the companion case to *Grutter* [2], admitting students to colleges and universities based solely on race is an inadequate and overly simplistic approach. Instead, the Court allows race to be considered, but as one of many factors that can bring about a student body that reflects the diversity that exists in America and the world. Only in this context does the Court suggest that national and world leaders can emerge [22].

The Court also appears to recognize the fact that African Americans and Latinos are heterogeneous populations with their own subcultures, tastes, and interests. African Americans and Latinos are not the homogeneous groups that affirmative action policy has always assumed them to be [23]. For example, when allowed to

choose courses in high school, four-fifths of Asians enrolled in mathematical courses, but only one-fifth of African Americans chose the same option [11, p. 49]. Furthermore, chlid-rearing practices of various cultures and subcultures (even those in the United States) have been shown to have a significant effect on intellectual performance [20, p. 369].

Another example can be found in Sowell's statement on research that shows "Jews and Japanese . . . are often outstanding in different sets of mental skills. Both Jews and Japanese have generally scored above average on I.Q. tests . . . but those parts of the tests on which Japanese particularly excel (spatial intelligence) are the parts on which Jews generally do less well than on other sections, while the outstanding verbal facility of Jews is not found among the Japanese, even those tested in their own language. Differences in child-rearing practices have been cited as possible reasons for those differences" [20, p. 369].

Thus, it can be said that disparities in minority workforce representation are influenced both directly and indirectly by inequities in the public education system and by cultural differences in the students who attend the schools. But it must be recognized that simplistic solutions, such as those advanced by current AA philosophies and practice, can never fully achieve their noble purpose. As outlined in our conclusions below, potential solutions must focus much more precisely on economic disadvantage, a condition that is relatively more difficult to manipulate by way of affirmative action in its current form, but infinitely more promising if the ultimate goals and promises of AA are to be realized. Before addressing this, economic approach in more detail, the controversial issue of societal discrimination," which is widely argued to justify AA, will be briefly considered.

Societal Discrimination

It has been suggested that a phenomenon called "societal discrimination" [24] explains why minorities and particularly African Americans have lower levels of academic achievement and lower representation in the higher job classifications. Societal discrimination means that people's social environments largely influence their rung on the economic ladder [25]. Since African Americans started out at the bottom of the ladder and share in the same disadvantages as their parents, they still suffer from discrimination [25]. However, even the Supreme Court has noted in *Wygant v. Jackson Board of Education* [24] that the concept of "societal discrimination" is "too amorphous a basis for finding a need for race-conscious state action and for imposing a racially classified remedy" [26, at 276]. It has echoed this belief in *McLaurin v. Oklahoma State Regents* [26]. In effect, there must be direct proof of discrimination. Moreover, if the source of discrimination has been effectively removed, it is then incumbent on the group in question to take advantage of the opportunities presented to them.

CONCLUSIONS

Minorities and females have made substantial gains in the employment arena since the implementation of the Civil Rights Act and through the affirmative action policies required by many hundreds of specific remedies resulting from lawsuits throughout the United States. These adjustments were clearly reasonable and justified by two centuries of employment discrimination. And while we do not recommend that AA be eliminated completely, as was done in California (and as has been proposed in many other states) [3], we do believe that the time has come to reconsider the focus of AA, for several reasons.

- As was illustrated in this article, the judicial remedies that have been crafted to address overt discrimination have had success, and minorities and females are being systematically integrated at all levels of the employment spectrum. There is no reason to believe that these trends will diminish if traditional AA policies are modified, particularly since several generations have grown up in an increasingly discrimination-free society and culture. It would be quite difficult to turn the clock back to the sins of the past.
- Minorities comprise an ever-increasing segment of the population. As a result, a diverse workforce is more of a necessity now than in the past.
- Perhaps the more important reason why AA must be reconsidered might be called "the Clarence Thomas factor." By this we refer to the taint that will forever be attached to the achievements of Justice Thomas and other African Americans of accomplishment. Because he is the recipient of the very AA benefits against which he argues, all that Justice Thomas has accomplished remains suspect. Although as a Supreme Court Justice he has reached the pinnacle of the legal world, it is possible to dismiss his accomplishments as the result of the benefits of AA. It is impossible to know whether, if Justice Thomas had not received these benefits, he might have reached the Supreme Court through his personal abilities and the force of his intellect. No matter what Justice Thomas accomplishes, it will always be possible to dismiss him as someone who succeeded by way of mandated, race-based preferences, rather than his own hard work. This same taint is the legacy of all African Americans who live in the AA era: Their deeds may be seen as unwarranted, and their success is suspect. This is why Justice Thomas has consistently echoed the sentiments of Fredrick Douglass, who demanded that African Americans be allowed to stand or fall on their own legs. Only then will their achievements be judged on an equal footing.

It is neither desirable nor possible to completely eliminate AA in employment at present, but we assert that it is time today, not 25 years from now, to begin adjusting AA to mirror the realities of the times. We specifically recommend the following:

Existing Court-Imposed Remedies: Court-imposed remedies that include AA and consent decrees that require preferences (including the use of quotas) based on race or sex should be continued for employment situations involving illegal, egregious racial/sex discrimination. But these remedies must be narrowly tailored, and they should be monitored to determine when employment statistics indicate that the remedy has accomplished its purpose.

Voluntary Plans: Voluntary plans propagated by private employers that are remedial in nature should be permitted to continue or pattern themselves based on national policy. However, public sector voluntary plans and plans imposed under Executive Order 11246, should be modified to focus more on disadvantaged status. By disadvantaged we mean those individuals who are below the government-defined poverty level regardless of racial or gender status. Ironically, this would bring AA in closer alignment with the fundamental principle of equal treatment based on gender, race, and ethnicity. At a minimum, disadvantaged status could be considered as a separate, protected class for purposes of the specific voluntary plan.

Core Value: A major reason that the Civil Rights Act and AA were enacted in the first place was that Congress determined that African Americans were systematically being denied the American dream (through hard work a disadvantaged person can "make it"). It was Congress's judgment that this was because of discrimination [27]. In 1960, the income of African Americans was about 50% that of whites, $3,000 [18]. By 2000, that gap had closed considerably: African-American males earned 72% that of white males, and white and African-American females received virtually identical income (see Table 2). In fact, when comparing the annual earnings of young men and women by race, African-American women with educational achievement levels similar to that of white women actually earned more, and the gap for African-American men with educational achievement levels similar to white men has greatly narrowed [21, p. ix]. This is further indication of a lack of systematic and pervasive race discrimination, since one would expect little or no difference between the genders if race discrimination were present. It is true, as some critics would be quick to point out, that women earn only 75% of men's salaries [28, p. 554], but when these statistics are adjusted for experience, performance, education, job, industry, hours worked, and other factors, this difference largely disappears [28, pp. 556-562]. In fact, at least one study puts the difference between male and female college graduates at less than 3% [24, p. 558].

A Focus on the Disadvantaged. There is evidence that many recipients of the benefits of AA are drawn from more-prosperous minority families [15]. "In fact 86 percent of blacks at twenty-eight selected universities . . . were middle or upper middle class" [15, p. 2]. Consequently, disadvantaged African Americans and other racial minorities, whom AA was intended to assist, do not, in our judgment, appear to be obtaining substantial benefit from the preferential treatment it affords. Based on sheer numbers, more than twice as many whites are

disadvantaged, in terms of being below the poverty line, than African Americans and Latinos combined (see Table 2). As previously discussed, regardless of race, those with lower levels of income have lower levels of educational achievement (in terms of test scores) [17]. Thus, it is our belief that the race focus of our AA policies and practices leave many poor people behind, including whites, African Americans, and Latinos, at a time when poverty rates are rising [29].

While statistics isolating this often-forgotten group are hard to come by, there is some evidence that a discrete group of economically disadvantaged Americans of various races has been unable to take advantage of the benefits that should flow from AA policies. This may be credited to the demise of training programs in the mid-1980s that were intended to prepare all disadvantaged workers for the job market. In particular, there is an identifiable class of economically disadvantaged white workers who were left stranded in poverty and unable to take advantage of such programs [30]. Moreover, a study of 17 different white ethnic and religious groups found discrimination against various subgroups (e.g., Irish, Polish Catholics, and others) [31]. In fact, a pre-affirmative action era study demonstrated that there was greater variation within "white America" than there was between "white America" and "Black America," and the whites at the bottom of the socioeconomic ladder were in approximately the same situation as were African Americans [31, p. A14]. Given the increased stratification and economic polarization, not to mention use of preferences, "affirmative action has done nothing but exacerbate these disparities" [31, p. A16].

Assume that the original premise of AA still holds, i.e., that it is still a core American value for the disadvantaged to be able to climb the socioeconomic ladder through dedication and hard work. Then, perhaps it is time for Congress and the president to consider modernizing AA in view of the favorable progress minorities and females have made in employment to focus on the disadvantaged rather than on such generic characteristics as race or gender, or at a minimum, to include the disadvantaged as a separate protected class [15, 27, 32]. This would provide a greater opportunity for those who most need assistance, regardless of race, to achieve the American dream. Moreover, research has found that "economic affirmative action would produce a dramatic increase in economic diversity and only a modest decline in racial diversity" [15, p. 1]. Besides, it is hard to argue that employment preferences should be provided exclusively to minorities in a nation where whites are themselves in the minority in three states (California, New Mexico, and Hawaii) and could become a minority in the near future in Texas, Florida, New York, and several other populous states [33].

Discrimination Redux: Minority groups, as well as many firms in industry, are concerned that without AA, discrimination will raise its pernicious head. This is not a likely scenario because the Supreme Court has already ruled in *Grutter v. Bollinger* that, at least in education, diversity is a sufficient state interest to justify the consideration of race in academic admissions. This ruling might be extended to firms outside the educational arena as long as they can demonstrate

that diversity is central to achieving the firm's mission, as the University of Michigan Law School was able to do [2]. In fact, the Seventh Court of Appeals recently ruled that diversity is central to the mission of the Chicago Police Department so that its officers can be representative of the racial and ethnic makeup of the city of Chicago [34].

Moreover, we doubt that AA is the only reason that minority groups have prospered over the past four decades. It is not even certain that their progress was based on AA. There is some evidence to suggest that AA may have been a hindrance, not a catalyst. For example, one 1984 study reported that Latino family income actually dropped between 1969 and 1977 [11, p. 51]; that the percentage of employed African Americans who were professional and technical workers rose less in the five years following the Civil Rights Act of 1964 than in the five years preceding it [11, p. 49]; and that "disadvantaged Black—the ones with less education and job experience—have been falling further behind their white counterparts under AA" [11, p. 52].

An alternative explanation of the progress minorities and females have enjoyed in employment involves attitudinal changes and effective legal mechanisms and remedies. The legal theory of adverse impact has played a very important role. This theory was not part of the original Civil Rights Act, but it was written into the regulations after 1964 and codified in 1991. Adverse impact focuses on the employment consequences of seemingly neutral employment practices. Where these practices have adverse employment consequences for protected classes such as African Americans, sanctions can be imposed, making this concept a particularly effective weapon in combating discrimination [35]. The concept of adverse impact also deters practices that have a discriminatory effect because it often forces employers to undertake many of the actions expected under AA, such as outreach and removal of discriminatory obstacles and practices. Thus, a great deal of credit for economic gains by African Americans and women may be attributed to this legal theory. There is no reason why adverse impact would not continue to serve both as an effective legal weapon and a defense against discrimination in the absence of AA.

Finally, opinion polls reveal that when asked if they support preferential hiring and promotion of Blacks, 57% of African-American respondents themselves were against such preferences [36]. It is interesting to note that in 1964 it was discrimination that denied minorities the chance to be judged by the content of their character, but now in the 21st century, affirmative action may be the very obstacle that prevents them from achieving Martin Luther King's most compelling dream.

ENDNOTES

1. *Fullilove v. Klutznick,* 448 U.S. 448 (1980).
2. *Grutter, B. v. Bollinger,* 123 S. Ct. 2325 (U.S. 2003).

3. J. E. Kellough, S. C. Seldon, and J. S. Legge, Affirmative action under fire: The current controversy and the potential for state policy retrenchment, *Review of Public Personnel Administration,* Fall; 17, 4, 1997.
4. *Steelworkers v. Weber,* 443 U.S. 193 (1979).
5. *City of Richmond v. Croson Company,* 488 U.S. 469 (1989).
6. *Adarand v. Pena,* 115 S. Ct. 2097 (1995).
7. U.S. Census, 2000, Profile of General Demographic Characteristics: 2000, DP-1, Data Set: Census 2000 Summary File 1 (SF1) 100-Percent Data, http://factfinder.census.gov.
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