Women's Groups Take On California Initiative

Nationwide Support Bolsters Effort to Preserve Affirmative Action Programs

By Kathryn Wexler
Special to The Washington Post

LOS ANGELES—Women's groups are marshaling forces nationwide to defeat a proposed November ballot initiative in California that would end state and locally sponsored affirmative action programs.

In a news conference last week, organizers for the Campaign to Save Women's Rights and Civil Rights, a coalition of 100 groups, said the ballot initiative would harm women and minorities in hiring, contracting and college admissions and would gut laws prohibiting sex discrimination.

The announcement came just after supporters of the initiative announced they had gathered more than 1 million signatures of support and that the initiative is likely to qualify for inclusion on the November ballot. Initially hampered by lack of funds and signatures, the campaign has collected more than $1 million, manager Renee Ramsey said.

"Those who would steal our rights and confiscate our opportunities have made their move and we are here to tell them that this is as far as they'll go," said Prema Mathai-Davis, national executive director of the YWCA and co-chairwoman of the anti-initiative campaign, which is backed by the National Organization for Women, the Mexican American Legal Defense and Education Fund (MALDEF) and the NAACP Legal Defense and Educational Fund.

The fate of the California initiative is being closely watched across the country. Five other states—Florida, Colorado, Oregon, Washington and Illinois—have similar propositions in the works, and in Congress and 17 state legislatures bills have been introduced to curtail or end affirmative action, according to Eleanor Smeal, president of the Feminist Majority, an advocacy group.

When the California ballot initiative petition drive was launched last year, it was assumed much of the opposition would come from black and Latino organizations, which immediately denounced the proposal and began gearing up to fight it.

But it quickly became evident that minority groups alone would not have enough votes to defeat the measure, and women's groups moved into the forefront of the effort. In the last gubernatorial election, women accounted for 51 percent of the vote and whites made up 78 percent, according to Mark DiCamillo of the independent Field Poll.

The fight over affirmative action is not a new one here. Gov. Pete Wilson (R), a leader of the initiative, last year moved to eliminate race and gender considerations in hiring and contracts for agencies and departments where he was not limited by state or federal laws. Last summer, regents of the University of California followed suit and voted to end affirmative action in admissions, which has given rise to student protests and sit-ins at the Berkeley and Los Angeles campuses.

Backers of the proposal say state employment applicants ought to be judged on merit alone.

In a separate development, officials this week announced that another California proposal that would deny citizenship to children born to illegal immigrant mothers on American soil did not get the 433,000 signatures needed to qualify for the ballot.

Organizers of the drive to save affirmative action said their greatest challenge is making clear to voters what the proposition, officially titled the California Civil Rights Initiative, stands for. They pointed out that nowhere in the initiative do the words "affirmative action" appear and said many people do not realize such programs will end if the measure passes.

The initiative states California "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." It also says gender may be considered if "reasonably necessary to the normal operation of public employment, public education, or public contracting."

A Field Poll taken in December found that after being read a portion of the initiative, 60 percent of voters supported the measure, while 30 percent opposed it.

Backers of the proposal, such as the state Republican Party and the Republican National Committee, charge that affirmative action laws discriminate against white men and say state employment applicants ought to be judged on merit alone.

"Our opponents are saying this is going to send women back barefoot into the kitchen, which is just ridiculous," said Glynn Custred, professor of anthropology at California State University at Hayward and co-sponsor of the proposal. "Over the past 30 years there has been a 180-degree shift away from individual rights and towards group entitlements. We're trying to erase that for everybody."

But opponents say the initiative would leave the door open for sex discrimination. At risk, they say, are programs ranging from those that target girls for science classes to others that select women for jobs like firefighters. Five local high school girls on the basketball team dribbled a ball at the news conference to suggest that even girls sports could be eliminated if the initiative passes.

"This takes women back to second-class status," said Constance Rice, western regional counsel of the NAACP Legal Defense Fund.

Organizers of the campaign to defeat the initiative said they hope to garner bipartisan support from women and are planning to mobilize student votes, since polls show college goers largely tend to favor keeping affirmative action intact. Students from 100 colleges around the country have agreed to spend the summer in California and work against the initiative, Smeal said. Students and other volunteers will canvass door-to-door, distribute fliers and work the phones.

"We are up against a well-fueled, deceptive machinery, but what we've got is people power," she said.

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PHYLLIS SCHLAFLY

Embarrassment for Clinton

It's difficult to embarrass President Clinton. He isn't embarrassed by the Paula Jones lawsuit, or the illegal Indonesian and Korean campaign donations, or the misuse of FBI files or the criminal convictions of his closest friends.

But we've finally found something that he admits is "an embarrassment." It's his failure to persuade the U.S. Senate to ratify the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

He called a special news conference to proclaim his mea culpas in the presence of Hillary Rodham Clinton and a half-dozen other feminist activists. He hung his head, saying that, although 130 other nations have ratified this treaty, the United States hasn't, and "there is no excuse for this situation to continue."

Pressure from the whining feminists may have been one reason why Mr. Clinton went public with this demand. Another reason was probably to deflect criticism from his Oval Office meeting two days earlier with Gen. Chi Haotian, China's ruthless defense minister best known for crushing the 1989 Tiananmen Square pro-democracy protests.

Do you suppose Mr. Clinton discussed his shame about U.S. failure to ratify this treaty with Gen. Chi? Unlikely. Nor is it likely Mr. Clinton registered disapproval of China's treatment of women or its policies of forced abortions and sterilization (even though China is a signatory to this treaty).

American women are the most fortunate class of people on the face of the Earth. A treaty to enforce uniform rules for us and 130 other nations, under the supervision of U.N. busybody bureaucrats, could only diminish the rights and benefits American women now enjoy.

Furthermore, ratification of the U.N. Treaty on Discrimination Against Women would be craven kowtowing to the radical feminists, exceeded only by its unlimited capacity for legal mischief. It would be a massive interference with U.S. laws as well as with our federal-state balance of powers.

Article 1 purports to abolish discrimination against women "in the political, economic, social, cultural, civil or any other field." Private relationships should be none of our government's business, much less the business of the United Nations.

Article 2 reiterates that the treaty would "eliminate discrimination against women by any person, organization or enterprise," including "customs and practices." No human behavior is beyond the purview of this impudent U.N. document.

The treaty would mandate the longtime feminist goal of total sexual integration in the military. It would turn over to the United Nations all decisions about military personnel, including the assignment of women to ground combat.

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Article 3 would require us to pass new federal laws not only in political but also in "social, economic and cultural fields." Article 5 would require us "to modify the social and cultural patterns of conduct of men and women" and to give assurances that we are following U.N. dictates about "family education."

Article 10 would make it a federal responsibility to ensure "the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education... by the revision of textbooks ... and teaching methods." Unable to persuade Americans voluntarily to go along with their censorship attempts, the feminists are trying to get the United Nations to do this job for them.

Article 11 would chain us to the feminist goal that wages should be paid on subjective notions of "equal value" rather than on objective standards of equal work. It would also require the federal government to establish "a network of child-care facilities."

Article 16 would require us to allow women "to decide freely and responsibly on the number and spacing of their children." In feminist theory, this means that the United States would have to allow abortions at any time for any reason.

On the other hand, this language does not protect Chinese women victimized by their government's policy of forced abortions. China takes the position that it is not "responsible" for a woman to bear more than one child.

Article 16 also levels a broadside attack on states' rights. It would obligate the federal government to take over all family law, including marriage, divorce, child custody, and property.

To monitor the "progress" made under this treaty, Article 17 sets up a Committee on the Elimination of Discrimination Against Women consisting of 23 "experts." No doubt that means "experts" in feminist ideology, probably as certified by Hillary Rodham Clinton and/or Bella Abzug.

The State Department memo that explains the treaty, which was written by the late Edmund S. Muskie, candidly admits that it applies "to private organizations and areas of personal conduct not covered by U.S. law." It also admits that the treaty completely fails to take into account "the division of authority between the state and federal governments in the United States."

President Carter signed this terrible treaty in 1980, and ever since the Senate has had the good judgment to refuse to ratify it. I trust the Senate will retain its sanity on this issue, despite Mr. Clinton's embarrassment.

Phyllis Schlafly is a nationally syndicated columnist.

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R. EMMETT TYRRELL

Artistic angst against frugality

Let us depart from that eternity that is the Clinton scandals. Let us allow the "mainstream" (as in dead-in-the-water) press to tussle with this week's scandals, that is to say, new scandals that by next month will be forgotten scandals. That is the way the American press operates in the Age of Clinton.

This week we have the story about those malodorous donations finding their way in and out of the Clintons' legal defense fund, and the Clintons' ongoing familiarities with the source of those funds — namely, a Little Rock restaurateur capable of conjuring up $600,000 for The Cause. We also have the story of former White House Director of Administration David Watkins revealing details about prior Clinton scandals in January's American Spectator. Mr. Watkins is now playing the role John Dean once played in the Nixon debacle. Only Mr. Watkins has been closer to his president for a longer period of time than Mr. Dean, and Mr. Watkins reveals a more sordid story. Surely by the time you read this the mainstream press will be airing his allegations from the ten hours of tapes he did with Spectator reporter Rebecca Borders. The mainstream press would not be censoring the news for the American people, would it?

So let us get on with another throbbing story, to wit, the "arts community's" angst over this year's reductions in grants from the National Endowment for the Arts. The cuts are the consequence of Congress' attempts to balance the federal budget. Hundreds of arty applicants who had become reliant on the Endowment's munificent teats will have to make do with less this year unless they can cadge more money out of their local communities. And their relations with those communities are not good. The "arts community" has the utmost contempt for ordinary Americans leading ordinary lives. Our federally-endowed Beethovens and da Vincis are more comfortable traipsing, hat-in-hand, to some Washington bureaucrat cast in the role of a Medici than in selling art to the locals.

Nearly two-thirds of the 887 applicants to the Endowment got nothing at all this year. That means many will have to go back to hanging out on street corners, scribbling graffiti, and pursuing lives of petty crime. Many of the members of the so-called arts community are shiftless picaroons. It is a fact that there is a higher incidence of crime among them than among almost any other stratum in our society. The automobile salesperson is a paragon of virtue next to the average performance artist. Compare the high standards of sexual hygiene practiced by golf pros and babysitters with those standards that were the boast and the product of, say, the homoerotic photographer Robert Mapplethorpe.

Thus with the Endowment's budgetary cuts we might expect some small increase in the crime rate. Marginal dancers, painters, poets, and those most idiotic of all moochers, the performance artists, will return to shoplifting and picking pockets. Some will have to take their lives of debauchery off stage to public parks and lavatories, where such practices are usually misunderstood by the vice cops. Unlike the bureaucrats at the Endowment these public servants in uniform do not provide grants for squalid acts. They lock the "artists" up, and the public is satisfied.

Now the "arts community" is angry. "There is a real sense of frustration and anger," groans Lee Kessler, executive director of something called the American Arts Alliance. Her colleagues expect the Endowment to subsidize their inscrutable and frequently repellent output. The taxpayer is to shell out, notwithstanding local zoning laws, environmental standards, health regulations, and common standards of decency. Of the many delusions held by the members of the "arts community," one of their most popular is that they are the American equivalent of Europe's royal families. They must be treated accordingly. Government is, by right, to supply them with cash for their gaudy lifestyles. Where would downtown Chicago be without the federally subsidized lumps of stone, and the rusting metal monstrosities that the aristocrats of the arts community provide? What would the sex perverts and other mental defectives do without the local performance artists on stage?

Our federally-endowed Beethovens and da Vincis are more comfortable traipsing, hat-in-hand, to some Washington bureaucrat.

Now the indignant artists are organizing. They are going to mail their congressmen protests — assuming they can master the postal system. Of course their congressmen are now most likely Republicans and devotees of Rush Limbaugh. Their constituents want the budget balanced, even if it means returning the members of the "arts community" to the ministrations of government's most qualified minders, the police and the psychiatrists.

R. Emmett Tyrrell Jr. is editor-in-chief of the American Spectator.

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NAACP

ARTHUR

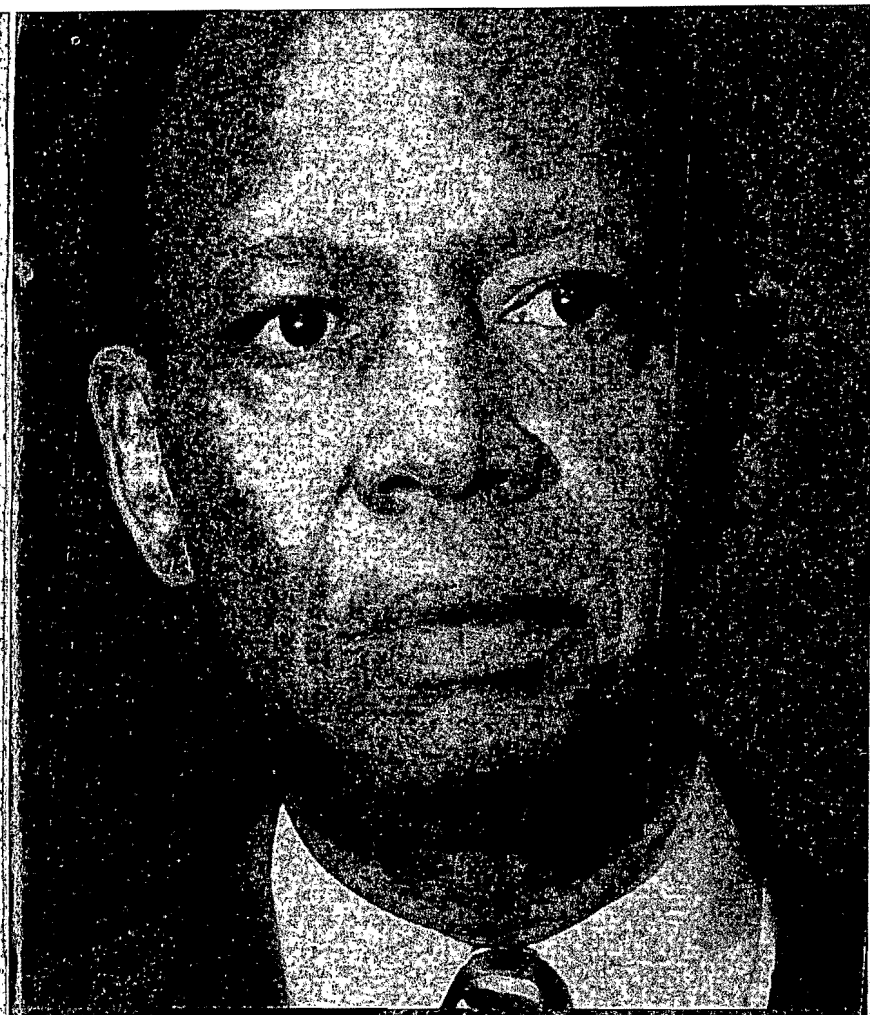
WHAT'S GONE WRONG AT THE NAACP? BY LYNNE DUKE

Ellen Gilchrist: Ghosts of Christmas Past

THAT WAS THEN THIS IS NOW

In its glory days, it led the struggle against racism in America. Today it's beset by scandals, debt, petty intrigue, ideological infighting and this haunting question: Has the NAACP outlived its usefulness?

PHOTOCOPY PRESERVATION



It's early on a Friday evening and Benny Sanotia, the keyboardist in Gabby's Lounge at the Pikesville Hilton Inn and Plaza, is deep into a late '70s fern-bar groove. The bar is relatively empty, though it won't be for long: Members of the NAACP's national board of directors are convening at their Baltimore headquarters this week, and after spending the day wrestling with the fate of their crippled organization, they will doubtless want to return to their hotel to unwind.

For now, though, ordinary patrons have Gabby's to themselves. Among them are Mary and Irvin Kinton, a couple from Owings Mills who are sitting at the bar, swirling snifters of cognac and watching CNN on the big-screen TV. Back when they lived in California, the Kintons belonged to a local NAACP branch; they quit, however, when they began to feel that the National Association for the Advancement of Colored People had become clubbish, out of touch. Their feelings haven't changed. For instance, Mary Kinton ventures, the NAACP really should do something to counteract what she sees as the news media's practice of treating blackness and crime as synonymous. But a cutting-edge PR campaign is just the kind of real-life and relevant idea that Mary—a woman who minces no words—would expect the NAACP to ignore.

"They are a close-knit group of people. They don't

NAACP board chairman William F. Gibson, top right, and former executive director Benjamin F. Chavis, bottom right, inherited an institution built by such storied figures as W.E.B. Du Bois, top left, and Thurgood Marshall.

BY LYNNE DUKE

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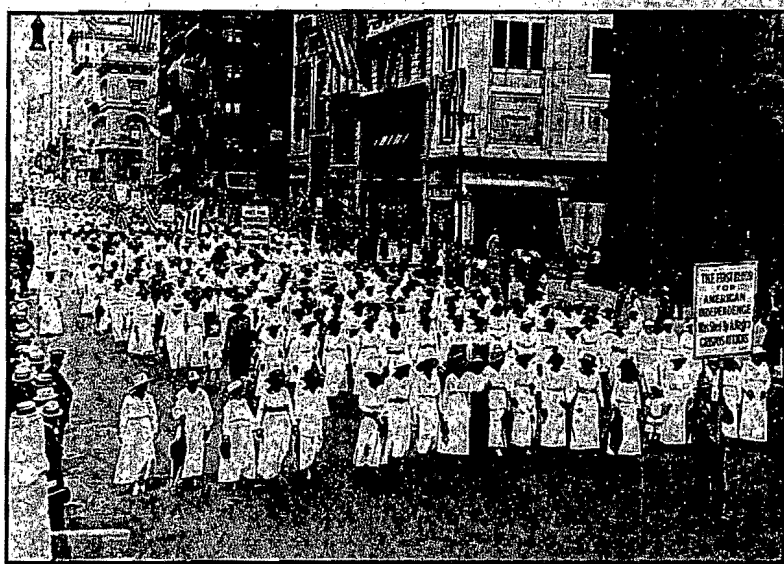

In July 1917 the NAACP sponsored a silent march down Manhattan's Fifth Avenue, top, as a dual protest against lynchings and the deadly race riot earlier that month in East St. Louis, Ill. Above, legendary NAACP leaders Walter White and Roy Wilkins.

want new ideas," says Mary. "They'll take your money, but they won't let anybody in."

"They don't talk to the common man," says Irvin.

When it comes to the NAACP, the Kintons are some cynical folks, and they have not been surprised by the back-to-back scandals rocking the organization. In August, the NAACP board of directors fired Executive Director Benjamin F. Chavis—hired only 16 months earlier—after Chavis admitted that he had settled a potential sexual harassment suit out of court, using NAACP money without telling the full board. With Chavis's firing, the public learned what the board had known for months: that the organization was virtually broke. In response, some donors like the Ford Foundation slowed or stopped their contributions until the NAACP could prove it had its finances under control. To keep the NAACP afloat, the board approved the furloughing of most paid staff. And columnist Carl Rowan exacerbated the board's internal factionalism when he accused William F. Gibson, the powerful chairman of the NAACP board of directors, of "double dipping" expense reimbursements and also spending lavishly, to the tune of perhaps hundreds of thousands of dollars.

Gibson denies the claim, and asserts that a majority of the board still supports him. But amid the allegations and counterallegations one thing is clear: The 64-member board—brain trust of NAACP civil rights policy—is at war with itself.

And now, back at Gabby's Lounge, here come some of that brain trust: Ben Andrews, a Connecticut investment banker and vice chairman of the NAACP board, chats with Kenyon Burke of New Jersey, an NAACP trustee. Board members Larry Carter of Iowa, a banker, Robert W. Gilliard of Alabama, a doctor, and David Livingston of Illinois, an affirmative action officer for a multinational corporation, sit down and order cocktails. It is a formidable gathering—and, for Mary Kinton, an irresistible opportunity.

"Are you the NAACP?" she demands, approaching their table on her way out of the bar. Her tone suggests a warm-up to a scolding.

In a heartbeat, the men construct a comic ruse.

"My name is Bill Gibson," Andrews deadpans, suppressing a laugh.

"I'm Roy Wilkins," says Burke.

"Ben Andrews," says Carter helpfully.

Kinton doesn't get the joke. She launches into her speech, enunciating each syllable like a schoolmarm. "It is time," she instructs them, "to change the direction of the organization . . ."

Livingston, stoking a fat cigar, doesn't allow her to finish. "Are you a member?" he asks.

"Used to be," Kinton snaps back.

"Then," he informs her, "you ain't got shit to say."

IT IS THE RETORT of a man who has temporarily forgotten that his organization needs all the friends it can get. "I'm so tired of that," Livingston says a minute later, after a shocked Mary Kinton has gathered up her husband and fled into the October evening. He leans back and drags deeply on his cigar. Then—as if Kinton were still standing before him—he says: "Become a member and help change it!"

His loss of cool is understandable, if stunningly rude. After all, the NAACP is taking some serious heat—and not only from the Mary Kintons of the world. Since the Chavis scandal broke, editorialists and pundits have criticized the NAACP, ridiculed it, urged its leaders to resign and suggested what loyalists hate to hear most: that the nation's oldest and largest civil rights organization has outlived its usefulness.

It is important to remember, as many of its critics do not, that the NAACP is much more than its national leadership—and that the paralysis of that leadership does not mean that the same inertia has seized the 2,200 NAACP branches, the Washington legislative office or the national programs on youth scholarships, voter education and economic development. In particular it is the local branches, some would say, that make up the real NAACP. "These people in these little towns and cities scattered across the country who, after work in the evenings, are meeting and planning how to lift the race in their communities," is how Julian Bond, an NAACP trustee, describes the locals. Just because the national leadership is in crisis doesn't necessarily mean the grass roots can't be strong.

Benjamin Chavis's vision—of a big tent under which both separatists

PREVIOUS PAGES: GIBSON AND CHAVIS PHOTOGRAPHS BY KEITH JENKINS; DU BOIS FROM BETTMANN ARCHIVES; MARSHALL BY SAN FRANCISCO EXAMINER.

PHOTOCOPY PRESERVATION

Still, there's no denying that local units have been tarnished by the behavior of NAACP leaders. Chavis was reckless and impolitic, and the board deserves blame as well. Among its members, petty intrigue and infighting have contributed to institutional drift, depriving the NAACP of a strong voice or a stirring purpose for the '90s. Board members are quick to tell you that as long as racial inequality exists in America, the NAACP's mission remains clear—to fight racism—but they are less readily able to answer the more difficult question: How? Or, rather, where? In the schools? In the workplace? In the courts? At the polls? Who knows? The board still meets regularly to argue the civil rights questions of the day—but too much of the time it merely meets to argue.

"The dynamics of the association's internal political wars work to make it extremely difficult to manage the NAACP and restore external confidence," Kelly Alexander Jr. of Charlotte, N.C., a second-generation NAACP board member, said in a recent speech.

"To some degree, we *have* become too inward-looking as opposed to outward-looking," acknowledges Bill Gibson, the board's embattled chairman. "It evolved. A series of election challenges brought the NAACP . . . to splintering. And unquestionably an overwhelming amount of time has been spent fighting amongst ourselves rather than fighting on the outside."

Last year the NAACP hired Chavis, a somewhat unlikely young leader, to reinvigorate it and guide it into the 21st century. But over time, his vision—of a big tent under which both integrationists and separatists could meet—clashed with NAACP tradition and the deeply embedded beliefs of the mostly conservative board. Even before his demise, which was fueled by his own indiscretions, Chavis had created internal enemies bent on stopping him.

His ouster exposed some of the inner weaknesses of the NAACP, especially the cutthroat wrangling. It also increased the vulnerability of his former closest ally, Gibson, who will confront an effort to take the chairmanship away from him when the board meets to select new officers in February. An independent audit of Gibson's expense account billing—requested by Gibson himself—has yet to begin. A Price Waterhouse auditing team is helping craft fiscal controls. Earl T. Shinhoster, the acting administrator, continues to try to raise money and drum up new members to replace those who fell away under Chavis.

In the meantime, the process for selecting a Chavis replacement has not begun. Chavis (who, on his lawyer's advice, would make only a few guarded on-the-record comments for this article) sued the NAACP for wrongful termination but settled out of court, receiving two mortgage payments and continued health coverage for his family. So hostile was the separation that the association's general counsel, Dennis Hayes, sent a series of "cease and desist" letters to NAACP student chapters, warning them to withdraw invitations for Chavis to speak.

Louis Farrakhan with Chavis on August 21, the day after Chavis's ouster.

For the first time in 85 years, the NAACP has no clear leader. "We are," says the Rev. Wendell Anthony, president of the 50,000-member Detroit branch, "a body without a head."

IN ITS GLORY DAYS, the NAACP stood—first alone, then with other groups—on the front lines of the battle to open American schools, parks, courts, voting booths, legislatures and minds. So deeply entrenched is it as a 20th century American institution—and so magnificently bureaucratic are its workings—that its documents constitute the largest collection of manuscripts at the Library of Congress. The protagonists in its story are some of the best-known names from the modern African American experience: W.E.B. Du Bois, Thurgood Marshall, Langston Hughes, Medgar Evers.

Its roots go back to the first decade of the century—a time when lynchings still were common, especially in the South. They sometimes escalated into mass violence by whites against blacks, and one such instance—in 1908 in Springfield, Ill.—prompted Oswald Garrison Villard, the grandson of abolitionist William Lloyd Garrison, to write an exhortation titled "The Call." Sixty people signed it, among them Mary White Ovington, a wealthy white writer; Henry Moskovitz, a Jewish social worker; Lincoln Steffens, the dean of the muckrakers; Ida B. Wells Barnett, a crusading black journalist; Jane Addams, the founder of Hull House; and Du Bois, the Atlanta scholar who a few years earlier had formed a civil rights group called the Niagara Movement. Released on the centenary of Lincoln's birth, February 12, 1909, Villard's composition urged Americans to rise up on behalf of black citizens.

And Americans did. Or some Americans did. As Ovington and

and integrationists could meet—quickly clashed with NAACP tradition.

OPPOSITE PAGE: MARCH PHOTOGRAPH COURTESY LIBRARY OF CONGRESS; WHITE BY ASSOCIATED PRESS. THIS PAGE: PHOTOGRAPH BY REUTER/BETTMANN.

PHOTOCOPY PRESERVATION

Board of directors member Hazel Dukes, a longtime Gibson foe, says the board "has got to be revamped."

other whites began planning a May 1909 "Conference on the Negro," Du Bois and many in his group joined them. The resulting multiracial conference—which included presentations on the neurologic parity of white and black—produced the National Committee for the Advancement of the Negro. A year later, the group renamed itself the National Association for the Advancement of Colored People. Du Bois chose the word "colored"—as opposed to Afro-American or Negro—because he envisioned that the NAACP would someday promote the interests of dark-skinned people around the world.

But while eight members of Du Bois's Niagara Movement sat on the NAACP's board of directors, the officers who ran the early NAACP were mostly white businessmen and philanthropists. Villard, who acted as treasurer, donated office space at New York City's Evening Post. Other reform-minded whites, a number of them Jewish, contributed either time or money. Funds were also donated by black groups such as churches and fraternal societies.

The NAACP's mission, even from the start, was multipronged. For decades the organization fought for anti-lynching legislation. It worked on behalf of blacks wrongfully accused of lawbreaking. It pressed for fair pay, voting rights, union representation, better education—many of the same issues that branches are still dealing with today. NAACP branches sprang up all over America, numbering 310 within the first decade. Subscriptions to the Crisis—the NAACP's magazine, edited by Du Bois—reached 94,000 just as quickly. In New York City, soberly dressed NAACP members marched in the streets; in the South, membership was kept secret for fear of the Ku Klux Klan. One of the group's executive secretaries, Walter White, gained acclaim in part because of his ability—as a light-skinned black man who could pass for white—to infiltrate the counsels of lynch mobs and learn who was doing the killing and why.

Some black leaders, such as Booker T. Washington, a longtime ideological foe of Du Bois, claimed the NAACP would do more harm than good by aggravating racial tension. The same charge was made in the nation's mainstream press. At the other end of the spectrum, Marcus Garvey of the back-to-Africa-oriented Universal Negro Improvement Association called the NAACP too integrationist, too middle class.

In those opposing criticisms lie the seeds of many of Benjamin Chavis's problems. Among American blacks, the assimilate-or-separate debate is more than a century old. One could even argue that Chavis's ouster is an example of history repeating itself. In the '30s, Du Bois—frustrated by white America's resistance to integration—used the Crisis to urge blacks to create their own businesses rather than solely trying to join white enterprise. This put him in direct conflict with the NAACP's founding principles and created a huge public split. White, the executive secretary, forced Du Bois to resign, opening the way for a young staffer named Roy Wilkins, the man who would later become the most prominent figure in the organization, to gain notice.

The 1940s saw the flowering of a formidable NAACP legal strategy. In the courts, NAACP lawyers Charles Hamilton Houston and his successor, Thurgood Marshall, whittled away at Jim Crow laws. Then in 1948, the NAACP began assembling education cases that could challenge *Plessy v. Ferguson*, the 1896 Supreme Court decision that upheld school segregation. In 1954 the most famous of these, *Brown v. Topeka Board of Education*, went to the Supreme Court, where Marshall argued it. With its ruling in that case—that separate schools were inherently unequal—the Supreme Court overturned *Plessy*. The victory cemented the NAACP's place in history, securing for it an unshakable moral authority even as Southern segregationists and McCarthyites attempted to paint it as a Communist front.

The 1950s and early 1960s also brought the coalescing of a broader civil rights movement. The NAACP had already allied itself with several Jewish groups, including the Anti-Defamation League of B'nai B'rith, the American Jewish Congress and the American Jewish Committee. At the same time, a host of other organizations had begun to mobilize their members for action. These included the Southern Christian Leadership Conference, led by the Rev. Martin Luther King Jr., the Congress of Racial Equality and the Student Non-Violent Coordinating Committee. Together they organized nonviolent marches, sit-ins at segregated lunch counters and other mass-action protests. Though NAACP members—even whole chapters—participated, direct action was not a favored tactic of the NAACP leadership. But as police hauled thousands of demonstrators off to jail throughout

'It was readily apparent we were operating in the red year after year after

PHOTOGRAPHS BY KEITH JENKINS

PHOTOCOPY PRESERVATION

the South, the lawyers who got them out were, more often than not, from the NAACP.

In the 1960s, with the rise of black power politics within groups like SNCC and CORE, many young activists saw the NAACP as stodgy and outmoded. Malcolm X of the Nation of Islam derided it as a bunch of "handkerchief-head Negroes." Still, with the passage in the middle 1960s of voting rights, civil rights and fair housing laws, the NAACP and its leader, Wilkins, could claim much of the credit for the legal and legislative pressure that produced these victories.

In 1977, health failing, Wilkins stepped down after 22 years as executive director. His replacement, Benjamin L. Hooks, arrived at a time when the organization—like the civil rights movement—was attempting to redefine its mission. He also arrived at a time when Margaret Bush Wilson, the chairman of the board, was attempting to transfer power from the executive director and his staff to the board itself.

Hooks and Wilson clashed over these goals, and in 1983 Wilson unilaterally fired Hooks. Her fellow board members thereupon rehired Hooks, forced Wilson out, and gave the executive director the additional title of "chief executive officer" to buttress his authority.

But the inherent tensions between the board chair and the executive director remained. And when Bill Gibson became board chairman in 1985, he too tangled with Hooks over how the organization was to be run and who would run it. When Hooks retired in April 1993, Gibson and his supporters were convinced that the NAACP constitution should be revised to place more power in the chairman's hands. Ben Chavis, Hooks's replacement, stepped onto a stage already set for conflict.

"Unquestionably an overwhelming amount of time has been spent fighting amongst ourselves," says Gibson.

WHEN HE FACES the press, William Gibson holds his hands behind his back and rolls to the balls of his feet, his chest jutting forward, his tone both defensive and defiant. He views himself—and is viewed by supporters—as Mr. Civil Rights.

That's because Gibson, like his parents before him, has been involved with the NAACP all his life. He desegregated lunch counters in his native Greenville, S.C.; registered black people to vote; fought for legislative redistricting to gets blacks elected. He rose through NAACP youth and college chapters. He was elected president of his local chapter, then in 1977 won the presidency of the South Carolina conference of chapters and a position on the national board. He is a dentist by profession, but his true calling is the NAACP.

Gibson's rise is typical of the way in which many current board members got there: by dint of popularity and long service. For many, obtaining a place on the NAACP board represents a life accomplishment. The board of directors is the pinnacle of power within the NAACP, and Gibson sits at its top.

But the board is defensive and nervous these days. The Chavis debacle has attracted unprecedented public scrutiny, and some critics have argued that the board is too big to be effective and too ingrown to be visionary.

Certainly it is big, bigger than it used to be. Thirty years ago, the NAACP board was half its present size, but the NAACP's grass-roots members demanded representation, so the board was expanded. Today its members are lawyers, judges, educators, bankers, doctors, labor leaders, preachers, corporate and public sector executives. Rupert Richardson, the board president, is a high-ranking social services official for the state of Lousiana. Treasurer Jerry Maulden is president of an electric utility in Arkansas and a friend of Bill Clinton. Maulden is one of only three whites on the board; another is Rabbi David Saperstein of D.C., the only remaining Jewish director. Of the 64 directors, only 15 are women. The NAACP leadership—like that of the black church—is still a patriarchy, even though women make up more than 50 percent of the overall membership.

The similarity to the church is more than coincidental: Many board members hail from the major Protestant denominations, such as Baptist and African Methodist Episcopal. They hail, as well, from sororities, fraternities and historically black colleges. They are a deeply religious and socially conservative lot, with middle- and upper-middle-class sensibilities and a strong belief in integrationism and coalition politics. Many of them fought in the struggle for basic civil rights, especially in the South. These days, that means many of them are well into middle age, or elderly. Sometimes, it is said, the oldest soldiers fall asleep at meetings.

While many members represent "the feelings and aspirations" of the NAACP regions that elected them, others are there for more self-serving reasons, says Hazel Dukes, a board member and longtime Gibson foe. Board members vie for perks; they fly around the country for meetings; and,

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year,' says board member Larry Carter. 'But we seemed to bounce back.'

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D I N I N G

dominated by a borscht-red mural depicting such important Russian figures as Solzhenitsyn, Yeltsin, Gorbachev, the owner, the chef, the guitarist and your waiter. A stuffed bear guards the service bar. Really.

The waiters range from Yale students of Russian studies to members of the owner's family drafted into service. Food isn't really their beat. We asked one waiter which dishes were best. The chef won a gold medal. Everything is good," he responded.

A gold medal in what?

Maybe not cooking.

The herring was the hit at my table. Not just the hit of the evening, but the hit of all my visits. A chunk of plump, deeply briny, glossy fish is served with slices of oil-slicked potato and a beet-and-onion salad. It's a perfect balance of salty and bland. Add slices of the dense rye bread, and this is an appetizer to make Moscow proud. Admittedly, not everyone adores herring as I do. Nor would everyone appreciate the other appetizer I admired, zakusk Boyarskaya, a platter of translucent slices of smoked fish and dill-cured salmon with half-sour pickles and onions. At $9.95 for six slices of paper-thin fish, it is expensive, though. A better deal is the caviar at $11.50. While I'd guess that it's pressed caviar rather than the sevruga the menu promises, it is fresh, authentic and delicious, even served with indifferent blini that are more like thick buckwheat crepes.

Altogether, the menu lists 20 appetizers, among them platters of smoked or jellied meats, underwhelming little pirozshki and several vegetable salads. There are also six soups that sound exotic and mysterious but taste as if they've been stretched to serve too many people. The cabbage borscht gives hints of how good it could be if it weren't so diluted.

Entrees are, at best, unpredictable. After a parade of dry, chewy pork shashlik and marginally better sturgeon shashlik, crescent-shaped dumplings—vareniki—with a filling that tasted like more dough and beef stroganoff that was a bowl of gnarled meat shavings in an anonymous, thin beige sauce, I was ready to give up on this kitchen. But after the chicken Kozak that our waiter recommended, I saw possibilities. It was just a boneless chicken breast scattered with dill and other herbs, but it had been sauteed to a perfectly juicy state and it perfumed the whole table. Maybe the chicken Tabaka—flattened and cooked so the skin is crisp, and lightly seasoned with garlic and herbs—would have been cooked fresh rather than reheated if I'd ordered it at dinner instead of lunch.

Lamb stew is chewy but has a rich, homey flavor that permeates its potatoes so that you chase down every morsel. As you might expect of a Russian restaurant, this one has a way with potatoes, whether stewed chunks, fried wedges or oiled slices in a salad. Its vegetable salads need seasoning; most taste as if they had been merely oiled rather than dressed. And they are erratic. One eggplant puree might be sharp and bitter, another mellow and almost sweet. And while most entrees come crowded with salads, the stuffed cabbage comes all by itself, just two rolls of meat-filled cabbage on a small plate, more like an appetizer than a main dish as we know it. Yet this restaurant has learned something about American style. Each entree is decorated with a slice of orange and a strawberry—surely unheard of in Moscow.

For dessert, the waiter brings a tray of plastic-wrapped cakes. Even after the plastic is removed, they taste like polyurethane layered with styrofoam. Something called a Russian cream torte seemed frosted with marshmallow chicks left over from an Easter basket. If you must have dessert, order blini with preserved cherries and sour cream. And certainly end with tea, if only to have a chance to use the filigreed metal holders for the tea glasses.

Half the times I've called Balalayka, I've encountered someone who spoke only Russian. It's taken patience to get any information, much less reservations. And of course it's taken patience to find the good dishes. But the reward is terrific herring and potatoes, deliciously schmaltzy music and caviar at lumpfish roe prices. That's enough of a wish fulfilled for the moment. ■

SOLUTION TO LAST WEEK'S PUZZLE

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NAACP

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as recently as last winter, they caucused in first-class hotels at NAACP expense. All of this should be reconsidered, says Dukes, a former executive of the New York State Off-Track Betting Corp. The board, she argues, "has got to be revamped. I think there needs to be a constitutional revision to look at the size, its quality."

Others disagree. "There's no problem with the board," says T.H. Poole, a bail bondsman from Eustis, Fla., who is a close friend of Gibson and one of the most powerful members of the board. No problem—except that too many of his colleagues appear to enjoy leaking internal matters to the press. "The integrity of those people is at rock bottom," Poole declares.

Gibson's opponents say their hostility toward the current chairman stems from a bruising 1991 fight in which Gibson successfully lobbied for removal of the six-year term limit on the chairmanship—enabling him to continue in the post. Percy Sutton, chairman emeritus of Inner City Broadcasting in New York, which owns the Apollo Theater, resigned his board position in protest. Also that year, Julian Bond, one of the last nationally known names on the board of directors, lost his bid for reelection (though he retained a seat on the board of trustees, which handles fund-raising) and Dukes lost the largely ceremonial post of board president, although she remained a board member.

Both Dukes and Bond believe that Gibson campaigned against them in retaliation for their support of a term limit. Gibson denies it.

In at-large elections now underway among NAACP members, Dukes hopes to be reelected to her current board position and Bond wants to win back his lost seat. A former aide to Martin Luther King Jr., Bond now teaches at the University of Virginia. According to Bond, the board of directors is suffering from "built-in stagnation, which comes when leadership is allowed to perpetuate itself." By "leadership," he means Gibson—who, he says, not only changed the rules in his own favor, but "through the naming of committees and chairs and through the handing out of plums was able to create a solid bloc on the board which perpetuated him and his policies."

Gibson acknowledges that the board has stagnated, but refuses to take the blame. "We've tried to be more inclusionary in regard to appointments. We tried to be equitable in regards to utilization of skill. We tried to not do anything that would antagonize people in the process of trying to get along. But for some, no matter how much you do, you're still going to have animosity and ill will."

Poole, more succinct, says Bond and

Dukes are mounting an "attempted takeover" because they covet Gibson's power. Gibson, Poole argues, has the support of at least 38 board members. "We're tired of the illusion that there's a groundswell for removal."

BENJAMIN CHAVIS and Bill Gibson no longer speak. Back in April 1993, however, the two stood shoulder-to-shoulder at the Atlanta press conference at which the NAACP announced the selection of its new executive director. Together they presented the dual strengths of the NAACP: the force of tradition and the energy of change. Gibson, who can be prickly with the press, appeared buoyant. Chavis, though happy, retained his habitual gravitas, presenting himself as an earnest man on a mission.

It was an optimistic time. NAACP leaders hoped that Chavis's selection would send a message of renewal, silencing those who questioned the organization's relevance, its ability to deal with the hard-core problems of race in America. Chavis had ideas about making the NAACP hipper, raising its profile in the inner city. At that press conference, a reporter asked whether Chavis still planned to attend a summit of gang members that he had helped organize before taking his new job. Chavis hesitated and looked at Gibson, who stepped closer to the microphone and endorsed the idea. "Well, I've just got a policy directive," Chavis said with a laugh.

Chavis looked attractive to the NAACP for many reasons. At 45, he was young by NAACP standards. As one of the Wilmington 10—a group of activists wrongfully jailed in North Carolina in the '70s—he had bona fide civil rights credentials. And, while not exactly prominent, he wasn't obscure either. Many in the NAACP knew Chavis from his days in prison and his leadership of the United Church of Christ's Commission for Racial Justice, where he was one of the first to campaign against "environmental racism." Equally important, Chavis brought access to money—specifically, $2 million that was pledged by the family of his friend Reginald Lewis, the late chairman of TLC Beatrice International. (To date, the NAACP has received $200,000 of the 10-year grant, according to Beverly A. Cooper, vice president of the Reginald F. Lewis Foundation.)

And for some on the board, Chavis looked attractive for another reason too: He wasn't the Rev. Jesse Jackson.

At one time, Jackson had looked like a genuine contender. Several Jackson supporters within and outside the NAACP had encouraged and even pleaded with the two-time Democratic presidential candidate to let his name be thrown into competition. And Jackson did; he had several encouraging talks with Gibson, although he clearly expected to be wooed in return. Meanwhile, Chavis mounted a traditional campaign, producing videos about himself that he sent to every board member. The two other finalists were Shinhoster—the current interim administrator—and Jewell Jackson McCabe, founder of 100 Black Women, a New York-based social service organization.

Jackson's flirtation raised the hope among some that he could recharge the NAACP with his energy and charisma. Others feared that his celebrity would overshadow the organization and its traditions. Could a man known for his independence be controlled? Would the board still be boss?

The questions proved moot. During a series of interviews, NAACP officials told Jackson what they had told other contenders for the job: that the powers of the executive director/CEO were likely to be curtailed by a constitutional revision. Gibson long had wanted to transfer some of the day-to-day control back to the chair.

Jackson pulled out.

In a letter to Gibson announcing his withdrawal, he criticized the proposed constitutional changes, saying that they "would greatly strengthen the board chairman and significantly weaken the executive director." Jackson also reiterated a pledge he said he had made to Gibson in private—that he would not be drawn into a "fratricidal political battle."

Of course, Jackson released the letter to the press—just days before the full NAACP board would vote on the new executive director. A feud ensued, in which several of Gibson's allies—convinced that Jackson wanted to embarrass the NAACP—set out to embarrass Jackson. In an open letter, T.H. Poole and two others called Jackson a "freelance operator" and speculated that he backed out because he knew he would lose. Poole went on to charge that Jackson withdrew because NAACP members "expressed grave concern over the administrative ability and temperamental compatibility of Rev. Jackson with the NAACP." In yet another swipe, Poole described the NAACP as "an organization that values substance over form."

And so Chavis got the nod. But he still had to contend with the movement to diminish his power. This effort came to a head during an October 1993 board meeting held at Paradise Island, a resort in the Bahamas. There, Chavis learned that the move to transfer some authority from the executive director to the chairman was imminent. Chavis phoned board member Joe Madison, a D.C.-based radio broadcaster, for advice. Madison, who later would emerge as one of Chavis's most vehement critics, for now was concerned about Gibson's power, and he advised Chavis to "draw a line in the sand." Chavis did.

As usually happens at NAACP board meetings, the informal pre-meeting gathering went late into the night. Chavis argued that the proposed change was unfair. After hours of rancorous debate, he managed to retain the CEO title and duties, although he relinquished to the board the right to hire and fire senior staff.

Chavis's recalcitrance came as a surprise. Most people had expected him to do the bidding of his board handlers, especially Gibson.

But, as his brief and tumultuous tenure would prove, tractability wasn't Ben Chavis's style.

CHAVIS LIKED to tell people that he'd been an NAACP member since his dad signed him up as a boy of 12 in Oxford, N.C. But he'd never been *inside* the NAACP. He did not know how stubbornly it would resist change. He did not know that his vision—of making the NAACP a big tent under which all black people could meet—was wildly optimistic. He didn't know that the NAACP is not for every black person in '90s America.

Or if he did, he didn't pay enough attention. And it didn't stop him from reaching out to Louis Farrakhan.

The overture came in September 1993, during a nationally televised town hall meeting of African American leaders at the Washington Convention Center. Chavis and Farrakhan were joined at the meeting by Jesse Jackson, Rep. Maxine Waters (D-Calif.) and Rep. Kweisi Mfume (D-Md.), chairman of the Congressional Black Caucus. Mfume used the now infamous words "sacred covenant" to describe the relationship between the caucus and Farrakhan. Unprompted, Chavis offered a public apology to Farrakhan, saying that civil rights leaders had made a "mistake" in excluding him from the program of the 30th anniversary March on Washington the month before. "I just thought it was time to break the ice" between Farrakhan and mainstream black leaders, Chavis says.

It seemed on that day that the leaders of black America were welcoming Farrakhan into the fold. The impression was reinforced a few weeks later when Chavis spoke in Farrakhan's Mosque Maryam on Chicago's South Side as part of a program to support gang truce movements.

Farrakhan's following, particularly in urban America, made him a player who could not be ignored by anyone concerned about the inner city. But his many opponents were dismayed by Chavis's actions. How would this affect the historic black-Jewish coalition? Was Chavis embracing the total Farrakhan, including the anti-Jewish statements he regularly makes? Could Farrakhan be only partly embraced? The same questions were being asked within the NAACP board.

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Then Chavis's hopes of making the NAACP a catalyst for broad dialogue in black America were overtaken by events—in the form of a speech by a previously obscure Farrakhan aide.

In November of '93, Khallid Abdul Muhammad gave a speech at New Jersey's Kean College in which he described Jews as "bloodsuckers" draining the black community and said that whites in South Africa—even white babies—deserved death. At the time, the speech received only scattered coverage. But in January, historian Roger Wilkins, the nephew of Roy Wilkins, wrote in the New York Times that black faculty at Kean who did not criticize Muhammad had "failed to uphold the best traditions of the black struggle." Times columnist A.M. Rosenthal weighed in three days later, blasting the NAACP, the Black Caucus and Jesse Jackson for "allying themselves with the salesmen for a new Holocaust." Six days later, the Anti-Defamation League ran a full-page ad in the Times that quoted Muhammad's speech extensively and invited its readers to decide for themselves whether Farrakhan and his followers were moving toward moderation. In a speech the day after the ad ran, Chavis denounced Muhammad. "I am appalled that any human being would stoop so low to make such violence-prone antisemitic statements," he said.

Pressure mounted on Farrakhan to do something about Muhammad, and on black leaders to distance themselves from Farrakhan. Finally, in early February, at a rare Nation of Islam press conference that was as packed and charged as an urgent White House briefing, Farrakhan announced that he was demoting his aide.

But Farrakhan ignited yet another firestorm by lobbing a rhetorical grenade at the ADL. At the same press conference, he accused the ADL of spying on black organizations, referring to a criminal investigation of an ADL contract employee who allegedly gathered information on American civil rights groups. (The investigation ended with a settlement between the government and the ADL. While denying any wrongdoing, the ADL agreed to a San Francisco court order not to use illegal means to gather information.)

A flurry of faxes landed in newsrooms as Jewish groups stiffened their condemnation of the Nation of Islam. The major black organizations also criticized Farrakhan for his remarks about the ADL, while praising him for publicly disciplining Muhammad.

Chavis, however, took a strikingly different tack.

He did not mention the accusations against the ADL. Instead, he applauded the action taken against Muhammad—and made yet another overture to Farrakhan.

"The NAACP is prepared to believe Minister Farrakhan's statement that he is neither antisemitic nor racist and we look forward to concrete deeds in the future that would affirm his statements," Chavis said in a statement. Chavis also repeated his call for a summit meeting of African American leaders, and said Farrakhan's pledge to participate was "welcomed by the NAACP."

Shock spread among Jewish groups—and within the NAACP, where members began to bail out in significant numbers. "We lost hundreds and hundreds of people, maybe thousands," says a source close to NAACP fund-raising. Chavis's statement of solidarity with Farrakhan, the source says, "was gratuitous." Other sources confirm the membership drain.

Until the NAACP leadership rebuilds its credibility, it can bring little to the national debate on legislative redistricting, race-based scholarships or welfare reform.

Chavis and others continued to claim that the NAACP had at least 500,000 members. But an official membership tally shows otherwise. In June 1993, according to the tally, the NAACP had 381,895 members. By June 1994 that number had fallen to 356,299. Sandra Almond, an NAACP membership processing official, acknowledges the accuracy of the tally, but says that recent membership drives have lifted the total. Apparently, membership numbers never have been a precise science: Board member Joe Madison jokes that the NAACP has claimed a half-million members ever since the 1950s, when "Walter White woke up one day and said, 'Damn it! We need a half-million members!'."

ALARMS WERE starting to go off in the NAACP, but Chavis wouldn't be stopped. In interviews at the time, he said that he was attempting to fulfill his mission to expand and revitalize the organization.

It's not that he didn't pursue its traditional activities. During Chavis's tenure, the NAACP lobbied on behalf of historically black colleges and universities, and pressed for legislation that would prevent the producers of toxic waste from dumping in poor communities. Chavis also negotiated the largest ever "NAACP Fair Share" agreement, in which the Flagstar Corp., parent company of Denny's restaurants, agreed to provide more jobs and franchises for blacks. (The company had been faced with a PR disaster following charges of race discrimination at various Denny's restaurants around the country.)

But when presented with the opportunity to reach out to a nontraditional, even controversial audience, he'd willingly do that too—with or without board support.

For instance, in February, while board member Madison and C. Delores Tucker, an influential member of the board of trustees, were picketing music stores that sold "gangsta rap," Chavis took a more forgiving position. Even though some of the lyrics are "derogatory and detrimental to the image of African Americans," he said at an NAACP-sponsored rap music discussion in Washington, the NAACP "cannot condone blanket censorship of rap."

Incensed at Chavis's position and go-it-alone attitude, Tucker and Madison mounted a double-team attack later that month when the NAACP board met in New York. Madison rallied votes for a sternly worded condemnation of gangsta rap; Tucker followed with a dramatic reading of a few choice lyrics. In a grandmotherly voice, she recited lines like: "Her body's beautiful so I'm thinkin' rape/ Shouldn't have had her curtains open, so that's her fate/ Slit her throat and watched her shake."

The board voted to condemn gangsta rap—publicly repudiating its own executive director.

At best, the incident illustrated Chavis's organizational innocence. Before endorsing gangsta rap, Joe Madison ventures, Chavis should have canvassed the board for support. "Chavis probably spent more time being different as opposed to different and effective."

But even when Chavis anticipated opposition, he would sometimes ignore it. In April, for instance, many board members were stunned to learn that Chavis and the Rev. Wendell Anthony of the Detroit chapter had held a "special 'invitation only' dialogue" with what they called the black community's nationalist and Pan-Africanist leadership. The meeting wasn't totally clandestine; two members of the national board who are from Detroit knew about it, and it was followed by a public black unity rally. But invi-

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tations were marked "confidential"; it was closed to the press and public; and board members who were already skittish about Chavis were angered that they were not told in advance. They started calling it the "secret meeting in Detroit."

Making matters worse were the participants. Relatively noncontroversial academics such as Cornel West of Princeton University and Manning Marable of Columbia University raised few eyebrows. But the guest list also included Angela Davis, the famed '60s radical; Afrocentric historian John Henrik Clarke; Lenora Fulani, presidential candidate of the New Alliance Party; Maulana Ron Karenga, founder of the '60s black radical group US; and Kwame Toure, a k a Stokely Carmichael, a founder of SNCC and of the Black Power movement. Leonard Jeffries, the controversial City College of New York professor who has referred to whites as "ice people" and charged that Jews financed the slave trade, was not invited but came anyway.

Anthony says the gathering was envisioned as a colloquy on the problems of black America. But some board members felt it put the NAACP in dangerous proximity to a cadre of nationalist and Afrocentric leaders and scholars with whom the NAACP had heretofore found no common cause. "People were expressing all kinds of concerns," says board member Bill Lucy.

The full board was scheduled to meet in May in Columbia, S.C. But now a special meeting of the 17-member executive committee was called to consider the "secret" Detroit dialogue. Chavis, according to sources, acknowledged that the meeting should have been handled differently, and explained that he had been under stress because of the recent deaths, from illness, of both a daughter and a sister. The executive committee decided to focus its anger not on Chavis but rather on his communications director, Don Rojas, who had handled arrangements for the Detroit meeting.

Rojas, who served in the government of the late Maurice Bishop on the island of Grenada, is a longtime socialist. He was born on the island, and his foreign-born status and Latino surname were, he says, a source of discomfort within the organization. Even now, one board member can't seem to get the Spanish pronunciation of his name right, and persists in calling him "Rowhouse." After the Detroit meeting, Rojas says, some board members treated him as if he were a tropical disease.

"Unfortunately, the board interpreted this whole meeting as being orchestrated by yours truly," he says. "A whole slew of redbaiting ensued . . . I was like this red virus in the place, infecting all these people. I had a good laugh, man. I cracked up. It's like a throwback to McCarthyism."

The executive committee decided that Chavis, Rojas and Lewis Myers, the deputy director, did not understand NAACP traditions and culture—so it sent them to reeducation camp. An informal seminar was arranged in which the executive trio was schooled in decades-old but still-official NAACP policies that forbid contact with Communists, so-called separatists and "Black Muslims."

Despite some board members' outrage at Chavis's direction, the board went ahead and allowed him to hold the NAACP-sponsored leadership summit that he had planned for June. That summit was discussed at the board's May meeting; Chavis confirmed that he planned to invite Farrakhan as well as Jackson, Mfume and a broad range of other leaders. The board entertained a motion to postpone the summit but decided to go forward. "My analysis was that [Chavis] was trying to bring all the players together to discuss some means of black empowerment," says Gibson, who endorsed the summit. "But when the press started attacking it, we started to get more people [on the board] expressing concerns."

Mae Joy Kindred, president of the Waxahachie, Tex., branch, prays a lot these days for money and for new members.

Chavis seemed to gather energy from the public controversy. As the closed summit meeting unfolded in Baltimore accompanied by intense media coverage and criticism of Farrakhan's inclusion, the NAACP director offered a rationale he would repeat again and again: "Never again will we allow any external force to the African American community to attempt to dictate who we can meet with, where we can meet and what we're going to meet about."

AMID THE hullabaloo about ideology, Treasurer Jerry Maulden says, he tried to warn both Chavis and the board's budget committee that NAACP finances were deteriorating. When warnings failed, Maulden prepared a special budget presentation for the May meeting in Columbia. At Maulden's behest, a staff accountant reported a deficit that was $2.4 million and growing.

How that deficit developed is a question as politicized as any other within the NAACP. The deficit now is said to be $3.8 million, against the association's $11 million budget. Chavis says that a deficit already existed when he took over. His predecessor, Benjamin Hooks, disagrees, saying that the books were balanced when he stepped down. Hooks's assessment is supported by a number of board members, who say that Chavis ran up the deficit with reckless spending, lax fund-raising, or both.

One of the critics of Chavis's fund-raising was Maulden. "My initial hope with Dr. Chavis and the new administration was that there would be a renewed enthusiasm and vigor for raising funds . . . but over the succeeding 15 months I really was quite disappointed," Maulden said in a deposition taken for Chavis's now settled lawsuit. But Maulden also said in his deposition that a $500,000 deficit existed when Chavis arrived, and that one of the reasons it grew after Chavis's arrival is that several outstanding bills—totaling another $500,000—had not been paid during Benjamin Hooks's tenure.

Maulden also pointed out that the Image Awards program, the NAACP's annual ceremony honoring blacks in the performing arts, had accumulated more than $1 million in deficits in the four years since the national board had taken it over from the Beverly Hills/Hollywood branch. T.H. Poole—as chairman of the board committee that now runs the event—is responsible for overseeing the independent contractors who produce it. "You got a bail bondsman trying to talk to Wall Street people," sniffs board member Leroy Warren, who suggests that Poole's appointment to head that committee smacks of cronyism and bad management. Poole says the Image Awards deficit grew because the national board was stuck with an unfavorable production contract when it took the program over from the local branch.

Now, the confusion is such that "I'm on the budget committee and I don't know the level of the deficit," says Larry Carter, who has been on the board six years. "It was readily apparent that we were operating in the red year after year after year. It was always red ink. But we seemed to bounce back."

The Columbia meeting, ironically, was itself an unbudgeted expense; the board had decided to meet four times a year instead of three. Also this spring, the NAACP sent a dozen officials to South Africa during that country's first all-races elections. The tandem travel habits of Chavis and Gibson also added up; Hooks had done most of the traveling himself. And, where Hooks had been paid an annual salary of $130,000, Chavis negotiated a contract for $200,000. Chavis's deputy, Lewis Myers, earned $120,000.

"When you don't budget for a trip to Af-

PHOTOGRAPH BY WYATT MCSPADDEN

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rica, you just do it; when you don't budget for a summit, you just decide to do it; when you have two people traveling for the same meeting where there was just one before; when you decide to give people an 8 percent [salary] increase because they hadn't had an increase in so long, yet you don't know where the money's coming from—that's a judgment question," says board member Bill Lucy.

But Chavis did not act unilaterally; the board approved not only the Africa trip, the Baltimore summit of black leaders, and his executive-level salary, but also the 8 percent salary increase he gave to NAACP staffers.

The high expenditures did not escape the notice of those who provide the NAACP with its income. Grass-roots members, who pay just $10 a year in annual dues, account for about two-thirds of the NAACP budget. But those members were dropping away, as were institutional donors. At one point earlier this year, 22 corporations and foundations were holding back about $1 million, says Shinhoster, the interim administrator. The largest of those, the Ford Foundation, demanded to see management controls before it would disburse a $500,000 grant already promised.

Some of the organized labor representatives on the NAACP's board were especially nervous about Chavis's impact on fundraising. Chavis was already estranged from these representatives, for two reasons. First, they felt slighted when Chavis broke a long tradition by failing to attend the 1993 AFL-CIO convention. Second, although Chavis says that he lobbied Congress against the North American Free Trade Agreement, as NAACP policy instructed him, they do not believe him.

The labor discontent came to a head during the NAACP's Chicago convention last July, in a late-night meeting in Gibson's suite. There, Bill Lucy, who is international secretary/treasurer for the American Federation of State, County and Municipal Employees, and other labor representatives told Chavis that his scattershot approach to crafting an NAACP agenda—coupled with his overtures to Farrakhan—was likely to make it even more difficult for them to raise money from the unions and auto makers for whom they worked.

Chavis's response, as Lucy recalled it, was: "I think we've got to go in new directions. I think we've got to become more inclusive."

Lucy says he replied that this so-called new direction created "a problem" for old allies. He says he told Chavis, "You're gonna bankrupt the organization on the basis of a personal principle that you're interpreting as a professional commitment. 'We can meet with who we want to meet with.' The new slogan might be catchy, he told Chavis, and it might be high-minded, but it wasn't helping to keep the NAACP's lights on.

IT WAS, to put it mildly, an unfortunate time for news to leak out that Chavis had pledged up to $332,000 in NAACP funds to settle an employment dispute.

The employee was Mary Stansel, who worked as an aide to Chavis while he campaigned for the executive director's position. When he got the job, he hired Stansel as an executive assistant. It didn't work out. He let her go. Stansel—who in the past had filed several civil actions—retained a lawyer, Kenneth Shepherd. In October 1993, Shepherd faxed a letter to Gibson threatening action against Chavis and the NAACP on any one of the following grounds: "breach of contract, intentional infliction of mental harm and emotional distress, employment discrimination based on her sex, sexual harassment and wrongful discharge." At a press conference, Gibson would later say that he "simply forwarded the complaint to the administration, which has the responsibility for personnel administration . . . Dr. Chavis had complete executive authority to address the administrative complaint regarding separation from employment with the NAACP."

Chavis settled out of court in November 1993, promising to pay Stansel up to $332,000 and help her find another job. He paid Stansel $82,000, of which $64,000 came from the NAACP treasury and $18,000 from private sources, then stopped paying after several months when she had not secured employment. In June 1994, Stansel filed suit for breach of contract.

The board knew nothing of the Stansel settlement, and Chavis acknowledges that as his mistake. "In hindsight, I should have informed the full board. But I thought I was doing so when I informed the chairman," says Chavis, who claims that he did inform Gibson. Gibson denies this. And at the Chicago convention in July, both men replied in the negative when board members put the routine question to them: Is there any outstanding litigation? Later, both would say that they did not learn of the lawsuit until after the convention.

Later in July, the story broke in the New York Times. And according to sources on the board, the money coming in to the organization virtually stopped.

It is impossible to know what actually transpired between Stansel and Chavis; neither will comment about the lawsuit. (Stansel's suit against the NAACP for the remainder of her settlement is pending, although the NAACP claims that Chavis, not the organization, is liable.) But to disillusioned board members, what did or did not take place between the two of them hardly mattered. What mattered was that Chavis had entered into a settlement without consulting the board—something the NAACP constitution does not permit him to do—and that he did so at a time when the organization was already facing financial disaster.

"If you know you've got people on your board who you have differences and difficulties with, if you know you've got people on your board who, no matter what you do, will think you're wrong, why would you let yourself get in a position like this?" asks Lucy.

Now board members gunning for Chavis started gunning for Gibson too. It was pointed out that the chair and the executive director had been joined at the hip for 15 months. Gibson stopped defending Chavis—in an effort, his critics say, to save himself—and called an emergency board meeting for August 20.

Once again, Chavis failed to work the organization from the inside.

Says Rojas, Chavis's former aide: "Right up to the very last week leading up to the ouster, me and Myers and others had been saying to Ben, 'Look. Why don't you put aside time in the next few days to make personal calls to every single board member . . . Even the enemies on the board. Call them. Give some explanation to each and every one about the settlement. Do a little mea culpa, be a little contrite and admit that you had an error in judgment.'"

Even then, many on the board remained undecided what to do, several sources say. Franklin Breckenridge, the organization's assistant treasurer and a Chavis ally, discussed with Chavis a possible scenario whereby he might be able to save his job, according to a deposition Breckenridge gave in connection with Chavis's lawsuit.

"What I said to him was that this is a political matter and that he needed to be prepared to deal with it in that manner," Breckenridge stated. In the deposition he denied that he had urged Chavis to deliver up a "pound of flesh." But he also admitted that he did suggest a small sacrificial purge.

"I asked him had he considered that one way he might be able to help sustain himself along with raising some money would be to ask for the resignation of one or two of his top staff people." The staffers Breckenridge had in mind were Myers and Rojas, according to the deposition. Chavis thought about it, Breckenridge said in the deposition, but "was not willing to do that."

On August 20th—in a voice vote that made it impossible to count the actual tally—the NAACP board voted to fire Benjamin Chavis on the grounds that he had engaged in behavior "inimical to the best interests of the association."

"THIS IS NOT the end of Benjamin Chavis," the former executive director promises in a lengthy but mostly off-the-record interview policed by his lawyer. But for now Chavis is looking for a job and giving occasional talks

PHOTOCOPY PRESERVATION

to student groups. Rojas is working in public relations and writing a book about the NAACP. Gibson is raising money—the chief preoccupation these days of top NAACP officials—and trying to consolidate his power base. Carl Rowan is still hammering away at Gibson. Poole is counting votes. The Ford Foundation has agreed to release its grant. Black churches have promised to lend their collection plates to an NAACP rescue. In Washington, NAACP lawyers, who lobby for civil rights legislation on Capitol Hill, face a much more hostile climate. But that hardly matters. Until the NAACP leadership rebuilds its credibility, it can bring little of its historic righteousness to the national debate on legislative redistricting, race-based scholarships, or welfare reform.

These days, if you really want to find someone who has the "best interests" of the NAACP at heart, you might do well to steer clear of conventions and board meetings and talk to somebody like Mae Joy Kindred in Waxahachie, Tex. On a soggy fall afternoon, Kindred is sitting in her two-room office just off the town square, happily counting $309 in cash. She is president of the Waxahachie branch of the NAACP, and the money represents the income from the branch's monthly sale of home-cooked dinners, which are dispensed from the back room of a Baptist church.

Part of that money will pay the rent for this tiny space, which is crammed with mismatched file cabinets, an aged television, a water cooler. Ordinarily, the branch would keep the rest. But Kindred's outfit still owes money to the national office; all branches must provide Baltimore with a portion of their annual fund-raising take and membership dues. This year, Waxahachie owed Baltimore $360, and Kindred cut a deal to pay it in $90 installments.

As NAACP branches go, you don't get much smaller than Waxahachie. Twenty-seven miles south of Dallas, the town of Waxahachie has only 18,000 residents, 9 percent of them black. Of those, not many are in the NAACP. Kindred's membership is at 87, down from 200 five years ago. A lot of elderly people have died or let their memberships lapse, she says, and it's not easy getting new people to join. Despite the drop-off, she still has a strong interracial membership.

Kindred, a 62-year-old retired Air Force nurse, is a churchgoing woman for whom faith in God and faith in the progress of the race are virtually one and the same. Like many other local NAACP leaders, she is a genuine force in her community, a resource for NAACP members and nonmembers alike. Whites come to her when they need entree into, or a spokesman from, the black community. Blacks come to her when they need help. The black boy suspended from school for violating the dress code by having a design shaved into his head. The black poll observers concerned that there weren't enough blacks watching the vote. The white man harassed on the job because his wife is black.

"They come to me with everything. Sometimes I try to hide from them," Kindred says with a laugh. "But they find me. And a lot of times I can't refuse."

This year, the Waxahachie NAACP started a new program, modeled after one at the branch in Fort Worth: a legal clinic where members and nonmembers can get free legal services from lawyers who are paid a nominal fee by a state grant. In the program's first quarter, the lawyers—most of them from Dallas—took on 31 cases involving discrimination, housing complaints or consumer problems. Robert Starr, the national board member in Fort Worth, helped Kindred start the program.

Kindred would like her office to handle cases of police brutality and wrongful arrest; but the state grant does not cover those problems, and the branch doesn't have the money to buy a copy machine of its own, let alone hire a lawyer. From towns even smaller than Waxahachie, she gets regular calls reporting police abuse. "I feel so bad because we can't do nothing," she says. "I'm afraid it's gonna be a blowup down here and I don't know how to prevent it."

She prays a lot for money and the new members that could provide it. New people will sign up, she feels sure, when they come to her for help and learn about NAACP programs. This fall, she got 13 new members—though she might have gotten more, if not for the bad press coming out of Baltimore.

She tells prospective members that the trouble at the national level "really has nothing to do with the local branches." She encourages them to think of the local branches as the children of feuding parents. "'When you have a family squabble, don't everybody get in it. Your mama and daddy may argue, but the children don't get in it.' I try to make a parable out of it."

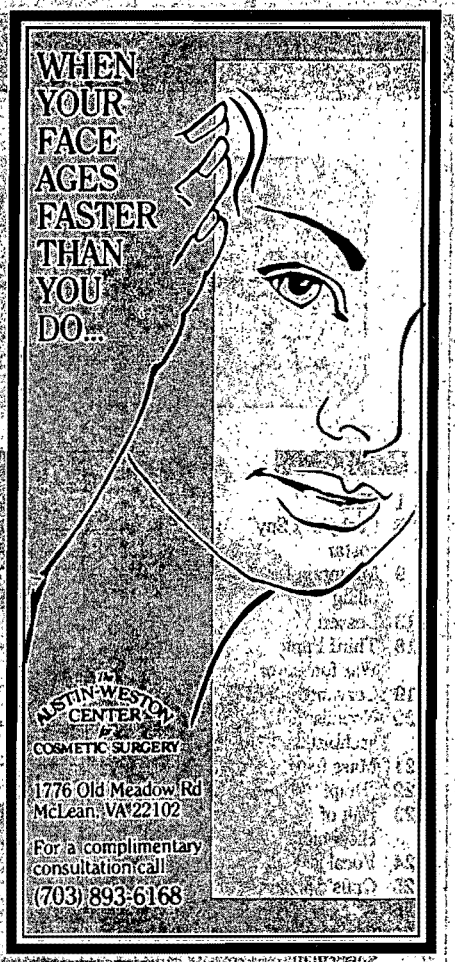
But parables don't always help.

"A lot of people say: 'Well, they throw the money away at the top.' They say, 'I'm not gonna send my money anymore, 'cause they think all of it goes to the national.'" She shakes her head. "Every time they have a flare-up or something up there, it hurts."

Hearing Kindred say this to a reporter, Emma Faye Newton, the branch's youth adviser, frowns. "You don't want her to quote you that way, do you?" she asks with some alarm.

"It's already out!" Kindred says. "I don't try to hide anything."

She shrugs and smiles an innocent small-town smile. "Sure, they got problems at the national office," she says. Then, with more hope than certainty: "They're working it out." ■



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The Washington Post

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Nat Hentoff

Scholarships and Race

SWEET LAND OF LIBERTY

Years ago, waiting for a college president in his office, I picked up a copy of the Chronicle of Higher Education. I have not missed an issue since. This large-size weekly often breaks stories that reverberate far beyond campuses.

Recently, for instance, Paulette Walker reported that Colorado Attorney General Gale Norton has "told the state's 28 public colleges they should no longer provide race-specific scholarships, nor should they help select students to receive such scholarships from outside groups." But "when a private organization provides a race-based scholarship" and *itself* "selects the recipient, college officials may accept the money."

Through the Chronicle, I have obtained the Colorado attorney general's actual memorandum. In it she explains why she believes that race-based scholarships violate the Constitution:

"When a [public] institution chooses to devote some of its limited scholarship dollars to a program which is open only to certain racial and ethnic groups . . . the institution excludes other applicants because of their race or ethnicity."

She cites the 1995 Supreme Court decision (*Adarand v. Pena*): "The Constitution protects persons not groups."

The attorney general does note that a racial classification can be permitted, but "only if it is narrowly tailored to promote a compelling state interest." However, in a memorandum bristling with Supreme Court and other judicial precedents, Gale Norton emphasizes that "the only interest which has been found to justify race-based decision making is the need to remedy the present-day effects of specific incidents of prior government discrimination. . . . [A] racial classification cannot rest on some generalized assertion that discrimination exists in society or on a particular campus."

Since "there are no specific findings of intentional racial discrimination by any of the institutions of higher education in Colorado," scholarships that exclude all but one race are unconstitutional. Nor, she adds, can the goal of a "racially diversified student body" be considered a compelling state interest. U.S. Supreme Court case law is undeniably clear on that, despite the insistence to the contrary of the head of the Civil Rights Division in the U.S. Justice Department.

In an interview with the Chronicle of Higher Education, Norton said that instead of race-specific criteria for scholarships, colleges ought to use financial need and/or a disadvantaged background. This is just what Justice William O. Douglas suggested in 1974 in his dissent in *DeFunis v. Odegaard*:

"Decisions [should be made] on the basis of individual attributes, rather than according a preference solely on the basis of race."

Included, for instance, said Douglas, would be the qualities of "a black applicant who pulled himself out of the ghetto" and "a poor Appalachian white" who had overcome other barriers.

As the Chronicle reported, Colorado State University started last fall—before the attorney general's memorandum—"to look first at economic criteria that affect all races, but may affect minority groups more. Scholarship panels look secondarily at race, gender, and ethnicity."

And Robert Shirley, president of the University of Southern Colorado, says that "most of our financially disadvantaged students are minority, so we are able to help them with scholarships by using economic criteria." Minorities are 30 percent of that student body.

In a well-known 1994 case, cited by Gale Norton in her memorandum, the 4th Circuit Court of Appeals struck down a University of Maryland scholarship program for which only African Americans were eligible. (The rejected plaintiff, a Hispanic student, had met all the academic and other requirements.)

Said the 4th Circuit in *Podberesky v. Kirwan*: "While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race consciousness such a remedy purports to overcome." Last May, the Supreme Court refused to review that decision.

Since the Supreme Court's 1978 *Bakke* decision, a frequent answer to that criticism of race-specific affirmative action has been Justice Harry Blackmun's statement in *Bakke*: "In order to get beyond racism, we must first take account of race."

Obviously, race must be taken into account whenever there is specific discrimination. But when general racial preferences—intentionally and with government support—discriminate against individuals who are not of that race, the Constitution has been substantially diminished. This is also true of gender and ethnic preferences—according to *group* identity—that cannot justify a compelling government interest.

William O. Douglas was right all along.

AP Associated Press

AP v5279 ra 3exec Border Buildup, Bjt,0556 01-19 5:58p

Border Patrol Agents Go South for the Winter as Buildup Blooms
AP Photo GO101
By ARTHUR H. ROTSTEIN
Associated Press Writer

NOGALES, Ariz. (AP) - Border Patrol agent Eldon Hurst has put away the parka and is wearing his summer-weight uniforms.

He's working 1,237 miles south of his usual post on the Canadian border in Idaho, and for the next month, he'll be a lot warmer - and a lot busier. The agent has been reassigned to the Mexican border as part of a U.S. crackdown on illegal aliens and drug smuggling along the nation's southern boundary.

"I did not want to come down here," Hurst said, "but now that I'm here I'm enjoying it. I've been telling people that they had to pry me off my snowmobile to get me here."

Fifty-two veteran agents from around the country are now in southern Arizona for up to three months to bolster the 400 permanently assigned Border Patrol officers here.

Federal officials announced plans last week to tighten control of the whole Southwestern border - with 300 additional agents in Arizona and California.

For officers like Hurst, who ran a three-man station at Bonners Ferry, Idaho, contrasts between north and south abound.

The southern Arizona region, the nation's second-busiest in illegal alien activity behind San Diego, had 227,000 arrests during the fiscal year that ended Sept. 30. The Bonners Ferry station arrested about 100 in all of last year.

The agents coming from the North are "just not accustomed to the numbers," said Ron Colburn, assistant agent in the charge of the Nogales part of the operation. "And they may be a little bit amazed by it."

"We find groups of 20 or so coming across all the time," Hurst said.

Drug seizures abound, too.

In a 24-hour period this week in the Nogales area, agents seized 240 pounds of cocaine in a parked van, and recovered 1,000 pounds of baled marijuana that backpackers had brought across the border through a canyon.

At the Bonners Ferry station, Hurst had no drug seizures at all last year. The worst he sees is contraband alcohol and cigarettes headed to Canada. A year and a half ago, agents seized a truck with 240 cases of liquor.

"It's not easy at all," Hurst said of the vastly different setting and tempo here. "This is the first time I've been down here."

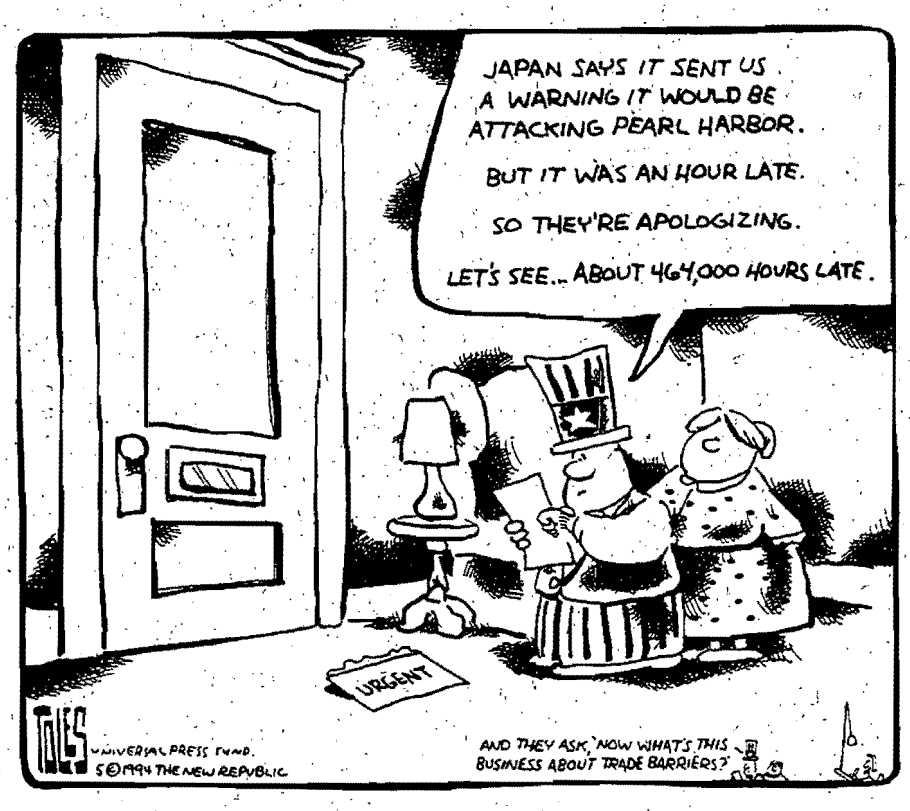
John France, sent from Casa Grande in central Arizona to Nogales for three months, said another difficulty has been the isolation he has felt in the few days he has been on the job here.

"I drive through the drive-through, I eat fast food, we work long hours and the rest of the time I've been in a motel room," he said.

cont'd

NOTEBOOK

SIC TRANSIT: Mick Jagger became honorary president of the London School of Economics. The Clinton administration said it would offer Bosnia's Serbs political and territorial concessions. Communists came to power in Nepal. California kindergarten student Tyler Palm, 5, was suspended and faced with expulsion after finding a discarded razor blade and bringing it to his school, which has a "zero tolerance" weapons policy. The Justice Department reported that one in four prisoners in federal prisons is not a U.S. citizen. Gary Blanchard of Northampton, Massachusetts, was sentenced to up to twelve years in prison for trying to kill librarian Nancy Brady, whom he beat with a book in "a fit of rage" after she told him it was closing time. Applicants for jobs in the Republican-controlled Congress were asked to complete a questionnaire on 152 issues, including their feelings about the pope, Alexander Solzhenitsyn and "Hard Copy." Daniel Sterling of San Francisco stabbed his girlfriend seven times in the chest and back and drank her blood after they saw *Interview with a Vampire* together. "I enjoyed the movie," he said. The House of Representatives passed GATT. Bill Clinton's horoscope said, "Individual who once declared, 'You don't do anything right' now says, 'You're beautiful!' "



DEPARTMENT OF OBFUSCATION: A generation ago political voyeurs flocked to a Paris suburb and returned with Ayatollah Khomeini's assurances that his Iran would be a constitutional democracy. A night of terror followed. The enthusiasts went on to other pursuits. Now they're at it again: this time the target is Saudi Arabia, and the place of pilgrimage is London, where a group of religious extremists called the Committee for the Defense of Legitimate Rights in Saudi Arabia poses as defenders of a would-be democracy. News of the committee, and a long apology for it, comes to us in the latest *New Yorker* from Leslie and Andrew Cockburn. Ignorant, ill-intentioned and gossipy, the article has all the set themes of its kind. There's the heroic, wannabe democrat: Muhammad al-Masari, an exiled, 46-year-old professor at King Saud University and one of the country's "leading theoretical physicists." In fact, Masari is a rabid fundamentalist, dabbling in theocratic incendiarism. One of the founders of Masari's "human rights" committee back in 1993 was a scholar by the name of Abdallah Jibreen. It was Jibreen who issued a *fatwa* decreeing the blood of the Shia in his country (mainly oil industry professionals, loyal to the country's institutions and rulers) *halal*, or permissible to shed. Jibreen quit the committee not long after it went public; but his outlook reflects the kind of bigotry that drives it. Another luminary of the group, Abdullah Tuwaijary, is described as a civil libertarian. It was men of his ilk, from the universities, many schooled in the West, who distributed leaflets calling the educated group of women "prostitutes" and "fallen women" and who gave out the women's phone numbers, urging vengeance because the government had been too lenient. The Cockburns write glowingly of two radical theocrats, Safar al-Hawali and Salman al-Audah, who were arrested in a crackdown last September as "men whose influence extends across the Arab Muslim world." Hawali is a wild preacher who recently prophesied disaster for the United States and his country in the Gulf war, warning his countrymen that America had come not to fight Iraq but to occupy Saudi Arabia. As for Audah, we are told he has many followers among the educated, that he is "another Khomeini." Some recommendation! Where a conservative state now rules, the Cockburns' heroes would build a merciless one. It is men like Audah and Hawali and Masari who turned the term "secularists" into something approximating a writ for banishment and worse. The Cockburns write that the Committee for the Defense of Legitimate Rights has made "routine complaints" about America's support for Israel. More than that: members of the committee, and their supporters, have been hounding the Saudi government since the Madrid Peace Conference

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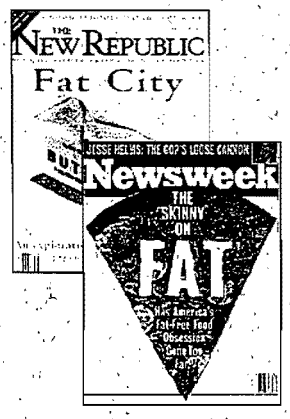
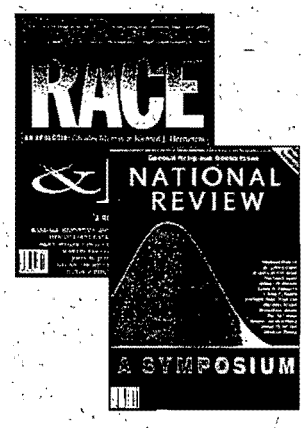
of October 1991. Their publications and cassette tapes have taken the government to task for taking part in the peace talks. They have condemned the Saudi state for inviting to Saudi Arabia "Jewish rabbis"—presumably members of the American Jewish Congress, the American Jewish Committee and other American Jews. The committee members have also called the U.N. an instrument of "Jews and crusaders bent on exterminating the Muslims and confiscating their wealth." The U.N. has many flaws, but it should be an easy call between the Saudi dynasty and the zealots who have stepped forth to challenge it. We have a new assignment for the Cockburns: in the alleyways of Gaza the men of Hamas, soulmates of their Saudi heroes, anxiously await visitors from afar. They, too, gunning for Yasir Arafat, have been proclaiming from the rooftops their devotion to the cause of democratic politics. Puff-piece, anyone?

BEHIND THE CURVE:





KEEP 'EM COMING:

School Survey Finds Violence All Over; Big Cities Are Worst

—*The Washington Post*, November 2

REALITY CHECK: The Ford Foundation has just given $550,000 to the NAACP. The foundation hasn't said whether these funds are designated to underwrite the damages the NAACP has agreed to give a former woman employee who threatened to sue its now bounced chief executive, Ben Chavis, for sexual harassment, or to pay the personal charges allegedly incurred by Dr. William Gibson as board chairman. Maybe Ford's largess isn't so clearly earmarked. The moneys, then, may simply go as a first payment on the accumulated $4 million deficit or to carry the costs of the next few weeks.

HOME NEWS: This week we say a sad goodbye to Associate Editor Alexander Star, who moves on to edit *Lingua Franca*, the award-winning magazine about academia. •

Diversity-mongering at the FCC.

COLOR TV

By Jonathan Rauch

The Clinton administration made history in July when the Federal Communications Commission auctioned off almost 600 interactive video licenses. For years the government foolishly was giving away slices of the broadcasting spectrum; persuading Congress to allow auctions has been a real advance. The biggest winner was a Florida company called Commercial Realty St. Pete, whose chief operating officer is a St. Petersburg entrepreneur named James C. Hartley. Commercial Realty won more than $40 million worth of licenses for about $33 million. It accomplished this trick because, under the rules of the auction, bidders received a 25 percent discount if they were owned and controlled by minorities or women—and Commercial Realty's majority owner was a woman. After the auction, eyebrows went up when the identity of the female owner became known: Teresa Hartley, James Hartley's wife.

When I asked Hartley about his wife's role, he said, "She's got a degree in finance and is very active in a lot of businesses we participate in. She's a majority owner in almost everything we do." She plays a "major role," he said, so why should it matter that she's his wife? "A lot of women are wives." He had me there.

Teresa Hartley's discount is part of a constellation of rules that favor not only women but, to an even greater degree, blacks and specified minority ethnic groups; James Hartley would have received his own 25 percent discount if he had been black or Asian. The superficial issue raised by these race-, ethnic- and gender-based preferences is whether people like Hartley are gaming the system. (Shortly after the auction, the FCC duly opened an investigation.) Of course, gaming a federal program to maximize benefits is hardly unusual. Ask any tax lawyer or farmer. The bigger issue is whether it makes sense for the government to favor Mrs. Hartley because she is a woman or to disfavor Mr. Hartley because he is a white man. For that is what the policy does, and on peculiarly self-referential grounds. A number of government programs discriminate to remedy past discrimination, but this one does it for the sake of ethnic and gender diversity—which, in practice, comes uncomfortably close to discriminating for the sake of discrimination.

Under a series of policies dating back to 1978 and now mostly mandated by Congress, the FCC's preferences come in four basic forms, primarily benefiting minorities but also helping women. First, when the FCC weighs the

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The Washington Post

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Clinton Invading GOP Strongholds

Campaign Moves to Keep Rival Off Balance

By Peter Baker
Washington Post Staff Writer

SANTA ANA, Calif., Oct. 17—President Clinton sailed into the home of the Reagan revolution today, as his confident campaign began mapping out a strategy that would stake a claim to traditionally Republican territory and sweep along Democratic congressional candidates.

White House officials woke up this morning convinced Republican Robert J. Dole did no real damage with his assaults on Clinton's character during the town hall forum in San Diego Wednesday night. Comforted by poll numbers showing voter skepticism of ethical charges, they said Clinton will continue to ignore the issue and leave rebuttals to surrogates and television commercials.

Instead, the president intends to try to keep Dole off balance by campaigning in areas where the Republican should be winning, such as today's stop in this conservative bastion of Orange County and a newly scheduled swing through the Deep South next week.

Clinton reminded the crowd in what he called "the most Republican county in the country" that he came in 1992 and promised to be a "fiscal conservative and still be progressive enough to meet the challenges of today and tomorrow."

"Do you feel that we're better off than we were four years ago?" Clinton asked the cheering crowd. "There has never been a partnership between the national government and the people of any state like this one we have forged over the last four years."

As Clinton and his aides meet Friday to discuss strategy for the campaign's closing days, they face a choice: Will Clinton try to boost his prospects for a blowout victory by making serious bids for states that Democrats rarely win, like Florida and Texas? Or will he assume his victory is safe and try to lengthen his congressional coattails?

If the latter is the goal, that could dictate trips to places like Minnesota, where Clinton scarcely needs to promote his candidacy but where incumbent Democratic Sen. Paul D. Wellstone is in a tough fight, and Massachusetts where Sen. John F. Kerry likewise could use the boost. White House senior adviser George Stephanopoulos said Clinton would balance his electoral interests with those of congressional Democrats.

"Battleground congressional races are in lots of battleground presidential states," said Stephanopoulos, noting Clinton would be promoting Democratic candidacies next week in Ohio, New Jersey, Michigan and other states. "A presidential visit does double-duty."

Sen. Bob Kerrey (D-Neb.), chairman of the Democratic Senatorial Campaign Committee, wants to add Colorado, Kansas, Georgia and Oregon to the list. While Clinton rarely makes explicit appeals for a returned Democratic majority, the views he espouses help Democrats generally, Kerrey said. "Wherever he is going and talking about his issues, that helps. . . . When you've got unity of agenda, it's enormously helpful."

"We're not going to try to sit on our lead," said White House political director Douglas Sosnik.

Clinton plans to spend all but a few days before the election on the campaign trail, leaving Sunday for a four-day swing through New York, New Jersey, Ohio, Michigan and Florida. After a brief overnight return to Washington, he will head back out to Alabama, Louisiana and possibly another southern state, such as Georgia.

The White House believes Dole is significantly ahead in states that would give him just 52 of the 270 electoral votes needed to win the presidency and considers states with another 198 votes to be up for grabs, not including California, whose 54 votes are the biggest jackpot.

Just a few days ago, Clinton advisers dismissed Dole's talk of fighting for California as a ruse intended to distract Democrats. However, they changed their minds today after Dole bought nearly $500,000 in television time in Los Angeles and other major markets over the next four days. Believing Dole has abandoned media drives in Connecticut, New York and Pennsylvania, Clinton aides said they will reduce buys in those states as well to allow him to respond here.

In places where he is on the air, Clinton launched a new commercial today featuring former Reagan press secretary James S. Brady intended to blunt Dole's character attacks without responding personally.

Clinton spent much of today on congressional efforts, headlining three separate fund-raisers in Southern California, two for the joint congressional campaigns and a third for New Hampshire Senate candidate Dick Swett. Today's shindigs in Los Angeles were the first of several high-dollar events over the next week intended to raise $10 million to $15 million for congressional campaigns.

That is also one of the reasons the president stopped here in Orange County. The White House considered the event a "two-fer" because it could help Democrat Loretta Sanchez knock off Rep. Robert K. Dornan (R-Calif.), one of the president's fiercest conservative critics.

Clinton warned the crowd not to become complacent. For the first time today, he added a turnout plea to his standard stump speech.

"I'm telling you, the big question in 19 days is who's going to show up," he told a crowd of several thousand sign-waving supporters on the steps of the Old Orange County Courthouse. "Are you going to show up?" His aides pointed to the 1994 elections when Republicans enjoyed historic success in part, they believe, because droves of Democratic voters failed to show up. "Their people were motivated, our people stayed home and we got our butt beat," said Sosnik.

Staff writer John F. Harris in Washington contributed to this report.

The New York Times

DATE: 10-18-96

PAGE: A-1

Dole, in California, Strikes Hard At Clinton on Illegal Immigrants

Continues Attack on President on Range of Issues

By ADAM NAGOURNEY

RIVERSIDE, Calif., Oct. 17 — Diving into social issues he had avoided for most of this campaign, Bob Dole today asserted that President Clinton had bowed to "militant special interests" in fighting efforts to "guard this nation's borders." Mr. Dole assailed Mr. Clinton for fighting efforts to cut government medical care for illegal immigrants with AIDS and to bar children of illegal immigrants from public schools.

Mr. Dole's decision to focus on immigration issues came in a wide and generally fierce attack on Mr. Clinton during a swing through Southern California. Mr. Dole intensified the assault on Mr. Clinton's fitness that he raised in their debate on Wednesday, suggesting today that the Democratic Party had laundered illicit campaign contributions and alluding to Mr. Clinton's effort to avoid service in Vietnam.

"I've fought before for America, and I think this is a fight for America's soul," Mr. Dole said, speaking heatedly and energetically at an unusually well-attended and handsomely staged rally in a green and sunny town square here. "This is a fight for America's future. This is a fight we can't afford to lose."

Mr. Dole urged the President as he had in their debate the night before in San Diego, to agree to a third debate. The White House today declined the invitation.

The start of what Mr. Dole described as the "home stretch" of his quest for the Presidency was politically significant both for where Mr. Dole chose to spend the day and for what he said.

His tour of communities around Los Angeles signaled that the candidate is indeed serious about devoting of his remaining time and resources on winning this state's 54 electoral states. "We take California away from Clinton, he can't win," said Mr. Dole's campaign manager, Scott Reed.

The choice of lines of attack on the President today seemed equally significant, as it seems fairly certain to set the tone for the final days of Mr. Dole's campaign.

Immigration was one of a number of socially disputatious issues raised by Mr. Dole today, and in doing so he followed the advice of Gov. Pete Wilson, who rode the issue to re-election in 1994. Mr. Dole also spoke strongly in favor of a California voter initiative that would bar most state affirmative-action programs and criticized President Clinton for opposing a Constitutional amendment to bar the desecration of the American flag.

Mr. Reed said the campaign had prepared television advertisements highlighting the affirmative action and immigration issues. But, in a sign of the kind of backlash these issues can engender among some groups — notably among women — Mr. Reed said there were now no plans to broadcast them out of the state.

Mr. Dole's decision to attack Mr. Clinton on immigration came during a week in which he has repeatedly yielded to advisers who have counseled a sterner campaign countenance. He made the adjustment smoothly today, and at times Mr. Dole sounded as if he were reading a speech from Patrick J. Buchanan, his conservative opponent in the Republican primaries, who made anti-immigration a staple of his campaign.

"Why are you paying millions in taxpayer dollars to provide drug rehabilitation for illegal immigrants?" Mr. Dole said to cheers here. "And worse, why are thousands of Californians the victims of violent crimes committed by people who should have been stopped at the border before they so much as stepped foot in the United States of America."

Mr. Dole noted that Mr. Clinton had forced Congress, before it agreed to an immigration bill over the strenuous objections of Mr. Dole's campaign managers, to drop provisions that Mr. Dole had wanted in the bill. "He changed it to allow illegal aliens to stay in public housing for up to 18 months," Mr. Dole said. "He changed it so that illegal aliens afflicted with AIDS cannot be denied taxpayer-funded medical treatment, no matter how high the cost."

Mr. Dole said the President's failure to keep out illegal immigrants had ended up costing states like California money in social, legal and medical benefits.

"Let me make it very clear; I feel sorry for these people," Mr. Dole declared. "But if the Federal Government can't stop illegal immigrants, they ought to pick up the tab. You should not have to pick up the tab in California. The Federal Government ought to do it."

With that statement, Mr. Dole also appeared to add another financial pledge to his campaign platform. Mr. Dole, who has already promised to cut taxes and balance the budget, did not affix a cost to his pledge. Mr. Dole put the cost of such services in this state at $3 billion.

From the start of the day, Mr. Dole's campaign aides today displayed the kind of peppy confidence that Presidential campaign operatives routinely display on the morning after a major campaign event — in this case, the Presidential debate — regardless of the performance of the principal. There were high fives all around, and when someone asked the press secretary, Nelson Warfield, about the status of a head cold that forced him to missed some debate practice sessions, he spun right on his heels: "My cold's much improved thanks to the Senator's great performance at the debate."

Even allowing for the possibility that some of the exuberance was exaggerated, Mr. Dole appeared in particularly good humor and almost boisterous. And after a week in which Mr. Dole seemed to be resisting the instruction of his advisers that he turn up his attacks on Mr. Clinton to turn the race around, he launched those attacks today with evident gusto.

Mr. Dole asserted that it was time for "adult leadership" in the country, adding: "Perhaps never has America seen a politician who brags so freely about promises he never kept, votes he hasn't earned, and goals he has never accomplished or virtues he has never displayed. It's a charming act. But it's wearing thin."

At the rally here, Mr. Dole stood in front of a lectern where the usual slogan describing his tax cut plan had been replaced with one that read: "Cast your vote with pride." A Los Angeles Times account of Vice President Al Gore attending a $140,0000 fund-raising event in April at a Buddhist temple quickly found its way into his stump speech.

"They had a fund raiser at a Bud-

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dhist temple in Los Angeles, and the Vice President showed up and ate vegetables," Mr. Dole said. "You have to take a vow of poverty to be in that temple. Well, several of them gave $5,000. Next thing you know they're going to be having fund raisers at homeless shelters."

"They've got such a laundering machine going, they've got their own laundromat," Mr. Dole said.

Though polls show Mr. Clinton well ahead in California, Douglas Sosnik, the White House political director, said today that Mr. Dole was within closer striking distance there than in virtually any state east of the Mississippi except Indiana and Ohio, so that it made as much sense for Mr. Dole to try to compete in California as anywhere else.

Mr. Sosnik, speaking after a rally with Mr. Clinton in Santa Ana, Calif., said he assumed that Mr. Dole's key goal now is also to help Republican Congressional candidates.

"This is not about pride," he said of Mr. Dole's options. "This is about survival."

Los Angeles Times

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Dole, on Attack in California, Blisters Clinton on Immigration

■ GOP: President's rival raises specter of 'aliens' of other countries committing crime, casting unlawful ballots.

By MARIA L. La GANGA
TIMES STAFF WRITER

RIVERSIDE—Republican presidential candidate Bob Dole issued a biting attack on illegal immigration Thursday as his campaign disclosed plans for a major shift in strategy—cutting back efforts in several Eastern states to pay for an expensive, last-ditch advertising blitz in California.

Touting internal polls that Republican officials said show Dole trailing President Clinton in California by single digits, the GOP campaign readied a statewide advertising effort that will start with two new ads today. The Dole campaign also said that during the remaining 2 1/2 weeks before election day, the candidate, his wife, Elizabeth, and running mate Jack Kemp will make a total of 18 appearances in the state.

In a them-versus-us speech in Riverside that played on fears of an uncontrolled border, Dole raised the specter of "aliens" from other countries committing crimes, receiving driver's licenses, sapping public services and casting illegal ballots.

"Why are you paying millions more in taxpayer dollars to provide drug rehab for illegal aliens in prison?" he asked, continuing the aggressive tone that drove him in Wednesday night's presidential debate.

"And worse, why are thousands of Californians the victims of violent crimes committed by people who should have been stopped at the border before they so much as stepped foot in this country?"

Immigrant advocates called Dole's comments indicative of what they view as a scapegoating approach to the issue that has been apparent in California since the campaign that led to passage of Proposition 187 two years ago.

The activists noted that laws on the books prevent illegal immigrants from attaining California driver's licenses, from voting and receiving most public benefits. "It makes one wonder what he's talking about," said Linton Joaquin, an attorney with the National Immigration Law Center.

Dole campaigned Thursday in both Riverside and Glendale—two communities where a strong showing is critical to his hopes in the state. Appearing with a bevy of area GOP candidates, Dole also pushed hard for Proposition 209, which would end government-sponsored affirmative action plans in the state.

Both immigration and affirmative action will be features of the new ads to appear in California, Dole's campaign chairman, Scott Reed, said.

The new moves amount to a major shift, both in message and targets. Until this week, Dole had carefully avoided talking about affirmative action and had seldom mentioned illegal immigration. His campaign had also been equivocal about how much time and money to spend in California.

Now, however, campaign aides said Dole would spend between $1.3 million and $1.5 million a week on television advertising in California during the 2 1/2 weeks remaining before the election. To pay for that, sources said that his campaign will essentially eliminate ads in the costly New York and Philadelphia media markets—effectively conceding the states of New Jersey, Pennsylvania, Connecticut and New York to Clinton.

The strategic shift followed a meeting in San Diego on Wednesday among Dole's national campaign officials and leading California Republicans, including Gov. Pete Wilson and Atty Gen. Dan Lungren.

"We're ecstatic," said Lungren, Dole's state chairman. "This is what we've asked for. This is more than playing the game. This is playing to win."

Lungren added: "California becomes the keystone of the whole race. It doesn't mean downplaying other states. This is one of several options that were considered from the beginning."

As Dole campaigned in the state after his second and final scheduled debate with Clinton on Wednesday night in San Diego, he called for a third encounter. "I'll even furnish the hall and the microphone," he said. He also continued the attacks on Clinton's character that increasingly are part of his speeches.

The president's record is "an insult" to California voters, he said during his address at the Mission Inn in Riverside. "Perhaps never has America seen a politician who brags so freely about promises he never kept, votes he hasn't earned, goals he has never accomplished or virtues he has never displayed," Dole said.

In a rally outside the historic hotel and in comments to reporters, Dole derided Democratic financial practices; alluding to a Los Angeles Times story about a recent fund-raiser at a Buddhist temple attended by Vice President Al Gore.

"They had a fund-raiser at a Buddhist temple in Los Angeles and [Gore] showed up and ate vegetables," he said. "You have to take a vow of poverty to be in that temple. . . . Next thing you know, they're going to have fund-raisers at homeless shelters."

Dole again criticized the Democratic National Committee for receiving donations from an Indonesian banking family with ties to President Clinton, and he charged his opponents' campaign with shady financial practices.

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"All across the country, at Clinton/Gore fund-raisers, they've got such a laundry machine going, they've got their own laundromat, pumping money into every single place in America," he said. And then he paused. "Later on we're gonna get tough," he joked. "But not today."

Sharing the Main Street promenade dais in Riverside with Dole were local Republican congressman, including Jay Kim (R-Diamond Bar), whose own successful campaign for Congress in 1992 is the target of a three-year FBI investigation into illegal campaign fund laundering.

Three Korean-based companies—Hyundai Motor America, Korean Airlines and Samsung America—have pleaded guilty of funneling illegal contributions to Kim's 1992 campaign, and a fourth company—Daewoo International (America) Corp., one of South Korea's biggest industrial conglomerates—has been indicted on similar charges.

Kim has not been charged in the cases, although his attorney has said that he assumes Kim is a target in the ongoing investigation.

Deriding Clinton for visiting California 28 times—frequently with federal money for state programs—Dole told a small crowd of supporters that the president takes the state for granted and places the needs of illegal immigrants ahead of the needs of California taxpayers.

"Whenever he has to choose between California taxpayers and the militant groups who demand public support for illegal aliens, he sides with the militant special interest groups," he said.

Dole charged that Clinton gutted the recently passed illegal immigration reform bill by pushing for an amendment to allow the undocumented to receive limited free public housing.

"He changed it so that illegal aliens afflicted with AIDS cannot be denied free taxpayer-funded medical treatment no matter how high the cost," said Dole, who believes that such AIDS sufferers should not receive public care. "When the president finished with that bill, it even opened up the possibility of illegal aliens receiving legal driver's licenses."

With licenses, he warned, illegal immigrants might be able to vote under the newly enacted motor-voter bill. "The possibilities for electoral fraud are just staggering," he warned.

At an afternoon rally on the steps of Glendale City Hall in the heart of the hotly contested 27th Congressional District, Dole made good on his morning promise to focus on the party and himself.

Since longtime Rep. Carlos Moorhead announced that he would not seek reelection, the traditionally Republican district has become a focus of the intense battle for the control of Congress.

Assembly Majority Leader James R. Rogan, who stood on the podium Thursday with Dole and received a plug from the buoyant candidate for president, is in a tight race with Democrat Doug Kahn.

Times staff writers Ronald Brownstein, Bill Stall, Tom Gorman and Patrick Mc Donnell contributed to this story.

The Washington Post

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PAGE: A-1

DNC Donor Controversy Widens As Republicans Step Up Criticism

By Ruth Marcus and R.H. Melton
Washington Post Staff Writers

Republicans yesterday escalated their rhetoric over what they called illegal foreign contributions to the Democratic National Committee, while the DNC said it would investigate new allegations that at least one contributor at a Buddhist temple fund-raiser was given $5,000 cash in small bills and asked to write a check to the party.

GOP presidential nominee Robert J. Dole accused the Democrats of laundering money from overseas sources. "They've got their own laundromat, pumping out money," Dole said. "Now they are out raising money at Buddhist temples where they take a vow of poverty," he said.

House Speaker Newt Gingrich (R-Ga.) said, "What we're seeing here is the opening phase of what will turn into being the largest scandal in American history . . . because it involves foreigners being directly involved in the American political system, the American government, the American criminal justice system."

White House Chief of Staff Leon E. Panetta, traveling with the president in California, said White House officials are concerned about the apparent problems with DNC contributions, particularly involving Asian donors. He said the White House had asked the DNC for an explanation.

The growing controversy centers on donations raised by the DNC's John Huang, a former official with the Lippo Group, an Indonesian financial conglomerate. Huang has raised millions for the party this year from Asian Americans.

A month ago, the DNC returned a $250,000 contribution that Huang helped bring in from one Korean company after determining that the money did not stem from the company's U.S. operations, as required by law.

Contributions from a Huang-organized fund-raiser in April at the Hsi Lai Buddhist Temple near Los Angeles also have come under scrutiny, and contradictory accounts emerged yesterday. Several people named in official DNC reports as having contributed $2,000 to $5,000 at the fund-raiser were listed with addresses at or adjacent to the temple. Both the DNC and Peter D. Kelly, the attorney for the temple, said Wednesday that those donors were monks and other religious personnel with the temple.

In a telephone interview Wednesday from Taiwan, however, the temple abbess, Tzu Jung, said that the temple only provided the site and no religious personnel had participated in the event attended by Vice President Gore. Monks and nuns, she said, do not have "that kind of money." She said the temple would not discuss anyone associated with the institution and would not comment on any of the contributor names listed with the temple address.

One of the $5,000 contributors listed, however, was Tzu Jung herself, also known as Su-Jen Wu, the name under which she appears in DNC records. In a separate interview at the temple yesterday, Man Ho, who said she was Su-Jen Wu's assistant, said the abbess earned stipends teaching at a Buddhist college in Taiwan and regularly received payment for lectures.

Another person listed as contributing $5,000 is a woman named Man Ya Shih, who is affiliated with a temple branch in Richardson, Tex. She was quoted yesterday in the Wall Street Journal as saying she had been visiting the California temple at the time of the fund-raiser and was approached by a woman who gave her $5,000 in small bills and asked her to write a check for that amount to the DNC. She said the woman was known to her as what the Journal called a "Democratic activist," but that she could not remember her name.

Making a contribution in the name of another violates federal election law. Employees at Shih's temple branch in Texas said yesterday that she had gone on a "retreat" and was not available for comment.

"We're looking into it," DNC press secretary Amy Weiss Tobe said of the Journal report. "We obviously had no prior knowledge and are disturbed by this report."

Tobe said Wednesday that "in hindsight, it was a mistake to hold the event in a religious institution" and that the DNC erred in failing to report the $15,000 cost of the fund-raiser as a contribution from the temple. She said the DNC will correct its report, but will not return the money because the contributions were legal even though the site was "inappropriate." Overall, the DNC raised $140,000 at the event.

At least seven people who gave addresses at or adjacent to the Hsi Lai temple in the town of Hacienda Heights were listed in Federal Election Commission reports as contributing a total of at least $37,000 to the DNC in February, or in connection with the April fund-raiser. Su-Jen Wu, the temple abbess, is listed as giving $3,000 at a February dinner in Washington.

Another listed contributor of $5,000 in April was the founder of the temple, Hsing Yun, who first met Gore on a visit to Taiwan in 1989 and who paid what Gore communications director Lorraine Voles said yesterday was a "courtesy call" at the White House in March. But in an article published April 30—the day after the temple fund-raiser—in the Chinese Daily News, a U.S.-published Chinese-language paper also widely distributed in Asia, Hsing Yun expressed concern about the gathering.

At a news conference after Gore had left the temple, the paper said, Hsing Yun said he had agreed to host the event as a "social visit" and did not know Huang planned to use it as a fund-raiser, which he called "inappropriate."

Another DNC contributor is listed as Gary Hsueh, with an address just down the street from the temple. According to FEC records, he gave $2,000 to the DNC on Feb. 23.

However, the occupant of that house, who identified himself as Jun Li, said he had never heard of Gary Hsueh and that he had been living in the house for the past 18 months. He directed inquiries about Hsueh to temple officials. When asked about Hsueh, a temple employee, who declined to give her name, said she did not know him.

Jun Li said his house, like others in the 14-acre compound containing the temple, is owned by the temple. When asked if he was a monk and whether he had contributed to the DNC, Li declined to comment and again referred questions to temple officials. "Maybe the temple knows," Li said as he backed into the house.

Tobe said yesterday that "at this moment, we're looking at that one contribution" from Shih. She said Wednesday that at the time of the fund-raiser, a temple official verified that the donors

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Should Race Be Considered in Med School Admissions.

Yes.

Affirmative action on the basis of race is used in almost all medical schools, the major exception being the University of California system.

Medical schools use affirmative action aggressively for a goal beyond that of other institutions of higher learning. Medical schools use it to improve access to health care for underserved populations.

In a study funded by the Robert Wood Johnson Foundation, we examined access by comparing service patterns of 4,500 young doctors between 1987 and 1991. The race and ethnicity of the doctors correlated strongly with whether they served poor, minority and Medicaid populations.

For example, only 17 percent of white physicians' patients were black and 9 percent were Hispanic, but 46 percent of black physicians' patients were black and 31 percent of Hispanic physicians' patients were Hispanic. Minority doctors also served disproportionate numbers of poor and Medicaid patients.

Even when our data are controlled for specialty, practice setting and other factors, the correlation with care for minority patients remains high. The first 10 years of physician practice, which we looked at, are a critical window on the future practice patterns of serving minorities and the poor.

The California Regents have said affirmative action can continue, but only on the basis of socioeconomic disadvantage. In our study, low socioeconomic background—based on the level of education and income level of physicians' parents—does correlate with increased service to the poor and minorities, but much less than race does.

Our findings suggest that the attack on affirmative action on the basis of race may cause policies that undermine access to care for underserved populations. Ending affirmative action in medicine may imperil access to care.

Joel C. Cantor
Director of Research, United Hospital Fund of New York

No.

Medical schools and other institutions of higher learning have attempted to increase minority enrollment by using unconstitutional, race-based admissions standards.

The result of such policies has been reverse discrimination. In the University of California system, for example, blacks and Mexican Americans with grade-point averages below 3.5 and mediocre admission test scores were admitted at a rate 50 times greater than that for others with similar credentials.

There is a groundswell of opposition to these discriminatory policies. The University of California Regents voted to end their race-based preference policies. Our public interest law firm won a significant victory in *Hopwood v. Texas*, in which the 5th Federal Circuit Court of Appeals (whose decisions are binding in Texas, Louisiana and Mississippi) declared nonremedial racial preferences unconstitutional. The attorneys general for Colorado and Georgia have urged that universities in their states stop using race as a significant factor in admissions.

Joel Cantor and his colleagues found a correlation between the race of a physician and the propensity to serve poor and minority people. But it [does not] justify the continuation of an unconstitutional, discriminatory system.

To increase the number of doctors assisting poor and minority individuals, the medical community should directly address physician service to the underserved populations instead of relying on correlative proxies. Professors can emphasize to students and residents the need to care for inner-city patients; schools can promote community service and externships; and loan-forgiveness incentives can be used.

All of these would be acceptable because they would not resort to deceptive and unconstitutional correlative proxies.

Michael Greve
Executive director, Center for Individual Rights, Washington

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PHOTOCOPY PRESERVATION

The New York Times

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California Pandering

A certain sadness attaches to Bob Dole's last-ditch efforts to narrow the Presidential race. In his scramble for votes, Mr. Dole is rewriting history — his own and the nation's — and repudiating what had been a strong record on civil rights during most of his three decades in Congress. It is not a pleasant sight.

Addressing an overwhelmingly white, invitation-only audience in California this week, Mr. Dole delivered a strong endorsement of the California ballot initiative known as Proposition 209. It would seem to bar affirmative-action programs by state and local governments — an extreme approach that even the current Supreme Court has rejected. The man who voted for the landmark Civil Rights Act of 1964, and a stream of race-conscious Federal laws since then, could now be heard complaining that all of these efforts, including many he had supported, had turned out to be a "blind alley," helping no one while dividing the country. He tossed around code words like "preferences" and "quotas" and raised the specter of reverse discrimination.

This was not the Bob Dole the country came to know in the Senate. Nor was it a careful reading of history. Scholars generally agree that 30 years of civil rights legislation, including affirmative-action programs, have rearranged longstanding patterns of exclusion and begun to open doors that had been closed to blacks and women.

Mr. Dole said he remained strongly opposed to racism and sexism and cast his support for Proposition 209 as a principled stand against unfair racial distinctions. "We cannot fight the evil of discrimination with more discrimination," he said. Yet Proposition 209 is a retrograde measure that would deprive state authorities of what little leverage they have to promote true equality of opportunity — a point President Clinton has grasped.

Mr. Clinton, whose "mend it, don't end it" policy has helped defuse an angry national debate over affirmative action, opposes Proposition 209 because it would bar an "extra effort" by government to make sure that "everyone has a chance to prove their competence."

Mr. Dole spoke in California in support of Proposition 209 last spring. Earlier he introduced similar legislation in the Senate as he got ready to run in the primaries. However, he never pushed the bill and, until now, has generally shied from the issue. His alliance with the anti-affirmative-action forces in California leaves Colin Powell and other fair-minded moderates who have lent their prestige to Mr. Dole's candidacy in an awkward spot.

But it is probably Mr. Dole's running mate, Jack Kemp, who feels most uncomfortable now. Mr. Kemp promised reporters last month that the Republican ticket would refrain from campaigning on divisive "wedge issues." Affirmative action, as defined by Mr. Dole, is just such an issue.

THE WALL STREET JOURNAL

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Clinton's Supporters

In the next day or so, it was announced yesterday, Bill Clinton is going to give a major speech in favor of, and outlining his proposals for, campaign finance reform. There surely are many metaphors we could compose around such an apparition taking place in the midst of this week's revelations about the amazing world of John Huang, but by now the Clinton Presidency is beyond comparison. After four nonstop years of this, Bill Clinton floats in a realm of the brazen never before witnessed in this country's political history. And the Democratic Party and its high-minded intellectual apparatus swallow it with scarcely a gulp.

Given the stakes at this particular juncture in electoral history, it's understandable that significant Democratic defections from this Presidency were never in the offing. Should Mr. Clinton lose, and the Republicans hold Congress, the Democratic Party likely would enter the wilderness for a generation. So perhaps we should be content with the few honorable exceptions drawing a line at scandal—longtime Democratic consultant Ted Van Dyk and former Watergate counsel Jerome Zeifman published on this page, and perhaps a few others. We have to note, however, that not one major figure in the Democratic Party, none, has separated himself or herself from the squalor of this Presidency. The party elders and liberal spokesmen in the press choose instead to lash themselves to the mast, at least through Nov. 5.

So we now have Senator Chris Dodd obliged to step forward and personally man the bilge pumps while the John Huang scandal pours forth in the final week of the campaign. Documents pried out of the Commerce Department this week show that Mr. Huang, described by party spokesmen as a mid-level nobody, had phone messages left for him at Commerce by an amazing array of key Clinton cronies: Hollywood pal Harry Thomason, who tried to capture the White House Travel office; Denver lawyer James Lyons, whose report drove the press off Whitewater during the '92 campaign; Arkansas-in-Asia rainmaker Mark Middleton; Mack McLarty; Bruce Lindsey and even Harold Ickes. Mr. Huang by his own account Tuesday met at the White House with the President "quite a few times . . . many times."

Again, we want to make a distinction between traditional politics and this Presidency. No one in politics would blanch at senior Democrats defending any one or two of the Clinton scandals and outrages as they arose. Politicians aren't holy men and stuff happens. But if you roll the tape back to Bill Clinton's entrance on the national political scene in the '92 campaigns, one sees the first signs in the bizarre equivocations of "didn't inhale" and the draft-board mumbo-jumbo. Something here was uniquely amiss.

He won. But what was foretold in those odd early episodes reappeared. The Travelgate episode and the ensuing White House stonewalling was passed off by defenders as "inexplicably ham-handed." Somehow the "inexplicable" continued unabated—the equivocal excuses, the ideological sellouts and buybacks, the stonewalling (I can't recollect, my memory is impaired, I lied to my diary), the flouted subpoenas from Congress and the courts, and the debauched procedures of the FBI, Secret Service and IRS ("honest bureaucratic mistakes")—with the campaign's final week now spent mocking the campaign reporting rules and defying a federal judge.

But for all those Democrats who served long before Bill Clinton arrived and rewrote the standards of acceptable political conduct, it is beyond so much as a bleat of comment.

"An unusually good liar," is how Democratic Senator Bob Kerrey, a former Presidential contender, described Bill Clinton months ago in an interview. Not now. From the Senate campaign committees, Sen. Kerrey tries to ride the Clinton coattails with Medicare ads for his candidates. The new standards are internalized.

We think of Whitewater committee stalwart Senator Paul Sarbanes, a Maryland Democrat. Sen. Sarbanes defended it all, and most skillfully. Then in the end, he signed onto the new standards, allowing the public humiliation of witness Jean Lewis. Sen. Sarbanes knows more than most, and we would give a nickel for his private thoughts as he enters the voting booth Tuesday, or for that matter the thoughts of Bob Kerrey or Bill Bradley or Daniel Patrick Moynihan.

The painful imperative of ensuring Democratic viability for the future is, we repeat, understandable. The screaming silence is not. And the flaccid hand-wringing of editorial endorsements appearing now is marginally better than, but oddly reflective of, the flaccid tone set by this Presidency's first term.

Whatever the result next Tuesday, these same Democratic elites will be back in public the next day insistently making their always high-minded arguments for high-minded causes. But Bill Clinton is debauching them as well; after this performance, there will be little reason to take their professions any more seriously than his.

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Civil rights office says Texas colleges can use race

By MICHELLE MITTELSTADT
Associated Press Writer

WASHINGTON (AP) - The Clinton administration has told Texas a recent federal court ruling does not force the state to adopt strictly race-neutral policies at state colleges and universities.

In response to questions from some Texas legislators, the Department of Education also said in a letter that the state could lose federal aid if it fails "to take appropriate remedial measures" to eliminate racial discrimination in higher education.

The department said despite the ruling state colleges can still take race and ethnicity into account in various programs - a position at odds with that of Texas Attorney General Dan Morales.

In a letter Monday, assistant education secretary Norma Cantu disagreed with Morales' Feb. 6 legal opinion directing state colleges and universities to have race-neutral policies for admissions, financial aid, scholarships and other aspects of college life. Ms. Cantu heads the Education Department's Office of Civil Rights.

One state senator who has been critical of the Morales opinion said Texas could lose up to $1.8 billion in federal funds if the state is found in violation of federal civil rights law.

Morales issued the opinion after the Supreme Court left intact a federal appeals court's decision striking down the University of Texas law school's former affirmative-action admissions policy. The plan, designed to boost minority enrollment, amounted to unlawful bias against whites, the 5th U.S. Circuit Court of Appeals ruled.

Ms. Cantu's letter said the appeals court ruling doesn't invalidate all race or ethnic considerations in Texas higher education programs.

"It is the position of the department that under the Constitution and Title VI (of the Civil Rights Act), universities and colleges may, in appropriate circumstances, consider race and national origin in making admissions decisions and granting financial aid," she wrote.

Morales' office said it interprets the 5th Circuit ruling as binding in Texas, Louisiana and Mississippi and requires race neutrality. But other officials have said the other states aren't under the same constraints as Texas because of a separate court case.

JET
USA $1.25/CANADA $1.60
MARCH 31, 1997

Black Baltimore County, MD, Police Officer Files Racial Bias Lawsuit Against Department

A veteran Black Baltimore County, MD, police officer recently filed a $9.6 million lawsuit against the police department for racial discrimination.

In the lawsuit, filed in U.S. District Court in Baltimore by Officer Calvin B. Settle, the 12-year veteran alleges a White sergeant in the department fashioned a noose and carried it around the offices of the Western Traffic Division in December 1992.

Police department spokesman Bill Toohey said the department conducted an 18-month investigation into the allegation and ruled against Settle. The department believed what the officer was carrying was a cable on a stick to open a locked car door, said Toohey.

According to the Baltimore Sun newspaper, Settle is alleging a pattern of bias that predated the December 1992 incident and ended with his and two other Black officers being transferred to patrol jobs last year.

No hearing has been set in the case as of JET press time.

Critics have accused Morales of overreaching, saying the court ruling can be narrowly interpreted to affect only the former University of Texas law school admissions program.

Morales' opinion "is not going to change based on a letter from the federal bureaucracy," said Morales spokesman Ward Tisdale on Tuesday.

State Sen. Rodney Ellis, a Houston Democrat, said Morales' opinion could cost Texas.

"I think that the letter from the assistant secretary for civil rights has $1.8 billion behind it," he said.

The Office of Civil Rights is assessing whether Texas has eliminated vestiges of discrimination in its public higher education system.

If discrimination is found, affirmative-action remedies could be imposed. As a last resort, Texas could face loss of federal funds should its higher education system be found in violation of the Civil Rights Act.

[discrimination]

Conference Report

ABA EEO Committee

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Discrimination

Attorneys Stress Preventive Steps In Aftermath of Charges at Texaco

ORLANDO, Fla.—Employers need to put procedures and policies in place to prevent destruction of documents and to avoid the kind of embarrassing mistakes that hurt Texaco Corp., a corporate counsel told attorneys at an American Bar Association conference session.

For both ethical and practical reasons, Joyce Margulies, in-house counsel with International Paper Co. in Memphis, Tenn., recommended making clear to all employees that "whatever's out there, we'll deal with it" and that employees should retain documents when in any doubt about whether they should be destroyed. If an employer claims a document has been destroyed but a copy shows up in an unexpected file, it is awkward to explain why it is missing from the primary file, she said during the March 22 conference.

When a discrimination charge is made, attorneys or managers should write memoranda instructing employees to retain all relevant documents, Margulies suggested. Another method is to send an attorney or paralegal early in the process to examine files and collect all relevant documents, managers' notes, and computer messages, she said.

Management attorneys should advise their clients to implement record-retention schedules but make sure that documents are retained long enough to comply with regulations of the Equal Employment Opportunity Commission and Office of Federal Contract Compliance Programs, Margulies said. Once a claim is made, relevant documents must be collected to make sure they are not destroyed in a regular purge, she pointed out.

Managers also should be instructed that good judgment and professional language is expected in computer messages, notes, and comments on daily planners, Margulies advised.

Plaintiffs' attorney Lawrence Solotoff of Solotoff & Solotoff in Great Neck, N.Y., commented that he sometimes has suspected that employers tampered with records, but it is seldom possible to prove that documents are missing.

However, he warned that plaintiffs and other sympathetic employees know to some extent what is going on in a company and that plaintiffs' attorneys often receive documentary evidence of discrimination from anonymous sources. After the Texaco tape-recording was reported in the media, employees sent helpful documents to the plaintiffs' attorneys, he noted.

Use Defensive Strategies. The Texaco case is typical of most class actions in that a gross statistical comparison—such as the percentage of minorities or women in management jobs as compared to lower ranking jobs—shows a problem, said management attorney Gary R. Siniscalco of Orrick, Herrington & Sutcliffe in San Francisco.

"Most employers dig their own graves" because they fail to implement defensive strategies in human resources selection procedures, Siniscalco said. If managers are permitted to pick whomever they want for promotions without soliciting applications, then plaintiffs can use gross data on pools of eligible people. However, an employer's use of a bidding system restricts the analysis to the group of people who actually applied for the job, he explained.

A similar strategy can be used with outside applicants, Siniscalco suggested. Require them to specify on application forms the particular jobs they are applying for rather than saying "any available job," he said. Employees can be surveyed to find out how many are actually interested in certain types of training, he added.

Margulies commented that many employers are reluctant to rely on a bid system for high-level jobs and prefer to encourage selected people to come forward. She recommended keeping records of the people who were contacted, which can show that the employer reached out to a diverse group.

However, keeping track of people who were encouraged to apply will backfire if the employer only talks to white males, Siniscalco commented. He urged the use of an objective method that requires employees to put themselves into consideration.

Keeping a list of potential "star" employees who management wants to develop and move up is defensible if specific, objective criteria are used to identify people and the process is monitored, Margulies said.

"It's not just about numbers. It's about fair selection procedures and the best people getting picked."

PLAINTIFFS' ATTORNEY LAWRENCE SOLOTOFF

Solotoff said that employers should define criteria in terms of job functions and warned that a standard such as "leadership skills" is a subjective psychological construct.

BusinessWeek

DATE: 9.11.95
PAGE: 23

Economic Viewpoint

BY PAUL CRAIG ROBERTS

QUOTAS: A BAD IDEA WHOSE TIME HAS GONE

TOSS 'EM: Americans hate race and gender quotas, and rightly so—they defy the Constitution and sap our ability to compete

Race and gender quotas, long a festering sore, have become a hot political issue. Republican Presidential contenders Bob Dole and Phil Gramm have promised their abolition. The California Civil Rights Initiative, designed to abolish that state's quotas, seems destined for the November, 1996, ballot. On July 20, the Regents of the University of California voted to end race-based employment and admissions policies, and California Governor Pete Wilson, another Presidential contender, has filed a lawsuit challenging the constitutionality of his state's quota policies.

A July, 1995, Gallup Poll shows that the public is fed up with quotas. Americans reject employment quotas by a margin of 63% to 35% and college-admission quotas by 57% to 39%. Favoring a less qualified "protected minority" over a white applicant is rejected by 84% of the population. Even blacks disapprove of this policy, with 68% opposed and only 22% in favor.

Quotas have many disturbing aspects, so it is not surprising that the public rejects them. Preferences are inconsistent with our colorblind Constitution, and they are strictly illegal under the 1964 Civil Rights Act, which is redundant with prohibitions against quotas.

Quotas are the work of Equal Employment Opportunity Commission interpretive regulations—themselves illegal under the Civil Rights Act—as well as federal judiciary decisions. These decisions, which at the time appeared to be limited rulings to open opportunities for minorities, had far larger implications.

BIG PICTURE. For example, in the late 1960s, EEOC compliance officer Alfred W. Blumrosen set aside the statutory focus on intentional discriminatory acts against individuals and redefined discrimination in terms of statistical underrepresentation of groups in the workforce. Under this approach, employers faced discrimination liability if they did not hire minorities in proportion to their percentage of the surrounding population.

This deviation from the Civil Rights Act reached the Supreme Court in 1971 in the case of *Griggs v. Duke Power*. Chief Justice Warren Burger saw the case in terms of opportunity blocked by "credentialism." In its decision, the Court deferred to the EEOC as the implementing agency and accepted what came to be known as the "disparate impact" standard, which defines as discriminatory any policy or job requirement that does not produce race and gender proportionality.

The disparate-impact ruling made quotas mandatory in order to avoid discrimination lawsuits, though this was not realized at the time. It was not until 1979, in *United Steelworkers of America v. Weber*, which upheld racial quotas, that Burger confronted the quota implications of his *Griggs* opinion. Alarmed, the Chief Justice dissented from the *Weber* decision, accusing the majority of Orwellian reasoning that ignored "statutory language, uncontradicted legislative history, and uniform precedent."

CASTE SOCIETY? Neither the court nor legal commentators realized at the time that *Griggs* destroyed equality before the law. However, once racial imbalance became proof of discrimination, white males adversely affected by quotas were deprived of the protection against reverse discrimination that the Civil Rights Act provided. It is impossible to have a civil rights policy that requires remedies for racial imbalance and simultaneously recognize the adverse impact of the remedy on white males.

Over the past two decades, we have inadvertently created a caste society in which there are two classes of citizens: those who are protected by civil-rights laws and white males, who are not. Equal standing under the law is giving way to a status-based legal system akin to feudalism, in which legal rights depend on race and gender.

The emerging status-based legal system has dire implications for the market allocation of resources. Quotas have already emerged in the mortgage market (see this column Jan. 24, 1994, Oct. 3, 1994, May 22, 1995), and some federal-employment policies explicitly prohibit hiring on the basis of merit. Catherine Crier reported on ABC-TV's *20/20* (Nov. 18, 1994) that job postings for U.S. Forest Service fire-fighting positions specified that "only unqualified applicants will be considered," and the Federal Aviation Administration, the agency in charge of air-traffic safety, has recently provided its supervisors with guidelines that state: "The merit promotion process...need not be utilized if it will not promote your diversity goals."

The exclusion of merit is an ironic outcome of a movement whose goal was inclusion. It bodes ill for the U.S. as a competitor in the emerging era of global capitalism.

Paul Craig Roberts is John M. Olin Fellow of the Institute for Political Economy and Distinguished Fellow of the Cato Institute in Washington, D.C. He is co-author of *The New Color Line: How Quotas and Privilege Destroy Democracy* (Regnery Publishing, October, 1995).

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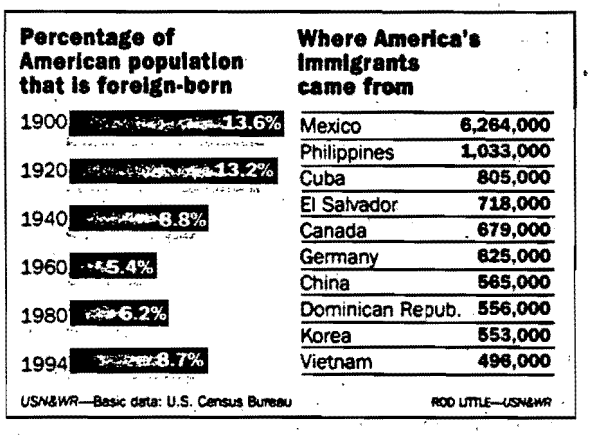
U.S. News & WORLD REPORT

DATE: 9/11/95
PAGE: 8

STIRRING THE MELTING POT

America has always been a melting pot, but not since World War II have immigrants composed so large a share of the mixture – 8.7 percent to be exact. That's just one of several surprises contained in a new demographic snapshot of the nation that is all but certain to fuel the immigration-policy debate. The new Census Bureau report, "The Foreign-Born Population: 1994," released last week, depicts an almost unprecedented wave of new arrivals in the past five years; nearly a fifth of the nation's 22.6 million foreign-born residents came here since 1990. Roughly a quarter of the 4.5 million most recent immigrants were from Mexico. Large numbers also arrived from Russia, Vietnam, the Dominican Republic and the Philippines.



All this may make for a more polyglot nation but not necessarily a more diverse one: More than two thirds of foreign-born Americans are white, 1 in 5 is Asian and just 7.1 percent are black. And the vast majority have settled in just six states, with California absorbing more than a third, followed by Florida, New York, Texas, Illinois and New Jersey. Although the foreign born are more likely to have graduate or professional degrees (11.5 percent of recent arrivals compared with 7.5 percent of natives), they are twice as likely not to have graduated from high school.

The new census numbers are sure to be a factor in the upcoming immigration debate on Capitol Hill. The Senate will consider a five-year ban on most federal benefits for new immigrants when it takes up welfare reform this week, while a House committee is expected to weigh in on a bill cracking down on illegal aliens. Meanwhile, the Immigration and Naturalization Service launched a new program last week to pare the huge backlog of immigrants who have applied for citizenship.

The Washington Post

DATE: 1-27-97

PAGE: A19

William Raspberry

What Are We Afraid of?

Hawaii's citizens may be about to do what its Supreme Court refused to do: Outlaw same-sex marriage. The state House has approved a proposed constitutional amendment to ban marriages between members of the same sex. Approval by its Senate would put the proposed amendment before the voters in November 1998.

The result could be—in effect, if not in legal fact—the outlawing of same-sex marriage *in America*. Here's why: The U.S. Constitution, in Article IV, requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." That means that marriages legally performed in one state must be recognized by all the states.

Given the opposition to gay and lesbian marriage disclosed in one opinion poll after another, no state is soon likely to approve same-sex marriage directly. Hawaii did so indirectly when its Supreme Court ruled that denying licenses to same-sex couples violated the state constitution's equal-protection clause.

Legislative attempts to reverse the ruling failed, and now opponents are trying to change the state constitution. The safest bet is that they'll succeed, and that will settle the question of same-sex marriage.

There is, however, another question that it won't settle—at least not to my satisfaction. And that is, why are so many of us so adamantly opposed to same-sex marriage?

There are two obvious answers: that the dictionary definition of marriage is the union of a man and a woman for the purpose of founding and maintaining a family, and that same-sex marriage is a violation of the laws of God.

The first doesn't present much of a problem in legislative draftsmanship. We already sanction marriages between people who have no intention of forming a family—senior citizens or infertile couples, for instance. The second, being religion, is more the province of the church than of the legislature. That religious authorities might choose not to recognize the legitimacy of a union between, say, a Zen Presbyterian and a born-again Hindu is no reason why a state shouldn't issue the license.

No, the polls suggest a repugnance that is more visceral than technical or religious—a distaste bordering fear.

But fear of *what?* That allowing homosexual marriages will increase homosexuality and perhaps even help spread such diseases as AIDS? But that makes sense only if you believe there's value in keeping homosexuality in the closet and that committed couples are as likely as casual sex partners to be promiscuous.

Fear that some people will abuse the privilege, for example, by marrying AIDS patients in order to extend them medical coverage? But marriage seems a more reasonable rein on such abuse than, for instance, the District's Domestic Partners Act, which required no particular show of commitment.

Fear that stretching the definition of marriage to include gay and lesbian unions will weaken marriage for heterosexuals? But how? Is the strength of my commitment dependent on the nature of yours?

Fear that homosexual couples will (gasp!) adopt children? And do what to them? Turn them gay? Leave them sexually confused? Make them laughing stocks?

I confess that the idea of going against widely held beliefs makes me uneasy. Sometimes what we see as mere prejudices turn out to be the hard-earned collective wisdom of society.

But sometimes (as used to be the case for trans-racial marriage) they *are* mere prejudices—no matter what social or scientific or religious evidence we offer in their defense.

I could, if I put my mind to it, come up with a fair load of evidence against same-sex marriage.

What keeps me from doing so is experience. I've known enough committed gay and lesbian couples to lose my fear that they are somehow dangerous. Many of these couples have seemed as loving and as devoted to one another as my wife and me.

And if they want to mark that commitment, by invoking the religious and civil forms used for the purpose, why isn't that a good thing? What are we afraid of?

The Washington Times

DATE: 1-25-97

PAGE: C3

CLARENCE PAGE

Workplace diversity role for employers

As the battle over affirmative action heats up, I am bracing myself for the time when my side — the side that supports it — loses.

The winners will be my rivals like Ward Connerly, the black businessman who led the anti-affirmative action proposition that California voters passed in November. Mr. Connerly recently formed an organization to spread the movement to other states.

Martin Luther King III organized a group to counter Mr. Connerly's. But though Mr. King's organization may have some successes, ultimately the pro-affirmative action side will lose.

Affirmative action was never supposed to be permanent. The question has never been whether, but when affirmative action is going to end.

Affirmative action as we know it has been around for about 30 years, more or less. This is as good a time as any to consider how well it has worked and whether it is still needed. I expect it to end. I just don't want affirmative action to end before its job is done.

In the meantime, it pays to ask, what harm is it doing? Is it opening the floodgates to unqualified or underperforming workers at the expense of deserving white males?

With exquisite timing, two economists at Michigan State University have uncovered strikingly persuasive evidence that, despite the concerns voiced by angry white males and others, so-called "affirmative action" hires do just as well or even better than white men do.

Economists Harry Holzer and David Neumark studied the education, qualifications and performance evaluations of workers at more than 3,200 randomly selected employers in Detroit, Atlanta, Boston and Los Angeles. Employers had identified workers hired at least in part as a consequence of affirmative action plans. (Most were government contractors, who are bound by strict affirmative action requirements.) Their qualifications and performance evaluations were compared to white men in comparable jobs and to workers hired by companies without affirmative action plans.

The results indicate that affirmative action hires appear to do just as well or better on the job than white males and others who were not hired with affirmative action in mind.

That revelation immediately brought up memories of my elders warning me years ago that I would have to set my goals high — to be "twice as good to get half as much" — as my white counterparts in school and on the job.

But, the researchers' results are a bit more complicated than that. White males were more "qualified," if you look at education alone. They averaged from a few months to a year more schooling than minorities or women holding similar jobs.

Yet, after some time on the job, surprisingly little differences appeared in the routine performance evaluations of so-called "preference" hires, compared to white men. In fact, when broken down into subgroups, African-American women generally outperformed white men, according to the job evaluations.

Curiously, only Latino men were "significantly" lower than their Anglo counterparts in the performance ratings. In a telephone interview, Mr. Neumark declined to speculate on the reasons why. Since the sample of Latino men was smaller than other groups, the researchers wisely refrained from making too many fine distinctions.

Whatever the reasons for the disparity regarding Latino men, it does not devalue the need for today's employers to broaden the pool of qualified applicants than employers in past eras did.

Perhaps the best definition of this form of affirmative action was articulated by Sen. Christopher Dodd during a panel on which we sat in Hartford, Conn., on the recent anniversary of the birthday of Martin Luther King Jr.

He defined it like this: "Look harder."

Employers facing an apparent lack of "qualified" candidates should "try harder," he said. They should take a second look at their selection process to ensure that standards are closely relevant to the job's requirements, otherwise they amount to a perpetuation of America's oldest affirmative action, preferences for white males.

Affirmative action as we have known it appears to be on its way out. But I expect the lessons it has taught us about the nature of job qualifications to endure.

Since white men are the slowest-growing group in the workplace, forward-looking employers already are finding they must cast a wider net for skilled job applicants and produce a more hospitably diverse workplace, whether the government tells them to or not, just to compete for the most talented workers.

So far, the damage done by affirmative action appears to be, as Mark Twain once said of reports of his death, greatly exaggerated. Instead, it has done all Americans a favor by producing a workplace that is far more integrated than most other aspects of American life. It pays to try harder.

Clarence Page is a nationally syndicated columnist.

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The New York Times

WEDNESDAY, MARCH 26, 1997

Finding Ability, Not Just Disability

Insurers Turn To Retraining Injured Workers

By JOSEPH B. TREASTER

HOG KEY, In the Ten Thousand Islands, Fla., March 22 — Lisa Kay Standard struggled to lift herself out of her long green canoe as it nosed onto the white sandy beach on this tangle of mangroves and palmettos on the edge of the Everglades. At first, her legs failed her, as they often do. But with an extra heave the 26-year-old woman pitched forward and was finally able to step ashore.

For nearly two years, Ms. Standard, who was forced to give up her job as a first-grade teacher because of a degenerative disease akin to muscular dystrophy, has been walking with ankle-to-knee leg braces and a cane and, for longer distances, riding a motorized wheelchair.

These last several days, though, she has been roaming the Everglades and the coastal waters and inlets of the Gulf of Mexico with a handful of other disabled people and guides as well as several specialists on rehabilitation and employee benefits, sleeping under the stars and keeping a watchful eye out for snakes and deadly spiders.

The outing, sponsored by the Hartford Life Insurance Company, is just one twist in a growing movement to get people off disability insurance and back to work.

For the insurance industry, the motive is mostly self-interest: Easy profits as disability coverage grew in the last decade to an $11 billion business gave way to losses as companies liberalized their policies to attract more customers and claims multiplied. Facing a long-term drag on earnings, insurers determined that making money depended on successfully managing the rehabilitation and retraining of injured workers.

In all, life insurers earn one in every eight premium dollars from disability coverage. The Unum Corporation leads the field, with more than $1 billion in

Photographs by Tom Salyer for The New York Times

To help persuade disabled people like Lisa Kay Standard that they can return to work, the Hartford Life Insurance Company sponsors outings to places like the Everglades. Initially, Ms. Standard worried about her limitations ...

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and that if Congress wished another result, lawmakers could amend the labor law to add an opposition clause.

The Sixth Circuit ruled that although the ambulance drivers did not file an FLSA complaint, Section 215(a)(3) requires the filing of "any complaint," not a "civil complaint," and the letters they wrote, although not asserting any rights under the FLSA, were nonetheless sufficient.

"To hold that plaintiffs have no recourse for such an action under FLSA defeats the purpose of the Act by allowing employers to use economic consequences to prevent employees from asserting their right to certain working conditions," the majority wrote.

The dissent objected that the county's decision to discharge the at-will ambulance drivers "was motivated by prudent business judgment, not a desire to retaliate against an assertion of FLSA rights."

The anti-retaliation provision of the FLSA was not meant to "achieve this absurd result," Batchelder wrote.

Five federal appeals court have ruled that informal complaints are enough to trigger the FLSA's anti-retaliation protections. Those cases were cited by Ellis as including the Sixth Circuit, in a 1992 ruling in *EEOC v. Romeo Community Schools* (1 WH Cases2d 264), the U.S. Court of Appeals for the Seventh Circuit in 1991 in *Crowley v. Pace Suburban Bus Div. of Regional Transp. Authority*, (30 WH Cases 761), the U.S. Court of Appeals for the Third Circuit's 1987 decision in *Brock v. Richardson*, (27 WH Cases 1689), and a 1984 ruling from the U.S. Court of Appeals for the Tenth Circuit in *Love v. Re/Max of Am. Inc.*, (26 WH 1360).

By Barbara Yuill

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Insurers Turn to Retraining Disabled Workers

revenue from disability premiums in 1995, followed closely by the Metropolitan Life Insurance Company. Hartford ranked third with $562 million, up from $270 million three years earlier.

The shift toward rehabilitation has paid off. "Profits have been on the rise," said Robert G. Taylor, the president of John Hewitt & Associates, an employee benefits consulting firm. "And premiums paid by employers would be higher today if it weren't for the emphasis on more sophisticated claims management and rehabilitation."

Corporate leaders say that getting disabled employees back to work, particularly those with advanced educations and special skills, saves money in recruiting and retraining and prevents losses in productivity that are inevitable when newcomers join a company.

More and more corporations "are demanding good return-to-work programs," said Ruth Brannon, a disability management specialist at the Washington Business Group on Health, an organization financed by America's biggest corporations. "They are modifying jobs and work stations and talking with supervisors and managers so they will accept people back."

One problem insurers face is ferreting out fraud without cheating disabled workers. The temptation to advance questionable claims can be strong because disability insurance generally pays about 60 percent of a disabled employee's salary until either recovery or retirement at age 65.

"There are rough spots," J. Robert Hunter, the director of insurance for the Consumer Federation of America, said, "just like there are rough spots in managed health care. Sometimes there is serious debate over whether this guy can go back to work. 'Is this the right therapy or should there be something else.'"

(While workers' compensation insurance for work-related injuries is mandatory in all states, disability insurance — which covers injuries and illness outside the workplace — is required only in a handful. Only about one-quarter of Americans are covered, either by their employers or at their own expense.)

On the Everglades camping trip, which lasted five days, there was no high-tech therapy. Rather, like Outward Bound excursions so popular with young people, its purpose was to help participants discover unsuspected reserves of strength for overcoming adversity. It was also a way for Hartford to showcase its new emphasis on rehabilitation.

Besides the beauty of the wilderness, the campers encountered squadrons of dive-bombing mosquitoes, a relentless sun, howling squalls, prowling raccoons and all manner of creepy-crawlies. They discovered life without plumbing and the surprising comfort of sleeping bags. And every day developed an edge that made it impossible, at least for the moment, to keep dwelling on fate and fairness and parts of the body that had stopped doing what they were supposed to do and would probably never work as well as they once had.

Before the expedition, Ms. Standard, who lives near Atlanta, had been wondering whether she was up to pursuing a master's degree in education. Hartford has agreed to pay for the schooling so she can teach at a higher grade level, where fewer acrobatics are necessary than with 6-year-olds. But now, sitting on the driftwood-strewn beach at nearby Whitehorse Key, where her group had pitched igloo-shaped green tents overlooking a gentle, rippling surf, it was hard to remember any doubts.

True, going back to college would be difficult, especially with a 13-month-old son to care for, even with help from her husband and church friends. But her resolve was evident in the way she willed the trembling from her legs when it threatened to pitch her onto the sand and in the tightening of her lips whenever someone offered a helping hand that she didn't need.

Much of what Hartford is doing is prosaic. Staff nurses and rehabilitation specialists talk with doctors and patients and then arrange for such services as chiropractic sessions, exercise and muscle-building programs, counseling in stress and time management and even weight-loss programs. Since 1992, the company has more than tripled its staff of claims managers, nurses and rehabilitation specialists to 535.

Once clients are recovering physically, Hartford administers aptitude tests and arranges for training in everything from job hunting to using computers. It pays for tools, books and even uniforms for those switching into new lines of work. It arranges for transportation to job interviews and, in some cases, has paid moving expenses so people could accept jobs in distant cities.

In order to get clients settled into new jobs, or to resume old ones, the insurance company works with employers to install such things as flashing lights, magnifying devices for those with impaired vision and special chairs, tables and lamps. Sometimes, too, Hartford hires industrial consultants to redesign jobs for its policyholders. Occasionally, it even helps them start small businesses, including, so far, a tae kwon do school, a commercial shooting range and a company that specializes in coordinating family reunions.

Hartford had thought an outdoor challenge would bolster people's spirits. And the tonic worked. Susan Nichols, for one, is regaining some of her self-confidence. A registered nurse who ruptured a disk while boating with her husband, Ms. Nichols figures she will never again be up to lifting patients and spending endless hours on her feet. But at 40, she has never worked anywhere but at St. Vincent's Infirmary Medical Center in Little Rock, Ark., and she worries about presenting herself in interviews for office jobs.

On the canoe trip, she left most of the paddling to others. But she and another member of the group, Melissa McCaskill, 31, chopped tomatoes and onions and chicken breasts for campfire meals. And in shorts and T-shirts, they combed the beaches for seashells, called out when they spotted cruising alligators in the back waters and, after months of mostly staying at home, exulted in their new-found freedom.

To hear Ms. McCaskill tell it, she could also use a lucky break. Two years ago, her estranged husband, a long-haul truck driver, smashed through the door of her house trailer and shot her with his .38-caliber revolver, shattering her left elbow. Surgery left her with a fused elbow, making it impossible for her to go back to her job at a hosiery factory in St. Pauls, N.C.

But under the terms of her disability-insurance policy, her payments will run out in 17 months because she is capable of doing less physically demanding work at about the same pay as before. With a teenager and a 6-year-old to support, she has been knocking on doors, but her injury scares off most employers.

The shift toward rehabilitation has improved profits.

"I've tried fast-food restaurants and motels, for housekeeping, laundry, whatever," said Ms. McCaskill, who stands nearly 6 feet tall and wears her hair in a spray of short braids. "I tell them about my arm and they say 'We'll get back to you,' and I never hear from them."

Around the campfire the first evening, when it came her turn to describe her expectations for the trip, Ms. McCaskill's frustrations boiled over. Without giving details, she accused Hartford of giving her a rotten deal. She did not know why she had come on the trip, she said, and was "not enthused at all."

After the others had turned in,

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Alicia Heine, a rehabilitation specialist for Hartford, sat under the pines talking with Ms. McCaskill. And the next morning, as the canoes were being readied, she called the company's regional office in Atlanta to get someone on the case.

Later, when she was feeling calmer, Ms. McCaskill said her employer had essentially chucked her out after her injury. A Hartford representative had spoken to her once and never followed up. And she had been left in the hands of a state vocational therapist who she thought had set her up for rejection by sending her out on job interviews without telling potential employers what to expect when she arrived.

A day or two into the wild, after the canoes had glided through places like Gator Bay and Fishhawk Creek, Ms. McCaskill was joking and smiling and, with a renewed pledge of help from Hartford, talking about getting on with her life.

And there was more than a little serendipity out there in the bush. Ms. Nichols befriended a Hartford case manager who had joined the excursion only after two other employees had dropped out and who, like her, was a former nurse. Their conversations persuaded her that she had marketable skills after all.

And watching Ms. Standard charging around in her wheelchair, both Ms. Nichols, with her bad back, and Ms. McCaskill, with her crooked arm, began to wonder whether they might not have unduely magnified their own difficulties.

"Some of us are in one stage," Ms. Standard said, "and some of us are in another."

It was not until the last minute that Wilderness Inquiry, a nonprofit organization in Minneapolis that ran the trip, decided to add John Galland to the contingent of guides. Twenty-six years ago, Mr. Galland leveled a small part of the Colorado forest as he rocketed off a ski trail and never walked again. But that did not mean he was immobilized.

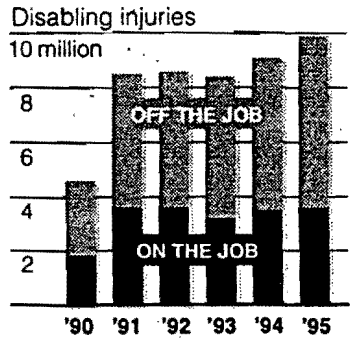
In a wheelchair outfitted with knobby tires, he made beaches and scrub brush seem like a sidewalk. At the stern of a canoe, he delivered a powerful stroke. There was very little, it seemed, that he could not do, from setting up tents and stoking campfires to tying fancy knots and brewing exotic coffees.

For the three disabled women, who have been coping with new limitations for no more than a couple of years, watching Mr. Galland was breathtaking.

"He's in a stage I'm not in," Ms. Standard said as the skies cleared one morning and a rising tide reclaimed the beach. "He's so comfortable with himself, and so confident."

Tracking Disabilities

Most disabilities are caused by diseases, not by injuries, and more people become disabled when they are not working.

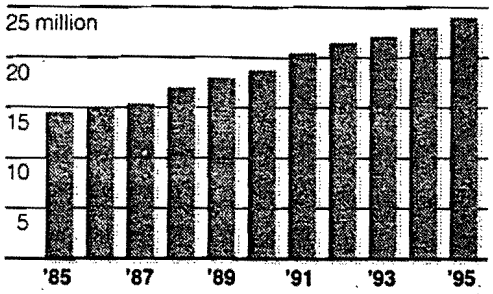


Sources: 1992 U.S. National Health Interview survey; National Safety Council

The New York Times

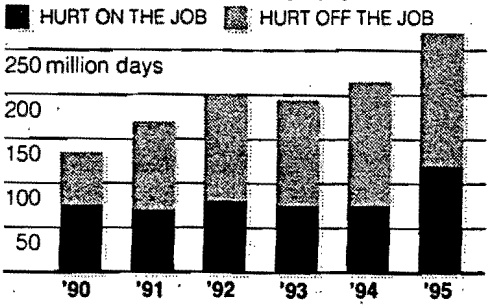
As Disability Insurance Grows More Common . . .

People with long-term group disability insurance



. . . Insurers Feel Pressure To Get People Back to Work.

Work days lost due to disabling injury or illness



Sources: John Hewitt & Associates; National Safety Council

THE WALL STREET JOURNAL DATE: 2/4/94
PAGE: B5

White House Memo on Federal Hiring Shows Defense of Affirmative Action

By PAUL M. BARRETT
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON – The Clinton administration said that affirmative-action efforts in federal hiring don't have to be changed drastically to comply with a conservative Supreme Court ruling issued last year.

The Justice Department sounded that theme in a memorandum sent last week to the general counsels of all federal agencies and released publicly Friday. At the same time, though, the dense 19-page legal analysis warned agency lawyers that to insulate themselves from reverse-discrimination lawsuits, they must be able to demonstrate a "compelling" need for hiring or promotion policies based on race.

Viewed together with the administration's courtroom defense of various race-based procurement policies, the employment memo underscores the White House's determination to defend most federal affirmative action, despite pressure from the Supreme Court ruling. The one major exception to this approach was a decision last year to suspend a Pentagon contracting set-aside program that reserved about $1 billion a year for minority-owned firms.

The Supreme Court, by a 5-4 vote, ruled last June that federal programs using racial classifications have to meet the same tough legal standard – known as "strict scrutiny" – previously applied to state and local government programs.

The Justice Department memo, issued by Associate Attorney General John Schmidt, concludes that "the application of strict scrutiny should not require major modifications in the way federal agencies have been properly implementing affirmative-action policies." He also stressed that the Supreme Court decision doesn't in any way restrict recruitment and outreach efforts that don't involve preferences for particular jobs.

Mr. Schmidt, the department's No. 3 official and a key political contact with the White House, explained that the sorts of "compelling interests" that could justify preferences for minorities over whites include "historical evidence" of an agency's past discrimination or "statistical evidence" of a current "under-representation" of minorities in a given job category. He didn't explore how many agencies might already have or be able to generate such evidence.

The memo observed that an agency's "operational needs" also could justify preferences. The Federal Bureau of Investigation, for instance, may seek diversity among its agents in the interest of winning community acceptance and because of the need to perform undercover missions, Mr. Schmidt explained. But drawing a principle from Supreme Court precedent on affirmative action in higher-education admissions, he added that race should be only one among a number of factors in a hiring decision, never the sole factor.

Affirmative-action programs shouldn't go on indefinitely, the Justice Department official said, although he didn't explain how the proper duration should be calculated in individual situations.

THE WALL STREET JOURNAL

DATE: 3/14/96

PAGE: B5

Sears Sets Model for Compliance With Disabilities Act, Study Says

By FRANCINE SCHWADEL
Staff Reporter of THE WALL STREET JOURNAL

When employees complained about pain after foot surgery, Sears, Roebuck & Co. allowed them to wear tennis shoes on the sales floor.

The big retailer spent $250 on an ergonomic chair for an employee with back problems. And it transferred an employee with a hearing problem to a nonsales job.

These are among the cases reviewed by Peter D. Blanck, a University of Iowa law professor, in a study of the company's experience with the Americans With Disabilities Act. By studying company data, he calculated the average cost to Sears of accommodating 71 employees with disabilities over the past three years to be $45. He also found that most job disputes involving the disabled are resolved without going to court.

Some business people have complained that the cost of complying with the law could be extremely high, especially for small companies. But a Harris poll of 400 executives last year found that the median cost of providing accommodations was $233 per employee. The Sears study provides a detailed breakdown of accommodations that one company made for even less money.

Accommodating the disabled doesn't have to mean "a large financial burden or an increase in legal difficulties," says Hamilton Davis, Sears's assistant general counsel of employment practices. He says the company has made many more accommodations than the 71 documented cases the professor studied.

Prof. Blanck says he focused on Sears because the company is committed to employing the disabled, its work force includes people with a wide range of physical and mental disabilities and it was willing to grant him access to its data. He points out that disputes involving workers with many of the disabilities Sears accommodated at relatively little cost have resulted in litigation for some companies.

The 1990 Americans With Disabilities Act bans discrimination against the disabled and requires employers to make "reasonable accommodations" for qualified workers.

Messrs. Blanck and Davis acknowledge that many of the scheduling changes Sears made to accommodate disabled workers might be more difficult for smaller companies or those with union contracts.

The professor also acknowledges that, in calculating the cost of accommodations, he didn't include big-ticket items such as automatic doors and a $21,000 system for entering computer data with verbal commands or braille keyboards. (He says both systems can also be used by people who aren't disabled.) He also didn't include the cost of settling ADA charges filed with the Equal Employment Opportunity Commission or indirect expenses such as staff time spent on assisting disabled workers. But he notes that the cost of accommodating disabled workers was far less than the $1,800 to $2,400 Sears spends to terminate and replace the average employee.

He also found that 141 ADA complaints were filed against Sears at the EEOC between 1990 and Aug. 10, 1995 – a number he says is low for a company with 300,000 employees. The agency is charged with reviewing ADA complaints.

Litigation was pending in only three of the complaints, or 2%. Two of them involved employees who were fired.

Twelve percent of the charges were settled at an average cost of $6,193. Nine percent were withdrawn and 33% were dismissed by the agency. (Some were dismissed because they were filed before the effective date of the employment provisions of the ADA in 1992). Thirty-four percent were still pending with the EEOC, which has a big backlog of cases. And in 8% of the complaints, the EEOC issued a right to sue letter, meaning a worker could still pursue a lawsuit. The outcome of 2% of the cases was unknown.

Among the more expensive accommodations Prof. Blanck found at Sears was a $500 tab for installing restroom railings for an employee who uses a wheelchair. The company also spent $469 for a closed-captioned TV so a deaf worker could watch while on breaks, $400 for a special fire-alarm system for the hearing-impaired and $350 for a wheelchair to help an employee who had difficulty.

Nearly three quarters of the accommodations were made at no cost, with many involving changes in scheduling or job duties. In one case, the company waived its pantyhose requirement for a saleswoman with an allergic sensitivity.

Prof. Blanck also documented five accommodations made for employees with mental disabilities, whose cases are often the most complex for businesses. That is because mental disabilities often aren't as clear cut as physical ones and determining how to accommodate such problems isn't as obvious.

While some disputes at Sears involved workers in this category, Prof. Blanck found that the company provided repeated instruction for a stock worker described as having "slow comprehension." An applicant with "clinical nervousness" was hired for a stocking job and was allowed to do only one "job function" at a time. An employee recovering from mental illness was given shorter shifts. A part-time employee with a learning disability was given more training and allowed to work at a slower pace. The company also adjusted the schedule of a mentally retarded worker to coincide with public-transportation schedules.

"The bulk of our accommodations are common sense and any company should be able to provide them," says Sears's Mr. Davis.

The Zitter Group's
Congress on Health Outcomes & Accountability

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Medicaid + Public Health

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The New York Times

DATE: 12-21-96

PAGE: 1

Clinton Decides To Join a Fight On Preferences

U.S. Will Oppose Ban Passed in California

By STEVEN A. HOLMES

WASHINGTON, Dec. 20 — Plunging into a contentious legal and political arena, the White House announced today that the Administration had decided to join a challenge to the constitutionality of a successful California ballot initiative that bans affirmative action programs by the state and its local governments.

The Justice Department had recommended the Administration's intervention after concluding that the ballot initiative, Proposition 209, approved by California's voters last month, violated the equal protection clause of the 14th Amendment.

The initiative, amending the State Constitution, forbids California to use race, ethnicity or sex as a basis for preferences in hiring, promotion, contracting or school admissions.

"Rather than remedying what's wrong with the affirmative action programs that exist, Proposition 209 has the effect of abolishing affirmative action," Michael D. McCurry, the White House press secretary, said today in announcing the Administration's decision. "The President believes that we need to continue to have that as a tool to remedy discrimination in our society."

Although Proposition 209 won passage at the California polls in November, 54 percent to 46 percent, the American Civil Liberties Union won a temporary restraining order against it before it could take effect. That order was issued by Thelton E. Henderson, chief judge of the Federal District Court in San Francisco, who is to decide by Monday whether to issue an injunction against the measure and so extend the blocking of it until the matter is settled at trial.

Justice Department officials said today that they had not yet decided whether they would petition the court to become a party to the suit or instead simply file a friend-of-the-court brief.

The Justice Department does not intend to argue broadly on behalf of any practical or legal merits of granting preferences to minorities and women per se. Instead, it will make the more limited argument that in approving the ballot measure, the voters illegally denied minorities and women the ability to seek redress from state and local institutions for past discrimination.

"The argument is not that affirmative action is constitutionally required," said a Justice Department official who demanded anonymity. "It is not that affirmative action can never be repealed or that it is always appropriate as a matter of policy."

The Administration's decision to intervene cheered the initiative's opponents, who before its passage had grumbled that President Clinton, although expressing opposition to it, was not doing enough to help defeat it.

"I think this puts a red, white and blue nail in Proposition 209's coffin," said Mark Rosenbaum, a lawyer with the A.C.L.U. of Southern California, which filed the challenge to the measure.

Supporters of the initiative attacked the Administration's move.

"By joining the lawsuit against Proposition 209, President Clinton has betrayed his commitment to centrist politics," said Ward Connerly, a black California businessman who led the campaign for the initiative. "He recently said he wanted to forge a coalition of the center, yet by this action he joins the radical left."

The Administration last year undertook a broad review of Federal affirmative action programs, prompted by Republican pressure to legislate an end to them. After that review, Mr. Clinton concluded that while some programs needed revising, the concept of preference programs for minorities and women ought to be retained.

But the decision to enter the California case raises the political stakes for Democrats, especially for their Presidential nominee in the year 2000. Although Mr. Clinton carried California this year despite his expressed opposition to the ballot measure, voters tend not to treat kindly politicians who seek to overturn popularly passed initiatives. Indeed, a legal challenge filed by Thomas S. Foley, Speaker of the House, against a voter-passed amendment in Washington State limiting terms for elected officials proved to be a major reason for his election defeat in 1994.

"The Administration has placed itself not only against the principle of non-discrimination but also against the popular will," said Clint Bolick, vice president of the Institute for Justice, a group that opposes affirmative action programs.

And with Republicans maintaining control of Congress, the Administration's rationale for intervening in the case will be vigorously dissected in hearings for a new Assistant Attorney General for Civil Rights, whom Mr. Clinton has yet to nominate.

Mr. McCurry, the Presidential press secretary, said the decision to try to overturn a measure approved by voters had been a difficult one for Mr. Clinton. But he added, "If a significant, overriding constitutional concern presents itself, the President, as the nation's chief constitutional officer, has to act to defend the Constitution."

Some civil rights figures put the issue in starker terms.

"If we were to make policy based on popularity alone, African-Americans would still be slaves and women would still be denied the right to vote," said Wade Henderson, executive director of the Leadership Conference on Civil Rights.

The Justice Department's central argument in the case will mirror that of the A.C.L.U. lawyers. It is based on a 1982 Supreme Court decision, State of Washington v. the Seattle School District, in which the Justices declared unconstitutional a successful statewide ballot initiative that barred school districts from adopting busing plans to end de facto segregation.

In that 5-to-4 decision, the Court said that by depriving blacks of the ability to petition school boards to institute busing, the Washington measure denied them the opportunity to seek redress for discrimination through the ordinary political process. While blacks were denied that ability, others could request busing plans for reasons other than ending racial segregation, and the Justices concluded that this disparity violated the Constitution's equal protection clause.

The Washington Post

DATE: 12-21-94

PAGE: A2

Administration to Join Fight On California Preferences Law

By Pierre Thomas and William Claiborne
Washington Post Staff Writers

The Clinton administration will mount a legal challenge against California's recently approved ballot initiative outlawing affirmative action, arguing that the new law is unconstitutional and should not be allowed to take effect.

"We intend to intervene in the case at an appropriate time," said Justice Department spokesman Myron Marlin. "It's not a question of if, just a question of when."

Justice Department and White House attorneys fear the new law could severely undermine federal civil rights policy and spur other states to follow California's lead. The amendment, approved last month by California voters, prohibits preferences based on gender and race in state contracting, hiring and university admissions. In a filing, the administration will argue that Proposition 209 may violate the equal protection clause of the 14th Amendment by putting women and minorities who seek relief from discrimination at a disadvantage.

In deciding to fight the law, the federal government will be joining civil rights groups who already have succeeded in temporarily blocking the law's enforcement.

The "presence of the nation's highest civil rights enforcement body is a powerful indictment of Proposition 209," said Mark Rosenbaum, of the American Civil Liberties Union of Southern California, which sued to halt Proposition 209. "It adds a nail to the coffin of this very bad proposition."

Conservatives and California proponents of the law blasted the administration and warned against trying to supersede the electorate's will.

Calling the decision "absolutely Orwellian," California Gov. Pete Wilson (R) said the Clinton White House "now has the distinction of being the first administration since the enactment of the 1964 Civil Rights Act to contend that a state cannot enact a law prohibiting all racial- and gender-based discrimination."

"The fact that the federal government seeks to confer preferential treatment and set-aside positions, promotions and contracts to the politically favored group of the moment—not on account of discrimination that the individual suffered but solely because of their group membership—is an affront to the American dream of equal opportunity to all and special preference to none," Wilson said.

Earlier this week, Clinton said he "publicly and strongly" opposed Prop 209 during his campaign. "I thought it was bad policy for the people of California, and a bad example for America," he said.

Yesterday's announcement comes several weeks after a U.S. District Court in San Francisco temporarily blocked enforcement of the ballot initiative, saying there was a "strong possibility" that it will be proven unconstitutional. The ballot was hotly debated in the final days of last month's election, pitting social conservatives against mainstream civil activists. Within a day of the election, civil rights organizations filed suit against the new law.

White House officials were mindful of the political and social ramifications of the decision, but concluded the Justice Department needed to act. Solicitor General Walter E. Dellinger had urged the administration to move slowly, concerned about the legal theories behind the challenge.

The Justice Department is relying largely on a 1982 Supreme Court ruling known as *Washington v. Seattle School District*, which struck down a Washington state statute barring local school boards from using busing to integrate schools. The court said the law, adopted as a ballot initiative, "uses the racial nature of an issue" to control local governments and "imposes substantial and unique burdens on racial minorities."

That case was decided 5 to 4. But most of the justices in the majority on that decision have since retired, and today's court is far more critical of race-based policies favoring minorities.

The Justice Department has yet to determine whether it will file an amicus brief in a show of support for parties trying to block the law or whether they will take a more aggressive stance and become a direct participant in the litigation.

Staff writer Joan Biskupic contributed to this report.

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The Washington Times

DATE: 12-21-96
PAGE: A1

Clinton sides with Proposition 209 foes

Justice Dept. to fight for preferences

By Warren P. Strobel
THE WASHINGTON TIMES

The Clinton administration yesterday waded into the legal battle over a California law outlawing affirmative-action programs, saying it will join in a court challenge against the measure.

The Justice Department has concluded that the ballot initiative approved by California voters on Nov. 5, known as Proposition 209, is unconstitutional, White House Press Secretary Michael McCurry said, adding that President Clinton backs the department's decision to enter the case.

News of the decision brought sharp responses from both sides in the battle over the law, implementation of which was temporarily suspended by a federal judge late last month.

The measure, formally known as the California Civil Rights Initiative, would bar preferential treatment based on race or sex in public employment, education and contracting.

California Attorney General Dan Lungren accused Mr. Clinton of "attempting to refute the principles of a color-blind society."

By arguing against a measure approved by voters, he said, the president "has contributed mightily to the growing cynicism of citizens toward their government by validating the overweening power of the federal judiciary over the states."

Opponents of the measure said they were heartened by the administration's action, which will mean extra ammunition in what is expected to be a lengthy court battle.

The Justice Department is "acting in the finest tradition of standing up for the basic civil and political rights of women and minorities," said Daniel Tokaji, staff attorney for the Southern California chapter of the American Civil Liberties Union, which is helping lead the challenge to the measure.

Mr. Clinton has acknowledged problems with some affirmative-action programs but has argued that there is still enough discrimination in American society to warrant preferences for minorities.

His catchphrase for affirmative action is "Mend it, don't end it."

The president's view is, "rather than mending what's wrong with the affirmative-action programs that exist, this [law] has the effect of abolishing affirmative action," Mr. McCurry said. "And the president believes that we need to continue to have that as a tool to remedy discrimination in our society."

The Justice Department's decision to fight the measure is based on a narrower argument. Department lawyers say that Proposition 209 violates the equal-protection clause of the Constitution by denying identified groups — women and minorities — access to services that are available to other groups, such as veterans or student alumni.

The lawyers based their finding on a 1982 case, in which the Supreme Court invalidated a Washington state referendum that banned school busing of minorities.

Mr. McCurry said the department lawyers would join in court arguments directly, in a practice known as "intervention," rather than merely presenting arguments as a friend of the court.

However, Justice Department officials said no decision had been made about how or even when the federal government would get involved in the case.

The administration decision comes at a critical juncture.

U.S. District Judge Thelton E. Henderson, who issued a temporary restraining order barring California officials from enforcing the law, is due to decide on Monday whether to issue a preliminary injunction. That could postpone enforcement of the law for much longer while its fate is decided in court.

California's voters approved Proposition 209 by a margin of 54 percent to 46 percent.

California Gov. Pete Wilson responded with a letter to Mr. Clinton, protesting the administration's decision.

The Washington Post

DATE: 12-21-96

PAGE: D1

Judge Orders New Design for Arena

Court Finds MCI Sports Center Needs Better Access for Wheelchairs

By Sharon Walsh
Washington Post Staff Writer

A federal judge ruled yesterday that the MCI sports arena, currently under construction in downtown Washington, is not properly designed to accommodate wheelchair users and ordered that a new design be submitted to the court within 30 days.

U.S. District Judge Thomas F. Hogan said the design of the arena fails to provide the number of accessible seats for wheelchair users required by the Americans with Disabilities Act, a 1993 law that requires equal access for people with disabilities. The design must provide spaces from which wheelchair users can see over standing spectators. In addition, the current design fails to adequately disperse the wheelchair spaces throughout the arena, Hogan said in his decision.

Hogan did not blame sports team owner Abe Pollin or his architects for the problems, saying they had acted in good faith. But he had harsh words for the Justice Department, which he said had failed to give designers any guidance on how to interpret the ADA.

"The ambiguity of the ADA regulations and the lack of guidance and participation by the Justice Department in these matters has created an unfortunate situation in which defendants can act in good faith and still fail to comply with the law," Hogan wrote. "It is a sad predicament."

The design of the 20,000-seat arena, being built by Pollin for his professional hockey and basketball teams, was challenged in court by the Paralyzed Veterans of America.

"We're thrilled that the judge has ruled in favor of the Paralyzed Veterans of America," said Lawrence Hagel, deputy general counsel of the PVA. "The real winners are current and future generations of people with disabilities who will be able to equally enjoy all that the MCI Center has to offer."

There was no answer at Pollin's office late yesterday and his attorney, Brendan Sullivan, declined to comment on the decision.

Hogan said that the defendants, including Pollin and Ellerbe Becket, one of the nation's leading designers of sports arenas, had tried to construct an arena that would meet the needs of wheelchair patrons.

The Justice Department, he said, "has not seen fit to step up to its statutorily mandated role by providing concrete guidance for architects and builders. . . . Therefore, the court is forced to step in and decide issues which would have been far better left to the politicians in the executive and legislative branches."

Justice Department officials did not return telephone calls seeking comment after the decision was issued late in the day.

USA TODAY

DATE: 12-23-96

PAGE: 1-A

SPECIAL REPORT, 10,11A

CHURCH ARSONS: ONE YEAR LATER

Out of the ashes, a sense of unity

One year ago, a rash of church burnings began in the South. In this report, USA TODAY looks at the on-going federal investigation and at the changes wrought by the national outcry that ensued.

By Gary Fields and Richard Price
USA TODAY

As fires go, it didn't amount to much. The night of Dec. 1, someone broke through a window of an abandoned building outside Georgiana, Ala., and set an old sheet ablaze to cast light around the room. In the process, the intruder left a few scorch marks on walls and furniture, about $50 worth of damage.

A year ago, the fire might have gone virtually unnoticed. But in the wake of a highly publicized string of arsons at black churches across the South, the fact that this building had once been a church, the white congregation of Consolation Primitive Baptist Church, was enough to unleash the full resources of local, state and federal authorities, including the biggest arson task force ever assembled.

The fire department called the sheriff. The sheriff called the state fire marshal. The state fire marshal called the FBI and the federal Bureau of Alcohol, Tobacco and Firearms. By the next day, 31-year-old Stacie Nix, who is white, had been arrested and charged with second-degree arson.

It was one year ago this week that the string of burnings began. Starting on Dec. 22, eight churches burned in 21 days, two of them on Christmas. By midyear, church burnings were being debated from the pulpit, in the press, on Capitol Hill and in the White House. A black church was burning almost daily in the South. Concern was growing that the fires were racially motivated and, possibly, the result of a region-wide conspiracy.

At the end of June, USA TODAY published a three-day series that reported the findings of a two-month investigation of church fires across the South. The investigation found no evidence of a widespread conspiracy and found racial hatred to be only one of many motives behind the fires. The series also reported that churches of every color and faith have long been a target of arsonists, not only in the South but across the nation.

In the past six months, the burnings have dropped off, and talk of a racial conspiracy has died down. But other activity has picked up. Volunteers poured into the South to help rebuild churches last summer. More than $7 million has been contributed. And the federal investigation has broadened beyond just black churches in the South to churches of every color.

"We have not slowed down at all," says Mark Logan, special agent in charge of the ATF's investigation in the Carolinas. "Because it is too important to these communities, and it's too important to America as a community to let this just fall away from view."

COVER STORY

And the legacy of the outcry goes well beyond fund-raising and the impact on law enforcement. It has created a new sense of unity among organized religious faiths. It has increased awareness of the strained relations between the races. It has led to closer scrutiny and understanding of arson, especially by juveniles. It has even changed the way churches are insured, where new ones are located and the materials used in building.

Massive federal, state, local investigation

But it's the federal investigation that has drawn the most attention. By Dec. 17, authorities had investigated 318 church arsons committed since Jan. 1, 1995. Investigators inherit about one new case each week.

Cont'd

tolerate racism or excessive force in her department. Maryland's Court of Special Appeals last month upheld Mehrling's dismissal of Robert W. Tippery, a white officer accused of beating a handcuffed black youth and using racially derogatory language.

An official source said internal affairs investigators and county prosecutors are investigating the incident last month in which a 16-year-old Seneca Valley High School student said an officer beat his head with a flashlight when the youth ran to avoid a loitering citation.

Many more complaints, though, have been rejected because they do not involve a violation of law or department rules.

Arthur B. Spitzer, legal director of the American Civil Liberties Union of the National Capital Area, said many of the complaints his office receives involve breaches of common courtesy. He said officers in the District and Prince George's County generate far more complaints of racially based harassment and excessive force than officers in Montgomery.

"I would say we certainly get at least twice as many, probably three times as many, complaints against Prince George's County police," Spitzer said. "We don't get much in the way of complaints about actual brutality [in Montgomery County, but] we do get a regular flow of people pulled over, stopped [and] not treated as politely as they could have been because of the car they drive, their age or their race."

The ACLU picks out the complaints with the most significant constitutional issues for court action. The group sued the county and the cities of Rockville and Gaithersburg and negotiated an undisclosed settlement recently for six Montgomery County men who were forced to have their pictures taken by officers during a 1993 drug sweep. The lawsuit alleged that officers from the Montgomery, Rockville and Gaithersburg departments, working together on a drug task force, used "foul, demeaning and racist language" during a search in Lincoln Park and took pictures of the men even though there was no reason to believe they had committed any crime.

The few black Montgomery County officers willing to be interviewed for this story conceded that the department has problems but said that black citizens are not singled out for mistreatment.

"I think there are some [black police officers who are] very sensitive to that and would be aware of any improprieties," said Lt. Janyce M. Wilkins, Montgomery County's highest-ranking black police officer. "If there were an ongoing problem, I'm certain I would be aware of it."

"I think the community has some valid concerns when it comes to questions of police tactics and police brutality," said Cpl. Marcus Jones, who heads the Coalition of Black Police Officers, which represents 85 of the department's 150 black officers. "My organization is concerned about stopping police brutality and harassment, but it's not as widespread as what the NAACP states it to be."

While NAACP national board member Leroy W. Warren Jr. likened the Montgomery County of 1996 to the Montgomery, Ala., of the 1960s, Jones disagrees. "That's definitely not the way I view it. It doesn't scare me to the extent that I'd be afraid to have my family drive in this area."

Jones said he believes that many of the complaints may stem from poor communication or bad manners.

"I think there's a misunderstanding in a lot of situations," he said. "It's not a matter of disrespect. The public a lot of times does not have a complete understanding of police work."

But Plummer disputed Jones's view, saying black officers are afraid to speak up against their own department.

"They're catching enough hell as [it is]," Plummer said. "We have been informed by more than a dozen of them how they're being treated and what's happening on the streets. A lot of our complaints are coming from them."

However, several black officers, speaking on the condition of anonymity, described Plummer as pursuing a personal attack on Duncan, who ousted the department's first black police chief, Plummer friend and ally Clarence Edwards, shortly after taking office in 1994.

Plummer vigorously denied that her friendship with the former chief has had any effect on her campaign.

In what may become an important test of the NAACP's allegations, a black man from Northeast Washington filed a federal lawsuit against the department in March after he was charged and later cleared in a restaurant burglary. Kurt Smith contended in court documents that he was falsely arrested and his civil rights violated by an officer who conducted a slipshod investigation.

In the pending lawsuit, Smith's attorney John E. Carpenter alleged that Montgomery police have "implemented, encouraged and/or permitted a custom, policy or practice of arresting and detaining African American males without probable cause or reasonable suspicion."

In one of the few successful complaints of any kind against the police department in recent years, a jury this year awarded $102,000 to a black Rockville woman who said officers searching for drugs forced their way into the wrong apartment—hers—and injured her. The woman did not mention racism in her lawsuit.

A 35-year-old black man from Silver Spring alleged he was so badly beaten by county officers during a domestic violence call in July that he suffered kidney failure. Officers said they used the force necessary to subdue a combative Merlin "Skippy" Williams after he refused to let go of his wife. Williams was acquitted of two criminal charges related to his arrest, and the department does not consider the incident racially based because black and white officers were involved.

Today, Plummer insists that the complaints of misconduct continue to pour in. The Rev. James C. Moone, of Rockville, executive director of the Maryland chapter of the Southern Christian Leadership Conference, said his organization also has charted an increase in complaints.

Moone said his organization receives about 10 complaints a month ranging from brutality to discourteousness. The department and the county should find out why they are being made, he said.

"These blacks are coming forth and telling us what's going on, and the government is saying, 'I don't believe it,' " Moone said. "Mark Fuhrmans exist in every police department. You don't have to be hit over the head with a billy club to feel you're . . . being picked on because of your race."

When Stacie Nix was arrested three weeks ago, she became the 125th person charged. A total of 134 people have now been arrested in 97 cases. Other cases have been solved without arrests. For example, some fires were set by people found to be mentally disturbed. The Justice Department reports a 31% arrest rate, nearly double the usual rate for arson.

SPECIAL REPORT

▶ **Young arsonists:** Juveniles account for more than 40% of those charged with church arson, **Page 10A**
▶ **Investigations:** Massive probe results in more arrests, fewer fires, **Page 10A**
▶ **Insurance:** Church policies cover only half of repair costs; steps taken to increase coverage, **Page 11A**

Most of those cases are still making their way through the courts, but there have been convictions in 31, including the first under the federal Church Arson Prevention Act. The new law was approved by Congress and President Clinton last summer, and it doubles the maximum penalty for church arson to 20 years.

Three persons pleaded guilty in Nashville to federal civil rights violations, and four ex-members of the Ku Klux Klan have pleaded guilty to federal conspiracy charges for burning a black church in South Carolina.

About 250 federal agents are still involved in the investigation. No one has totaled the cost of local, state and federal efforts, but federal officials estimate it is at least $30 million. Last summer, President Clinton added $24 million to the ATF's budget over two years expressly to investigate church fires.

The relationship between local, state and federal agents has been unusually cooperative. Especially in the South, any church fire is reported almost immediately to Washington. ATF spokesman John Limbach says people are now more aware of the role of the ATF, which is the nation's leading investigative agency in cases involving arson and explosives.

And federal, state and local authorities now have an unprecedented amount of information to guide them. The National Arson Task Force, co-chaired by Deval Patrick of the Justice Department and Jim Johnson of the Treasury Department, is the central repository for information on burned churches. For the first time, authorities have a file on every fire.

Rebuilding efforts going at full steam

Meanwhile, the rebuilding of the churches has evolved into an institution. Last summer, thousands volunteered to help build, and fund-raising programs were announced whenever a church burned. Now some religious organizations, including the Christian Alliance and the National Conference of Churches, have permanent programs.

The NCC, which has 33 church organizations in its membership, had raised more than $5 million by Dec. 20 and received contributions of materials valued at about $3.9 million. The group is seeking another $3.7 million from foundations, church offerings and public donations.

About 75% of the money is targeted for rebuilding. The NCC has a "burn office" that assesses each church's needs. A total of 124 churches are on its list, and the list grows weekly. As of Dec. 20, the NCC had distributed $4.5 million to 79 congregations. The NCC also refers churches to banks to apply for federally guaranteed loans, part of a $10 million program set up by the Housing and Urban Development department.

New churches are being built differently. Old ones were usually constructed of wood, and little thought was given to preventing fire of any kind, let alone the work of an arsonist. New churches are built with fire-resistant materials and may have sprinkler systems. Some have electronic alarm systems and sensor lights to detect prowlers. A few cities have formed ecumenical neighborhood watches to keep an eye on all churches.

Some churches are being rebuilt in more public places. Many of the burned churches, especially black churches, were in remote, forested areas that made them easy targets. New locations typically are in areas with fire hydrants nearby.

Overall, congregations are paying higher insurance premiums now, but not because insurance companies are penalizing them. Instead, congregations have realized their churches were underinsured. Most churches were insured for market value, which almost always is less than replacement value.

In a check of seven black churches that burned in and around Jackson, Nashville and Knoxville, Tenn., for example, USA TODAY found that the churches had been insured for a total of $1.1 million. Their replacement cost was $2.5 million.

So coverage on a whole is rising. "Churches are more mindful of their coverages now," says Roxanne Taylor of the Church Insurance Partnership Agency. "Insurance is now at the top of the priority list."

During the height of the publicity over church fires early last summer, a few insurance companies dropped churches. But public officials all the way up to President Clinton issued sharp warnings against that, and the cancellations stopped.

Instead, insurance companies have retooled packages for churches, rewarding congregations that make their buildings more arson-proof. "Companies have become more diligent in trying to provide coverage at an affordable price," says Steve Goldstein of the Insurance Information Institute.

New Macedonia Missionary Baptist Church in Fruitvale, Tenn., was paying $800 a year for $126,000 in coverage before the church burned last year. The new church, built with a security system, received $300,000 worth of coverage from a sympathetic local insurance company for just $750 a year.

Many of those arrested were juveniles

Besides the urgent matters of investigating the fires and rebuilding the churches, this year's outcry over the burning of black churches launched examinations of the underlying causes of the fires. The possibility of a widespread racial conspiracy generated the deepest concern. But USA TODAY's in-

much more to do with race than with the church fires, were given to Southern state advisory committees for development. Those panels are meeting across the South and will make recommendations to the rights commission, which expects to produce a landmark report early next year that will include a blueprint for change. The report is expected to ask President Clinton to give priority to improving police/community relations in the South. It will also focus on the impact of desegregation and racial disparities in education.

"This is not something that anyone is walking away from," says Mary Frances Berry, chairwoman of the commission. "We expect something positive to come out of this."

Dozens of businesses and organizations also have responded. About 15% of the money raised by the NCC has been earmarked for a Racial Justice and Reconciliation Program that conducts seminars and workshops to improve race relations. The NCC draws contributions from virtually every religion in the country.

Four leading human rights groups formed a "Bigotry Watch." The groups are the National Urban League, a black advocacy group; the Anti-Defamation League, a Jewish-based watchdog group; the National Council of La Raza, advocate for Hispanics rights; and The National Council, a coalition of Christians and Jews.

The private sector has joined in, too. Last month, the Boston Piano Co. established a trust fund to help churches victimized by hate crimes. Its first beneficiary: Trinity United Methodist Church in St. Petersburg, Fla., damaged in riots Oct. 24 after the shooting of a b[illegible]k motorist by a white p[illegible]lice officer.

Will the most enduring legacy of this year's turmoil be about church burnings or about race? In the end, it probably will be about both. Earlier this month, the Southern Christian Leadership Conference hosted a summit in Atlanta for a long list of organizations that have been rebuilding churches as part of the SCLC's "Beauty from Ashes" movement.

cont.D

SCLC president Joseph Lowery clearly had more than churches in mind. "We cannot rest at simply rebuilding churches, but must use this opportunity to call for a renaissance, a new beginning in race relations and efforts by the church to truly spread love and the gospel to all people, regardless of class or color."

vestigation of 65 fires in the South found no evidence of a conspiracy and determined that racial hatred figured in only a small percentage of the fires.

Instead, the fires were set for a range of reasons, and not all the arsonists were white. Of the 134 people arrested so far, 108 are white, 23 are black, two are Hispanic and one is listed as Asian/Pacific Islander.

One alarming trend did emerge: the youthfulness of the arsonists. Forty-two percent of those arrested for church arsons since the start of 1995 were under 18 at the time. At least six arsonists were so young that charges were never filed. One was seven years old.

Those numbers are less surprising when compared with national statistics. In both 1994 and 1995, more than half those arrested for arson were juveniles. And from 1990 to 1995, juvenile arrests for arson nationwide rose 24% while adult arrests dropped 10%.

The church burnings have highlighted the youth problem for the national arson task force. Authorities are studying the phenomenon in an effort to learn what motivates young people. On the whole, says Hugh Munn, spokesman for the South Carolina Law Enforcement Division, the one thing most juvenile arsonists share is "no fear of consequences." Beyond that, he and most other authorities have few answers.

It's an important question, though, because none of the 56 juveniles arrested so far have been charged under the tough new federal arson law. Instead, they are treated as vandals, resulting in light penalties if convicted. Does that invite more juvenile arson? Opinions vary, but Assistant Treasury Secretary Jim Johnson, for one, vehemently opposes treating a church burning as a petty crime by a mischievous youth.

"Burning down a church is not comparable in any way to ordinary, small-time acts of juvenile vandalism," says Johnson, who co-chairs the National Arson Task Force. "Damage runs into the hundreds of thousands of dollars and the psychic damage on the community is decidedly traumatic."

Routinely treating juvenile arsonists as vandals begs another question: Did some of the white juveniles who burned black churches have racial motives? Some investigators privately believe that's the case, although proving that would be difficult.

Issue of race brought into national consciousness

No legacy of this year's church burnings has carried more passion than the one surrounding race.

Early this year, the fires captured the nation's attention primarily because of a widespread belief that racism might be the major motive. Although the facts eventually disproved that fear, some of the fires clearly were racially driven. As a result, the fires became the symbol of a new movement to address racial problems.

Beginning with the beating of Rodney King in Los Angeles and the Los Angeles riots that followed, this decade has been marked by a series of ugly racial episodes. The most recent involved Texaco executives who were tape-recorded making racially disparaging remarks about black employees.

But the church burnings may have left the biggest imprint on the American consciousness. Recognizing that, the U.S. Civil Rights Commission embarked on a fact-finding tour across the South last summer to explore whether racism was a contributing cause to the fires. Ultimately, the commission found that race was only one of many factors in the arsons, but its members were stunned by the "rampant racism" that turned up.

The commission's preliminary findings, which have

The Washington Times

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The law of pernicious consequences

The unanimous decision by Oakland, California's school board to declare "Ebonics" — that is, African-American argot — a language separate and distinct from English is not just "political correctness gone awry," as claimed by black linguist John McWhorter. Mr. McWhorter, who teaches at the University of California at Berkeley, is quite right to be appalled, but in this instance, it is a mistake to blame political correctness. Blame more correctly attaches to the federal government, whose misguided education and civil rights policies are the real villains.

To hear it from the school district and the district's political allies, "Ebonics" does seem to be yet another nutty idea from the fever swamps of PC. "All we're trying to do is accept that many of our African American students speak differently," said Oakland school board member Jean Quan. "We're not culturally respectful of that at times when we try to teach standard English." The lengths some will go to in the effort to show "respect" and bolster "self-esteem" — it would seem that Ms. Quan would sacrifice her charges' chances at success in the mainstream so that they can enjoy a false sense of being respected. One would have to agree that political correctness has run amok were that not a tautology.

But the school board is not telling the whole story. Mr. McWhorter, though he railed about the ravages of PC, also savvily spotted the real goal of the school board: They are less interested in promoting ethnic pride and facilitating language skills than they are eager to grab federal swag. School districts with large Latino and Asian immigrant populations are rewarded by the federal government with piles of cash for bilingual education programs. This has not gone unnoticed by school districts with primarily black students. If Ebonics is a language separate and apart from English, then standard English can be taught as a second language to inner-city youth, and the district can collect the bilingual ed. support payments.

The Department of Education is trying to discourage this line of thinking. Department spokesman Rick Miller said that Ebonics "is considered dialect, so I don't think we would be allowed to do it [disburse bilingual funds]." Who knows how long that resolve will last among the federal educrats, especially when the Oakland school district gets around to suing the Department of Education for racial discrimination. But the point is that the Oakland school board is not acting from some irrational urge to be politically correct. Instead, the district is acting in a perfectly rational way, responding to the perverse incentives set up by the Department of Education's bilingual education program.

Nor is Ebonics the only recent instance of federal education policy run amok. The recent rash of "sexual harassment" in the nation's elementary schools — a phenomenon also blamed on crazed political correctness — is also the result of Washington's ideological interference with local education. Hand in hand with the more radical cells of the feminist front and with the ambulance chasers in the plaintiff's bar, the U.S. Department of Education's Office of Civil Rights has been prosecuting grade schools and high schools that don't stamp out the "sexual harassment" rampant in the schools' "hostile hallways." The idea is that, just as businesses are responsible if they allow a "hostile environment" in the office, schools are responsible for any loutish behavior allowed in the classroom, hallways, on the playground or schoolbus. In 1993, the Eden Prairie, Minn., School District, was found to have allowed a "hostile environment" because some third grade special education boys teased some first grade girls at the bus stop. This, even though the boys were punished by their school for their bad behavior. The school district was punished in turn by the Department of Education because the school had only treated the incident as bad behavior rather than as sexual harassment. Similarly, the Nashoba Regional School District in Massachusetts felt the Department of Education's lash recently. A school in the district had investigated some sexually explicit graffiti written by girls in the girls' bathroom about another girl. The girls suspected of penning the graffiti were reprimanded, but the school was sued for not reprimanding them *for sexual harassment*.

Is it any wonder that school districts have started prosecuting their students for sexual harassment at the slightest provocation? Once again, the schools are responding in a rational way to the bizarre carrots and sticks proferred by the Department of Education. Not only is Political Correctness not at fault, but by ascribing blame to local outbreaks of PC, the pests in the Department of Education are let off the hook. Republican lawmakers, who seem to have forgotten the reasons for eliminating the Department of Education, may want to consider renewing their efforts.

churches in the South fit into. Privately, investigators say they believe some of the cases are racially motivated. Proving that, however, is difficult. Of the 56 juveniles arrested, 49 are white and 7 are black.

Not one of the 56 has been charged under the Church Arson Prevention Act, a tough federal law passed last summer that doubled the maximum penalty for church arson to 20 years. And no one has been charged with federal civil rights violations, which carry the possibility of up to 10 years in prison.

The South Carolina Law Enforcement Division's report on the Springhill church fire lists the motive simply as "thrill."

"I don't know if those boys even knew what color that church (membership) was," says Bobby McLean, Dillon's assistant police chief. "It's just out there waiting for anybody wanting to do wrong. There are other black churches nearby they didn't go to."

McLean says juveniles have too few responsibilities, too much free time and too much gas in their cars, a recipe for disaster.

"I came home and had to get behind the mule and plow a few rows," he says. "These kids, all they've got to do is come home and be bored to death.

"They all have cars and nothing but time on their hands, and not enough responsibility."

Melvin Paige, a Dillon High senior and a classmate and friend of Talbot's when they attended junior high school, doesn't know how Talbot could have gotten involved in a church arson. But Paige, who is black, says he is certain of one thing: Talbot "isn't a racist."

Two bright futures thrown in doubt

The fire started around 2 a.m. The arsonist put a pile of rags and old T-shirts beneath a rear window outside Springhill AME, doused the pile with lighter fluid and lit it with a cigarette lighter. By the time firefighters arrived, the church was already lost.

Talbot and Moody were arrested three days later after an anonymous phone tip came into an arson hot line.

Juveniles 52% of arson arrests

Juvenile arrests for arson have risen 24% nationwide since 1990. Adult arrests have dropped 10%. Juveniles are those 17 and younger. A look at the numbers:

	Incidents reported	Total arrests	Juvenile arrests	
1990	102,874	19,100	8,404	44%
1991	99,784	20,000	9,400	47%
1992	102,009	19,900	9,751	49%
1993	95,764	19,400	9,506	49%
1994	102,129	20,900	11,495	55%
1995	94,926	20,000	10,400	52%

Source: U.S. Justice Department

For Eric Willis, a sophomore at Latta High, the fire that destroyed Springhill was a shock. But the arrests of two of his schoolmates was almost unbelievable.

"That dude (Talbot) was smart. He got all kinds of (academic) awards all the time," Willis says, taking a break from washing clothes at a local laundry. "And Moody, he was cool with me. He was all right."

Talbot, Moody, their parents and Moody's lawyer would not agree to interviews for this story. But acquaintances describe two well-adjusted teen-agers who would not fit into any of the traditional categories of juvenile arsonists.

They say Moody was a hard-working student who was not as gifted academically as Talbot but was more outgoing.

"His daddy is one of my jailers," says Dillon County Sheriff Harold Grice, "a good hard-working family."

Talbot was quiet and was a chemistry and math whiz. His future was considered bright.

Now neither boy is allowed to return to Latta High School to complete his senior year.

Talbot stays home, rarely venturing out. Neighbors say he occasionally knocks a golf ball around the yard. His lawyer, A. LaFon LeGette Jr., says Talbot is taking correspondence courses to get a diploma.

Even if Talbot is cleared in the church arson, his life has taken a turn no one expected of the A student.

The two conflicting portraits of Talbot are portrayed in the pages of the Aug. 6 edition of the local newspaper, *The Dillon Herald*.

Sheriff's department mugshots of Talbot and Moody are on the front page, along with the story of their arrest. On page 9, Talbot appears with five other students in a picture of scholarship winners from a state Conservation Workshop at Clemson University.

"He'd really have to go at it to get his life back where it was," LeGette says. "It's a terrible strain on him not knowing what his future is."

Talbot and Moody face other charges in connection with a rash of blown-up mailboxes and broken windows the night of the fire and in the weeks leading up to the blaze. But it is the outcome of the first-degree state arson charge that will shape their futures. If convicted, they could face up to 30 years in jail. They have pleaded not guilty. A trial date has not been set.

Meanwhile, the future of the Springhill AME also is on hold. All that remains of the church is a welcome sign. Yellow crime scene tape still clings to the rickety wire fence that rings a sandy lot the size of two football fields. A road is nearby, and neighbors live within 100 yards. But noon here is quiet and still. In 30 minutes, only a blue Jeep and a white sedan pass by. Both drivers wave.

Lee Davis, 84, looks at one small piece of burned wood. The pastor here for 17 years, Davis is an open and gracious man full of faith that "the Lord will provide."

Although unsure how or when the woefully underinsured church will be rebuilt, Davis says he is not angry with either of the young suspects.

"I love those two boys," he says. "The devil got into them for a night, and something happened."

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Massive investigation leads to more arrests, fewer fires

By Gary Fields
USA TODAY

The number of people arrested for burning a church increased nearly seven-fold from 1995 to 1996.

In 1995, 17 people were charged with church arson. So far this year, arrests total 117.

In addition, church arsons are being solved at nearly twice the rate of arsons overall. In 1995, about 16% of all arsons nationally resulted in arrests. Suspects have been arrested in 31% of church arson cases.

While the arrest rate has gone up, church arsons in 1996 have declined from a peak of 52 fires in June to 26 during the nearly seven weeks from Nov. 1 through last Tuesday.

The increase in arrests is attributed largely to the 1,000 federal, state and local investigators who were assigned to investigate church arsons this summer and the 500 who are still working the cases.

James Shanley, of the National Association of Fire Investigators, says the massive investigation has illuminated several truths.

The first, he says, is that "our law enforcement agencies are capable of getting together toward a common goal." The second is that intense investigations lead to arrests, even under difficult circumstances.

There have been convictions in 31 of the 97 cases in which arrests have been made.

Most recently, former Ku Klux Klan members Hubert Rowell, 50, and Arthur Haley, 51, pleaded guilty Dec. 9 to federal charges that they conspired to burn Macedonia Baptist Church in Bloomville, S.C., in June 1995.

Results of a two-month USA TODAY investigation, published last summer at the height of public concern over church arsons, found that racial hatred was only one of several motives behind the fires. Other motives included juvenile vandalism and insurance fraud.

The wave of church arsons led to creation in June of the National Arson Task Force, which includes agents from the FBI and the Bureau of Alcohol, Tobacco and Firearms. A national church arson computer database also was created.

The database, maintained by the Justice Department, for the first time gives arson investigators a central source of information on church burnings. It includes each church arson reported to federal authorities and lists the name of the church, its location, date of the fire, information about suspects and details of the fire.

Before the database's creation, no central repository existed. In some cases fires were not reported to state fire marshals or to federal authorities.

Another noticeable change has been in the response to church arsons by law enforcement agents in the field.

In past years, a fire at a small, rural church would have drawn one deputy at best and perhaps one state investigator. A similar fire today draws a team of federal, state and local investigators.

"Our agents, with task force members and local authorities, are looking at every reported fire which occurs in a house of worship in the United States, no matter what the extent of damage might be," says Patrick Hynes, assistant director of the ATF, the nation's premier arson investigation agency.

"If we know about it, we're going to look into it."

The probe of church arsons also has resulted in changes in state laws from coast to coast.

California modified a law to allow Gov. Pete Wilson to offer rewards of up to $100,000 for information leading to church arson convictions. The previous limit was $50,000.

South Carolina Gov. David Beasley signed a law this summer that makes burning a house of worship a first-degree arson with a maximum sentence of 30 years. Before that, the crime was considered third-degree arson and had a maximum sentence of five years.

Some question whether the additional time and resources devoted to church arson investigations will be sustained long term.

At the height of national concern over church arsons last summer, President Clinton authorized an additional $24 million in ATF funding over two years to help offset the cost of the investigation. It is unclear whether additional funds will be provided beyond that time.

But Justice Department officials say there is little danger of the Task Force being disbanded before 1999 because churches continue to burn and the number of unresolved cases climbs daily.

"The president (and) Attorney General (Janet) Reno ... remain committed to getting each one of these cases solved," says the Justice Department's Deval Patrick, co-chairman of the task force.

Still, some arson investigators in the field worry that the commitment will wane as public attention wanes.

Shanley says that would be a big mistake.

"Arson is a crime that's going on in every little town and every city every day of the week," he says.

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Young lives amid the ruins

By Gary Fields
USA TODAY

DILLON, S.C. — When arsonists burned Springhill AME Church to the ground, the black congregation and almost everyone else here expected the culprits to be white men filled with racial hatred.

The suspects ended up being two white teen-agers — one the son of a county corrections officer, the other a member of the national honor society. Both youngsters count black teens in their circle of friends.

The arrests of Dennis Moody and Neil Talbot, both 17 at the time of the blaze Aug. 1, shocked this city of 6,000 nestled amid tobacco and soybean fields. But they are typical of many of the suspects arrested during a wave of church arsons that swept through the South this year and sparked a national outcry. More than 40% of those arrested are juveniles.

Perhaps more significantly, the arrests reflect a national epidemic. The number of juveniles arrested each year for arson of all kinds increased 24% from 1990 through 1995. Juveniles, those 17 and under, now account for more than half of all arsons nationwide.

"This should be an alarm bell of something that is endemic in our society," says Brian Levin, director of the Center on Hate and Extremism at Stockton College in Pomona, N.J. "This also relates to the general trend of incivility and the use of violence and aggression as a means of self-expression in young people."

Of the 134 people arrested in connection with 97 church arsons the last two years, 56, or 42%, are juveniles, according to the National Arson Task Force. In 1995, juveniles accounted for 52% of the 20,000 arrests for all types of arson nationwide, up from 44% in 1990.

"I'm not so sure if that means more juveniles were setting fires or just more juveniles were getting caught," says Melissa Sickmund, senior research associate at the National Center for Juvenile Justice.

But Meri-K Appy, vice president of public education for the National Fire Protection Association, says the "whole issue of children and fire in our society is grossly underestimated."

Hidden problem with tragic results

Reports of juvenile arson are common, and the results are often tragic:

▶ In Providence, R.I., two 14-year-old boys were charged in October with setting a fire at the former American Tubing and Webbing Mill. Besides destroying the 100-year-old mill, the fire damaged or destroyed three neighboring apartment buildings. Thirty-six people were left homeless.

▶ In Dayton, Ohio, in October, a county juvenile court judge found a 13-year-old boy responsible for three counts of involuntary manslaughter and one count of assault in the burning of an apartment in July. The fire killed three people and critically injured a fourth.

▶ In Omaha, a 15-year-old boy awaits trial on homicide charges as a result of an April arson in which a roof inside a burning Family Dollar store collapsed, killing Fire Capt. John Goessling. Police said the boy used a cigarette lighter to set a pile of leaves, twigs and other debris on fire outside the store.

Arson experts say that many people who work with juveniles remain unaware of the problem.

"Fire people are paying attention to this, but still, a lot of mental health and legal people are not," says Vaughn Hardesty, a psychologist at the Maine Medical Center's Psychiatry Department in Portland. "I don't think it's big on anybody's list, but it's increasing as a problem."

In the late 1980s, the psychiatry department discovered that among the juveniles it was treating for a variety of problems, more than 30 also were arsonists.

"And not one of them had been referred to us for starting fires," Hardesty says. "We just happened to learn they were fire setters."

Partly because of what the medical center discovered, the Portland Fire Department started the Juvenile Firesetter Program to address the problem of juvenile arsonists.

At least 150 juveniles have been through the program in five years. Several categories of juvenile arsonists have emerged. They include:

▶ Crisis fire setters: These are young people who have some kind of crisis in their lives, such as parents getting a divorce. The fires are considered a call for help.

▶ Copycat arsonists: These are adolescents who set fires after reading or hearing news reports about arsons.

▶ Juveniles who are being manipulated by adults to set fires for insurance or hateful purposes.

▶ Juvenile delinquents. These are typically older adolescents who exhibit antisocial behavior and have had run-ins with the law.

▶ Pathological arsonists. These juveniles get psychological or even sexual gratification from setting fires. Experts consider members of this group the most disturbed and dangerous among all of the young arsonists.

Loretta Worters, who works with the Insurance Information Institute, says the problem of juvenile arson is great enough that "parents need to be concerned about it. Often, people bury their heads in the sand and don't notice the problems the kids are having."

No one is sure which category juveniles who burned

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LAW AND LOBBYING IN THE NATION'S CAPITAL
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Struggling With Racism

So Stuart Taylor is sick of "so-called black leaders" who talk about race. Taylor joins a growing list of pundits who in the aftermath of the November elections have sprung into action in an attempt to portray civil rights advocates and black leaders as irrational and irresponsible race mongerers bent on promoting and maintaining racial divisiveness.

As proof, they point to the re-election of a few African-Americans to Congress from majority-white districts redrawn by courts after majority-black districts were declared unconstitutional. Civil rights advocates had expressed alarm and consternation after the Supreme Court's 1993 decision in *Shaw v. Reno* paved the way for a series of attacks on "majority-minority" voting districts," primarily in the South. Those districts had been created in accordance with the Voting Rights Act in jurisdictions with long histories of racial discrimination and polarized voting that had completely precluded the opportunity for black voters to elect candidates of their choice (regardless of race) or for black candidates to win elected office.

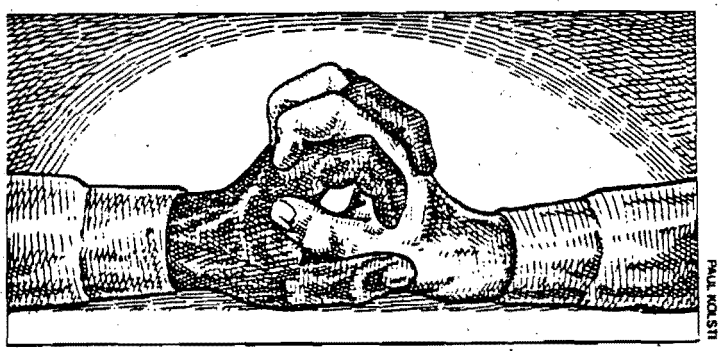
Until the election of Barbara Jordan of Texas and Andrew Young of Georgia in 1972, not one African-American from the South served in Congress in the 20th century. And, in spite of the fact that more than half of African-Americans live in the South, not until 1992 did many southern states integrate their congressional delegations. This change occurred only because black candidates were able to run in majority-minority but well-integrated districts purposely drawn pursuant to the Voting Rights Act to offset continued racially polarized voting.

Racially polarized voting in Louisiana means, for example, that since Reconstruction, no black person has been elected to the state legislature or to Congress from a majority-white district. No black person has been elected to statewide office. And, if left to the majority of white voters, former Ku Klux Klan leader David Duke would have been elected governor of Louisiana in 1991.

In the last Congress, only three of the 39 black members of the 104th Congress were elected from majority-white districts. The Supreme Court has yet to establish clear principles limiting the attacks on majority black districts. In view of these facts, concern among civil rights advocates about the ultimate impact of *Shaw* is far from irrational.

If our worst fears are not realized, all the better. We welcome whatever progress we as a nation are making to break the patterns of racially polarized voting that have dominated our political landscape in the South and elsewhere. In the 105th Congress, for the first time in our history, three African-Americans were elected in majority-white districts in the South. These victories were a direct result of the Voting Rights Act.

Taylor's commentary does not stop with his woefully misinformed discourse on the redistricting debate. It also consists of a remarkable diatribe in which he links the Texaco case with "the Tawana Brawley hoax," attacks Carl Rowan for his provocatively titled book, *Coming Race War in America*, criticizes Myrlie Evers-Williams and Johnny Cochran for endorsing it, and pillories California Civil Rights Initiative opponents as race-baiters. Along the way, for good measure, Taylor manages to raise the specter of Louis Farrakhan and O.J. Simpson.


PAUL KOLSTI

Taylor's scheme to marry hot-button racial issues with civil rights advocates fails miserably. In the end, it is a mean-spirited exposition that deepens polarization.

Taylor seems to think that if high-ranking Texaco officials caught on tape planning to destroy evidence directly relevant to an employment race discrimination case did not use the word "nigger," the significance of the incident changes. Perhaps this is what he means when he writes that while "[t]here is still plenty of white racism in this country . . . there is a lot less than in the past, and it has been driven underground." Whether Texaco officials were uncouth enough to call African-Americans "niggers" may be of interest to those who thrive on sensationalism or to those whose eyes remain closed to anything but the most crude form of racial discrimination. Yet, ultimately, it is only incidentally relevant to the larger question of whether Texaco engaged in a broad pattern of racial discrimination, condoned at the highest corporate levels. Any fair reading of the tone and content of the tapes affirms that it evidences such a pattern.

Taylor tries to isolate the significance of the Texaco case. But the thousands of race discrimination complaints that the Legal Defense Fund and other anti-discrimination agencies receive on an annual basis bear witness to a much more endemic problem.

Apparently, Taylor's real point, posited in his penultimate paragraph, is that the most serious racial problem this country now faces is "black bigotry and the stereotyping of whites as racists." This theme now enjoys

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and even seems to have found its way into some of our jurisprudence. It is an incredible proposition in light of the reality that truly characterizes our society. Nonetheless, it is part of an Orwellian scenario—black is white, up is down, and if one did not know better, America's race problem is the result of discrimination by and on behalf of African-Americans against white people.

But such an argument depends on reducing complex arguments to simple-minded mischaracterizations and assigning views to civil rights advocates they do not hold. In their warped misrepresentation, Taylor and others turn black voters into racists when they vote for black candidates in the rare elections in which they have the opportunity to do so, even though most black voters continue to vote for and be represented by white office holders. Taylor's tirade reflects hostility toward and disdain for African Americans and their advocates. It implies that blacks are paranoid and hysterical, while Taylor and company are presumably objective, credible observers on racial matters. Nonsense.

A recent Harvard Medical School study confirmed what many African Americans already know: racism takes a physical toll manifested in hypertension and diseases that rob years from black lives. Black people are sick and tired of the race issue, too. If it could go away tomorrow, it would be a miraculous liberation that would free us all to pursue a healthier and happier existence. But the race problem remains with us, and no amount of prevarication, distortions, or wishing it away will change that.

Stuart Taylor Jr. responds:

Mr. Shaw makes some reasonable points in favor of drawing majority-minority election districts, but then descends into caricaturing my positions and from there into personal invective.

I'm afraid I may have invited some of that by setting too bitter a tone in my column. In particular, I regret dismissing those I criticized as "so-called leaders of the black community," and saying that I was "sick of . . . them."

But my too-bitter tone surely does not warrant Mr. Shaw's despicable claim that my column "reflects hostility toward and disdain for African-Americans." Are civil rights activists incapable of responding to criticisms without smearing the critics as racist?

By way of general response to Mr. Shaw's specific points, I strongly disagree with his pervasive implication that whites in this country today are more racist on average than blacks, and that white racism is the whole problem. Our problems are surely a legacy of white racism. But that legacy has unfortunately produced a powerful and dangerous backlash of black racism.

Theodore M. Shaw is associate-director counsel of the NAACP Legal Defense and Educational Fund.

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■ COMMENTARY

The case for ending racial preferences

Reward talent and grant some rare exceptions

DAVID BUTOW – SABA FOR U.S.N&WR

Another view. *Students protest at the University of California–Berkeley against Proposition 209.*

If Proposition 209 is upheld—it's known as the California Civil Rights Initiative—are there grounds for giving preferences to applicants for admission to public colleges and universities besides academic ones?

State schools already extend preferences to athletes and people with other skills (like musicians) or with connections (children of key alumni). Many critics of Prop. 209 claim that eliminating race and gender as admissions criteria cannot be reconciled with these preferences.

There is truth to that, but critics are ill-advised to pursue the argument. The Supreme Court has defined race as a suspect classification that will be subjected to strict scrutiny wherever used, meaning the justices must be very skeptical of government distinctions by race. The recent decision barring the male-only admissions policy at the Virginia Military Institute comes close to treating gender the same way.

Race was made a suspect classification to bar its use as a means of discriminating against blacks. No school may bar people on racial grounds: The corollary, I believe, is that no school may admit people chiefly on racial grounds either. Race cannot be a bar to discriminating against blacks and an invitation to discriminating against Asians and Caucasians.

The *Bakke* decision of the Supreme Court allows race to be a "plus factor." But in California public colleges, race has been close to the decisive factor. They (and colleges elsewhere) have finessed this racial issue for many years by dramatically lowering the qualifying test scores used for admitting blacks and Hispanics, while keeping them high for Caucasians and Asians.

Some kinds of special consideration make sense. Some individuals are not prepared for college because of disadvantages. They may have come from poor families, or no families at all, or have lived in families that have been denied equal access to education. I believe colleges have the right to stretch admissions policies to take these factors into account.

How much? Enough to compensate for errors in predicting college performance on the basis of high school grades and SAT scores. These tests are good predictors, not perfect. The error factor in them—the average of how far off they are in forecasting correctly—creates a small amount of leeway that could be used for disadvantaged applicants.

Yet, according to many studies, SAT scores tend to *over*predict black performance in college. Blacks do not do as well as their SAT scores predict. Any racial edge in admissions ought to be reserved for individuals whose personal circumstances warrant special consideration. The best contenders would be from poor or recent immigrant families.

Instead, college admissions officers have often let in sons and daughters of middle-class black parents and, at least in California, denied admission to poor Asian children with higher scores.

Blacks and Hispanics have been overadmitted in the name of "diversity," which has never received a serious defense. It cannot be defended in purely racial or ethnic terms: In a college, true diversity reflects differences in ideas and beliefs, not in skin color or national origin. If

PROPOSITION 209: The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.

FIRST SECTION OF THE CALIFORNIA CIVIL RIGHTS INITIATIVE

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colleges want diversity, they should overadmit libertarians or conservatives, vegetarians or hunters.

My support for Prop. 209 was based largely on how indefensibly the diversity goal was pursued. As an alternative, colleges should let low income, or immigrant status, count toward admission to the same degree, and for perhaps the same number of people, that athletic ability now counts. This would help some blacks and immigrants but on the basis of personal and not ethnic status.

In graduate and professional schools, such preferences would stop. By then, all applicants have graduated from a four-year college and have revealed their abilities. Early family background should count for little. My support for Prop. 209 intensified when I learned that law and medical schools, which never admit people because of athletic or musical ability, were admitting students on racial and ethnic grounds.

There is no justification for that, except the dubious claim that a law or medical school ought to help make the professions "look more like the country." There may be a demand for women gynecologists or black defense lawyers, but they already exist. As they pass standard law or medical school tests, more will join the professions. No argument has been made that we need so many more that women or blacks should receive preferences denied to poor students or Asian ones. This was the basis for the rejection by the federal court of racial and ethnic preferences in the *Hopwood* case of the University of Texas Law School.

Colleges draw on a more unevenly prepared group of applicants than do law schools. Looking for talented but unprepared students makes sense. But college is an intellectual challenge as well as a door of opportunity. With few exceptions, it must strive to reward talent. This view is widely shared among professors. When the Roper Center for Public Policy Research surveyed college faculty recently, it found a clear majority opposed to racial and gender preferences in admissions (and faculty employment).

For colleges today, the challenge is to decide about the exceptions—what criteria, besides academic ability, should be allowed to influence admissions decisions and how to manage the process so that individual capacities and past barriers, not group identities, are used to achieve a promising student body. ■

BY JAMES Q. WILSON

James Q. Wilson is a professor of management and public policy at the University of California at Los Angeles.

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The Hopwood effect kicks in on campus

Affirmative action as we know it in higher education began to die before Prop. 209—because of a federal court case in the South

For those with a stake in affirmative action, pro or con, the passage last month of California's Proposition 209 seemed to mark a turning point. It was the first time in the 30-year history of the policy that a majority of voters had explicitly rejected the idea that women or minority group members could get special consideration when applying for jobs, government contracts or university admission. The referendum battle now continuing in court has generally been discussed as if the future of affirmative action depends on it. In higher education, vigilance is especially keen: The University of California is poised to shift to a colorblind, class-conscious admissions policy.

But affirmative action as it has been practiced by colleges and universities began to die last March, before Prop. 209 had collected enough signatures to go on California's ballot. The agent of its demise was a federal appeals court decision, *Hopwood v. Texas*, widely discussed in the world of education yet barely known outside. Ripples from the case are spreading throughout America. These ripples—the *Hopwood* effect—have begun killing off or modifying affirmative action at one institution of higher education after another.

Unless the Supreme Court intervenes to change the post-*Hopwood* trend, which seems unlikely given the court's current makeup, affirmative action as we know it in higher education is, for better or worse, headed toward extinction. Colleges and universities are being propelled toward policies—especially "class not race" plans—that are touted as the new answer to problems of inequality but, on the basis of early evidence, are almost certainly being oversold.

Hopwood v. Texas involved an admissions plan at the University of Texas Law School. The plan considered white and minority applicants on separate tracks, to increase the number of minority students admitted. The *Hopwood* ruling, which found this approach unacceptable, held that the school could no longer use race or ethnicity as factors in admissions. Judge Jerry Smith, a political conservative, said that using race to pick students makes no more sense than choosing by blood type. He declared invalid what has been the most important and best-known legal decision about affirmative action, *Regents of the University of California v. Bakke*. In that 1978 Supreme Court case, known as *Bakke*, Justice Lewis Powell found that special consideration by race could pass muster under the Constitution if a school used race as a "plus factor" while reviewing all applicants in one pool. The ruling is synonymous with the argument that "affirmative action" to help candidates is fine but that fixed quotas by race would be unacceptably discriminatory.

Bakke to the future. The strict letter of the *Hopwood* ruling so far has only limited effect, since the Supreme Court decided in July not to review it. While the Texas admissions plan was plainly unlawful because it had separate racial tracks, the Clinton administration has advised that *Bakke* remains the law of the land—and that most affirmative action programs are still acceptable.

Yet across the country, many leaders in higher education treat *Hopwood* as an indication of where the legal future may lie, for public and private institutions alike. In May, Harvard hosted a meeting of 40 officials to develop a response to the case. Since then, major foundations and educational organizations have also focused on *Hopwood*.

The *Hopwood* effect has at some institutions redoubled support for affirm-

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ative action. Leaders of elite institutions like Harvard and Yale, as well as many others, have proclaimed their commitment to diversity in education and the need for race-conscious admissions to achieve it.

But in other institutions, *Hopwood* is changing policies through what lawyers describe as "prudential" actions taken to protect against the inevitable copycat suits. At schools in states like Arkansas, Michigan and Wisconsin, affirmative action is under review. Quietly, institutions like the University of Washington with unchallenged but illegal two-track programs have been mending their ways.

There are also more dramatic signs that the *Hopwood* ruling is the beginning of the end for affirmative action as it has been practiced. In Texas itself, the university system has ended a race-based scholarship program, though it was not contested in the law-school case. Arizona and Florida have eliminated some of their minority scholarships, and Colorado all of its race-based grants.

In Georgia—in a different federal jurisdiction technically unaffected by *Hopwood*—Attorney General Michael Bowers asked the university system to treat the ruling as a precedent and end all race-based programs of admissions and financial aid at its 34 campuses. University System of Georgia Chancellor Stephen R. Portch asked the heads of the campuses to develop "a contingency plan for future admissions decisions," partly because of the Bowers "advice letter." Members of the admissions committee at the law school prevailed on the university to insure them against legal judgments. They were worried about being held liable for bias against white applicants, minorities or both.

Solid bloc. Bowers is a politician whom legal observers sometimes dismiss as a grandstander, but his advice can't be written off. For a half decade, the U.S. Supreme Court has not approved any race-based program. On today's court, five justices—a majority—have never voted to uphold an affirmative action plan based on race. They treat exclusion and inclusion by race in almost the same way. (They are Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas.)

The other justices have argued that there is a clear distinction under the Constitution between racial classifications designed to help minorities and those that discriminate against them. (Justices now in this group include John Paul Stevens, David Souter, Ruth

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Bader Ginsburg and Stephen Breyer.)

These views can't be reconciled, and the core of the dispute can be traced to the Powell opinion in *Bakke*. Powell said that the court should neither condemn affirmative action nor fully support it. He left the law with a basic incongruity. A biography of the justice by his former law clerk, John Jeffries, a professor at Virginia Law School, calls the heart of Powell's analysis "a transparent failure." The *Hopwood* effect springs partly from a belief that if affirmative action is to survive, its advocates must come up with a new legal basis for their case.

Despite the recent furor in California and consistent poll results showing hostility to quotas, affirmative action ranks surprisingly low among problems about which Americans say they are concerned. In a *U.S. News* poll, only one half of 1 percent of respondents chose ending the policy as the top political priority. On the list of major issues, it ties for 30th, after reforming the tax code and abolishing the IRS. Even fewer picked protecting the policy as their prime concern. But references to "quotas" or "preferences" tap into economic worry and racial resentment and tip opinion to the negative.

Critics are pressing to draw on these sentiments and keep up the momentum they believe they gained with the passage of Prop. 209. Ward Connerly, an architect of the initiative, just launched a national organization to promote similar challenges in other states. Charles Canady, a Republican congressman from Florida, announced he will reintroduce next year a bill he cosponsored in the last session to outlaw federal affirmative action.

Because of this apparent momentum and the *Hopwood* effect, many schools are studying colorblind, class-based admissions. Among conservatives as well as neoliberals, they are viewed as the preferred route to diversity and an overdue step in public policy. Yet Thomas Kane, an assistant professor at Harvard's Kennedy School of Government, reports. "For those who think class can substitute for race, the numbers are sobering. You just can't get there from here."

SAT factor. Kane recently analyzed data about 1982 college students. Hispanics and blacks made up a fifth of all high school graduates. Because of that low share, even though they were more likely to come from low-income families, they represented only a third of poor college-age students. A college would have had to admit three students through a colorblind, class-conscious preference to yield a Hispanic or a black.

BEVERLY BARRETT – THE DAILY TEXAN

University of Texas. *Protest after court struck down affirmative action*

Factoring in SAT scores, the numbers change drastically. Among those who scored 1100 or above, Hispanics and blacks were more likely to come from low-income families but represented only 6 percent of the low-income youths who scored that high. A college limiting itself to those who scored 1100 or above – the threshold for applicants to the top 20 percent of colleges where affirmative action is concentrated – would have had to admit 16 students through low-income preference to get one Hispanic or black.

This analysis is based on national data, so Kane argues that in states with higher shares of minorities, like California and Texas, the outcome of a shift to a class-based approach might be less extreme. The University of California–Berkeley has studied the consequences of that sort of shift and the results are sobering there as well.

According to a confidential memorandum from Berkeley Chancellor Chang-Lin Tien, applying class-based standards to the most recent pool of applicants, the incoming class would have held less than half as many Hispanics (7 percent vs. 15) and blacks (3 percent vs. 6.5). By contrast, it would have contained many more Asians (46 percent vs. 38.2) and somewhat more whites (32 percent vs. 29.4).

Race and class. Berkeley's current approach represents a middle ground. About it, the school has hard data. In 1989, the university switched from a system based largely on race to one giving special consideration for race and class. From '89 to '94, the share of admitted Hispanics dropped (from 21 percent to 17), as did the share of blacks (11 percent to 7). The percentage of whites fell modestly (37 percent to 33), while the percentage of Asians soared (24 percent to 36).

To Jerome Karabel, a sociologist at Berkeley, "the lessons are unmistakable": Hispanics and blacks of every economic level, including the working class and poor, will be replaced by whites and especially Asians in a class-based plan.

For law schools, the story is starker. Linda Wightman, an official of the Law School Admission Council, had an unparalleled source of information, data for 90,000 applicants to every certified school in fall, 1991. She concluded that colorblind admissions would have had "a devastating impact" on minorities. Twenty-six percent of blacks were admitted then through race-conscious plans. Under a colorblind model, the number would have plummeted to 3 percent.

All these numbers frame the heart of debate about affirmative action: How should a school measure the value of a student in deciding who deserves the chance to enter higher education, the surest gateway to success in America? ■

BY LINCOLN CAPLAN WITH DORIAN FRIEDMAN AND JULIAN E. BARNES

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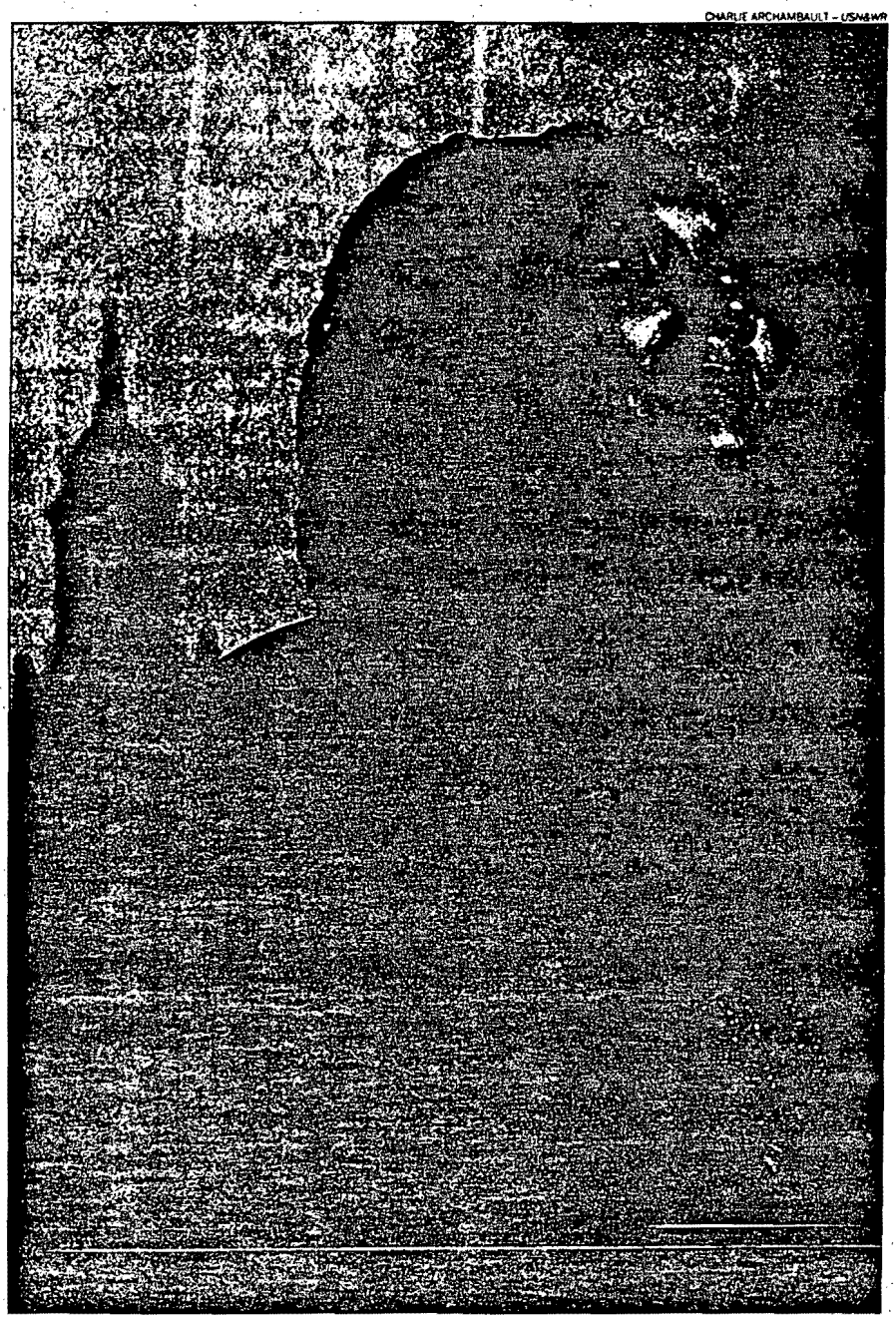
The martial melting pot

How the military encourages and promotes blacks without lowering its standards

CHARLIE ARCHAMBAULT - USN&WR



When I joined the Air Force in 1980, my eyes were not on the wild blue yonder. All I wanted was a steady job and an escape route out of the inner city. In north St. Louis, black kids like me – the daughter of former Southern sharecroppers – weren't raised to think big. I was a timid, aimless, underachieving 20-year-old who tried hard not to make eye contact.

When I was discharged 12 years later, I was a captain in intelligence too confident and too ambitious to be contained by the organization that had made me that way. I had served two tours of duty overseas, earned a college degree and a master's and was on my way to Harvard Law School.

My experience in the military gives me some insight into the national debate about affirmative action. As the choice is often framed, America picks between two losing propositions: lowering standards so blacks can have a chance to prove themselves, and pretending that most blacks have had the same opportunities as most whites, keeping the status quo. I propose Plan C, the military way.

No standards were lowered for me as I climbed the Air Force ladder. I had to best one white male after another. But military leaders had designed a system that didn't let me flounder. The system zeroed in on strengths in me I was years from seeing in myself. Skillfully, it drew those out – partly, no doubt, because of my race and gender.

Beginning in basic training, I had leadership positions thrust upon me. If two trainees are sent to pull weeds, one will be placed in charge and held accountable. I was always the one. Soon, to my tearful distress, I was promoted to dorm chief, the trainee responsible for everyone else in the flight (the Air Force version of a platoon). I begged to be passed over, but Tech Sergeant Harris – in training, you would never call a superior by his first name – tossed the dorm chief badge at me and threw me out of his office. He spent the next few weeks berating or praising me, each at the right moment. When the flight graduated first in the squadron, I began thinking that maybe the Air Force was right. Maybe I could compete and win.

I did, and so do many other minorities. Consider the Army, the most integrated service and the subject of a new book, *All That We Can Be: Black Leadership and Racial Integration the Army Way*, by two military sociologists, Charles Moskos and John Sibley Butler (one white, one black, both veterans). The authors note that the Army is the only American institution where blacks routinely boss

around whites. Of its generals, 7.3 percent are black, a critical mass of leadership approached nowhere else in society.

The services succeed by putting a premium on achievement. They find a way to measure everything; in order to progress, soldiers navigate an endless stream of standardized tests and comprehensive performance evaluations. I'm a natural test taker (I just needed backbone), but many other blacks struggle with exams. A "colorblind" military would leave too many black soldiers trapped in undemanding jobs while crucial positions went understaffed.

The military prepares all its soldiers to face the hurdles of competition. If a soldier fails an exam, he is usually offered a makeover or a remedial course and "encouraged" to attend. If he doesn't, and continues to fail, he'll end up a civilian again. If he makes the attempt, his commander will support him fully. No one, black or white, is stigmatized for initial failure or remedial effort. Only a failure to try counts against you.

The U.S. Military Academy Preparatory School is the Army's ultimate commitment to its mission. Begun 80 years ago to help enlisted men pass the West Point entrance exam, it now also prepares high school grads who have no enlisted service. It is closely modeled on West Point, where two thirds of the "prepsters" end up. The course work stresses basics: "Our curriculum is simple," said its commandant in 1994. "We got English. We got math."

Blacks constitute 20 percent of the enrollees, and their accomplishments are formidable. According to Moskos and Butler, only 6.8 percent of cadets entering West Point in 1993 were black. Forty percent of those entered via the prep school. Recently, 94 percent of prepsters graduated with their West Point class in four years; only 79 percent of the entire student body did.

Officers' Training School. *Dickerson with buddies and in a formal portrait. Her commander wanted her to compete to be wing commander, and she won the honor.*

The 10-month course isn't cheap for taxpayers; estimates range from $40,000 to $60,000 per student annually. Without that investment, though, there would be far fewer black Army officers and fewer blacks competing at the highest levels.

Secrets of success. Military leaders face the same pressure that some of their civilian counterparts do to meet affirmative action goals. But the military sets itself apart by practicing "supply side" affirmative action. Rather than basing plans on the total number of available minorities, it develops the

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largest possible pool of qualified applicants and then sets goals.

There is another secret of the military's success: taking credit for the accomplishments of subordinates. The military, long intensely competitive, has become more so as it downsizes and has fewer accolades like promotions to award. So if Eagle Squadron produces the airman of the quarter, everyone above him in the chain of command can claim leadership points on his own evaluation. When a unit produces no standouts, soldiers conclude there is a lack of leadership in the squadron. The hunt for talent in that kind of environment can't afford to get sidetracked by race.

Five years after my epiphany in basic training, this military quest changed my life again. With the ink still wet on my college degree (earned via an Air Force "Bootstrap" fellowship), I stood at attention before my flight commander at Officers' Training School while I received my first evaluation. Captain Lowery wanted me to compete for wing commander, the top spot among the 900 in training. *Déjà vu*—I begged to be passed over.

No way out. Lowery cut me off, slammed a pad on his desk and made me an offer I couldn't refuse. Narrating ominously, he scrawled, "Despite her enormous leadership abilities and her duty of loyalty to her comrades, Dickerson feels her personal comfort and abundant free time is more important than national security . . . ."

So I reconsidered. Given no way out, I located every competitive bone in my body and, with the captain's support, became wing commander. Lowery took full credit. That Midwestern white boy wanted to win: The only way to do that was through his troops. Whether my race and gender were a plus or minus to him (and those who selected me) I don't know. I do know that I went toe-to-toe with a bunch of white males, the best in their own flights, and won. The military knows that, while talent can't be manufactured, it must be molded. No one can be wasted if an organization is to be all that it can.

While far from perfect, the military handles race relations more deftly than any civilian institution I've experienced. For one thing, soldiers know why good relations matter: Without them, there's no unit cohesion; without unit cohesion, soldiers die. For another, the military doesn't try to change hearts and minds. Racism is not cast as an evil to be erased, but as a fact of life that has no use in the military. Yes, everyone must attend "sensitivity training," but the services eschew the "Kumbaya" quality typical of mainstream "diversity management."

Unlike many universities, the military doesn't punish all hate speech, only the kind that "upsets order and discipline or provokes a breach of the peace." In 1992, it declined to discipline a drunken airman who called an arresting MP a "nigger." The military standard is that the MP, trained to handle far worse, could live with such booze-induced abuse. But flaunting racist beliefs is a career buster; your evaluations will likely reflect that those views don't square with leading or following in a multiracial organization. Uniformed racists survive in clandestine cells, shunned as losers and forced underground. But everyone is required to stow his racial baggage for the duration of the duty day. Because everyone understands the rules, soldiers take risks about race that can have a surprising payoff in unit cohesion.

In South Korea, I served under a daredevil Mexican-American, Lieutenant Salas, in Charlie Flight. One Sunday, several hours before dawn, we got bored. The reports were typed and filed, the *Stars and Stripes* crossword solved. There was nothing to do but wait for the Communist horde to swarm over the DMZ.

We were bantering about the upcoming squadron Halloween party and making lewd suggestions about what each person should wear. Nonchalantly, Lieutenant Salas changed the game. He suggested I tie a rag around my head and come as Aunt Jemima. Every keyboard, every phone, every conversation in the room fell silent.

The only woman and the only black in the room, I scanned the faces of my flight mates for clues about how to process this radioactive taunt. Salas became fascinated with the coffee in his cup. Then the snickering began. Though still wide-eyed with shock, my buddies couldn't stifle guffaws. Now Salas looked up, proud of himself. He threw me a challenging look.

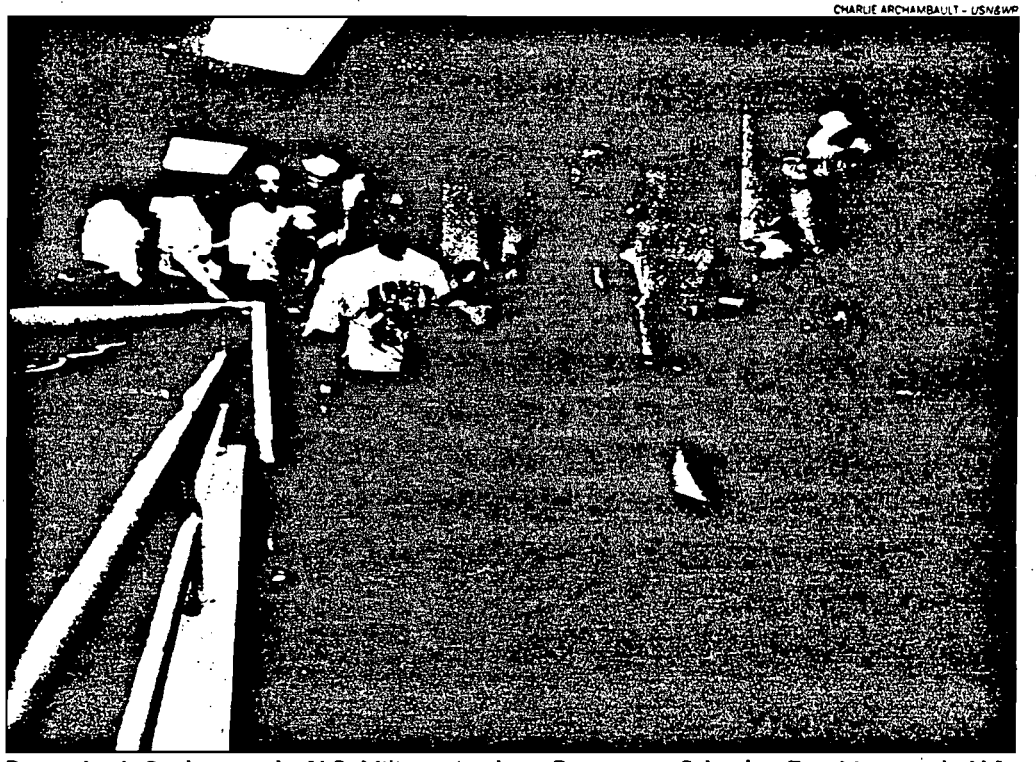
"All right, sir," I said. "*I'll* wear a head rag and come as Aunt Jemima if *you'll* dry your back off and come as an American." I put my hands on my hips and stared him down.

Pandemonium erupted. Charlie Flight rolled on the floor in Caucasian delight.

Salas turned beet red but was man enough to laugh. He extended his hand. I shook it. When our shift ended at 6 a.m., we all went out drinking. And Lieutenant Salas taught me to two-step. ■

BY DEBRA DICKERSON

CHARLIE ARCHAMBAULT - USN&WR



Prep school. *Students at the U.S. Military Academy Preparatory School at Fort Monmouth, N.J.*

LETTER FROM WASHINGTON

JUNE 6

THE current controversy over the anti-job-discrimination civil-rights bill is only in part about civil rights. It is also about the searing racial tensions that have developed in this country, making race our most divisive and explosive domestic issue. It is about politicians attempting to deal with the competing pressures of racial minorities trying to further, consolidate, or salvage gains made in the past three decades and of the white majority putting up increasing resistance. It is about some politicians trying to gain advantage from the racial tensions. It is about lawyers and other advocates haggling over legal niceties and confusing everyone else in the process and losing track of what the issue really is. Because of these factors, the furor over the issue is out of proportion to the importance of the bill itself. But the furor has its own importance. The way the issue is being handled in Washington at the moment isn't a pretty sight, and is damaging the country even further. The tragedy is that this wasn't necessary.

No area of civil-rights policy is as neuralgic as the one that governs discrimination in employment. The reasons are manifold: anti-job-discrimination policy gets to such matters as the government's intruding on an employer's right to hire and fire and putting the employer at risk of lawsuits over his employment practices; the pitting of one racial group against another in the competition for jobs; and simple (if unacknowledged) racial prejudice. The remedies for proven racial discrimination in hiring can work to the disadvantage of innocent whites. The current agony over job discrimination grows out of a law passed in the halcyon days of the civil-rights movement. Title VII of the Civil Rights Act of 1964 prohibits discrimination by employers with fifteen or more employees in hiring on the basis of race, color, religion, sex, or national origin. That was the easy part. For the next few years, plaintiffs who thought they had been discriminated against could bring suits. The plaintiff had to prove intentional discrimination, or "disparate treatment," and the remedies included court orders to stop the discrimination, reinstatement, and up to two years of back pay, plus attorneys' fees. (Later, a court decision construed an old Reconstruction statute to allow unlimited damages to victims of intentional race discrimination.) Then, in 1971, the Supreme Court, in a unanimous decision called Griggs v. Duke Power Co., greatly broadened the sweep of Title VII by saying that plaintiffs no longer had to prove *intentional* discrimination but would have grounds for suing if hiring practices had a discriminatory effect, or "disparate impact." The application of the "disparate impact" theory is really what the current fight is all about.

Some civil-rights lawyers say that the Griggs decision was to employment discrimination what the Brown decision was to school segregation. Griggs opened up employment discrimination to class-action suits. Under Griggs, a plaintiff couldn't simply charge that the racial (or gender) makeup of the work force of a given company was *significantly* at variance with the *qualified* applicant pool but also had to point to the employment practice or practices—a supposedly neutral test, a certain education requirement, a height requirement, and so on—that might have led to the disparity. (In the Griggs case, involving a power-generating company in North Carolina, the employer was judged to have required tests and high-school diplomas for obtaining entry-level jobs for which such credentials weren't necessary, with the effect of excluding blacks.) The Griggs decision further held that the employer could prevail if he proved the "business necessity" of such a practice, and it went on to give varying formulations of how to define "business necessity": "significantly related to successful job performance," or "manifest relationship to the employment in question," or bearing a "demonstrable relationship to successful performance of the jobs." In the years following the Griggs decision, there were numerous court cases that leaned on different interpretations of "business necessity." Twenty years after Griggs, the fight is ostensibly over what terminology should apply to defining the relevance of the employment practice—but it is actually about a lot of other things.

"Myrna! Feel sorry for Mrs. DeStefano. She's never read Eudora Welty."

PRESERVATION PHOTOCOPY

USA TODAY

DATE: 03-12-96

PAGE: 3-A

NATIONLINE

Caucus seeks church-arson probe

The 75-member Congressional Family Caucus, which includes many conservative Republicans, wants congressional hearings into recent arsons at Southern black churches.

The caucus also wants Attorney General Janet Reno to "speak out on the issue and help arouse the conscience of the nation against this kind of terrorism."

AP

Reno: Asked to raise consciences

The requests come in response to a USA TODAY investigation that found fires at black churches across the South have risen dramatically, from an average of one a year between 1987 and 1994 to more than one a month since January 1995. Federal authorities are investigating 25 black church fires since April 4, 1993.

The hearing request will be considered Wednesday by the House Judiciary Committee staff.

Today, three white men will be sentenced in Nashville federal court for burning two black churches in Maury County, Tenn., in January 1995. They've already pleaded guilty to civil rights violations. — Gary Fields

Written by Claudine Kriss. Contributing: Paul Leavitt, Carrie Dowling and Steve Marshall.

The Washington Times

DATE: 3-12-96

PAGE: A-7

Affirmative action uniting former foes

Factions gear up to fight its demise

By Carol Ness
SAN FRANCISCO EXAMINER

SAN FRANCISCO — Spurred by California's anti-affirmative-action initiative, Newt Gingrich's Congress and Pat Buchanan's presidential candidacy, the disparate elements of the progressive movement are making an unprecedented effort to put their differences aside and unite against the right.

Most significantly, women's organizations and leaders in the black community are trying to overcome their historic skepticism of one another and forge the kind of alliance that's been talked about for decades but never achieved, according to Patricia Ireland, president of the National Organization for Women, a key backer of the effort.

"There's a particular new urgency," said Mrs. Ireland. "This year it's crucial."

Mrs. Ireland is seeking support and money for a national "Fight the Right" march in San Francisco April 14.

The NOW march, in the works since last year, originally was slated for Washington. It was moved to California because of the initiative to end affirmative action headed for November's statewide ballot and because of California's importance in the presidential election.

The march, supported by hundreds of women's, black, Asian-American, Hispanic, labor, homosexual and religious groups, is the most visible manifestation of affirmative-action, anti-Republican organizing.

A broad coalition spearheaded by the Los Angeles-based Feminist Majority Foundation has been barnstorming college campuses in the Bay Area, Washington and around the country to recruit students for a "Freedom Summer '96" in California to save affirmative action.

Patterned on the civil rights movement's Freedom Summer of 1964, which sent college students to the South to register black voters, the campaign already has contacted hundreds of campuses to sign up interns, according to Alicia Daly of the foundation's Campaign to Save Women's Rights and Civil Rights.

In San Francisco, hundreds of groups have come together under the aegis of the Bay Area Affirmative Action Coordinating Council, founded by the progressive Vanguard Foundation.

At a gathering of some 600 activists — including Mrs. Ireland and the Rev. Jesse Jackson — two weeks ago at the Palace of the Legion of Honor, foundation Executive Director Hari Dillon stressed the importance of transcending identity politics in order to defeat the Republican strategy of using affirmative action as a wedge between communities.

"The assault on affirmative action is not only an African-American issue," Mr. Dillon said. "Prop 187 was not only a Latino issue. All these things are fundamental moral issues for progressive humanity."

He told the group, paraphrasing the 25-year-old words of James Baldwin, one of the most eloquent voices of the civil rights movement: "If they come for me in the night, they will come for you in the morning."

Those words are still relevant, Mr. Dillon said, adding, "I think Pat Buchanan and his bunch are coming for us and our children."

Mr. Dillon said Vanguard decided last year to try to build a coalition of blacks, Hispanics, Asian-Americans and Indians to work for the defeat of the anti-affirmative-action initiative promoted by California Gov. Pete Wilson.

One reason Proposition 187, which targets illegal immigrants, passed in 1994 is that its proponents were able to "ghettoize the attack on immigration as only a 'Latino issue,'" Mr. Dillon said.

This time, he said, progressives are on their guard against conservative portrayals — and public perceptions — of affirmative action as a black issue.

Originally, the coalition planned its own march in Sacramento. But then Mrs. Ireland and NOW's California chapter head, Elizabeth Toledo, got involved. The two groups decided to merge their efforts.

"I think this is a breakthrough for the progressive movement in California and for the country," Mr. Dillon said. "If we can unite this coalition of color with NOW and the feminist community, that's something that hasn't happened in a long time."

The New York Times

DATE: 3-23-97

PAGE: 14

Religious Freedom, Constitutionally

A small church in the town of Boerne, Tex., provides the backdrop for one of this term's most significant Supreme Court cases. The church, faced with overcrowding, sought a permit to demolish most of its 74-year-old Mission Revival structure and expand into Boerne's historic district. When the permit was denied, the church sued the town, alleging a violation of its religious freedom under a Federal statute called the Religious Freedom Restoration Act. The city responded by challenging the act's constitutionality, raising the core issue that the Court must now decide.

An impressive array of religious and civil rights groups are urging that the statute be upheld. They are rightly concerned about the implications for religious freedom if the Restoration Act is overturned. But the immediate issue is not religious liberty. It is whether the statute's attempt to counter a damaging Supreme Court decision violates the constitutional separation of powers. This launches the dispute into a gray area that makes the outcome hard to predict. But even if the Court strikes down the statute, the justices need to reconsider the flawed ruling that inspired the law.

The Restoration Act, approved by an unusually united Congress and enthusiastically signed by President Clinton in 1993, was a response to a Supreme Court decision in 1990 that watered down the First Amendment's protection of "the free exercise" of religion. That decision held that churches have no special exemption from "neutral, generally applicable" laws that happen, as a by-product, to burden religious exercise. In the case before it, the Court approved using a state's general ban on peyote to prohibit the drug's use in religious rituals by a Native American church. Other rulings impinging on the free exercise of religion followed.

The Restoration Act sought to blunt the original decision by setting a very high standard for governments to meet if they are to override claims of religious liberty. Under the act, governments may not enforce laws that "substantially burden" the exercise of religion without demonstrating a "compelling" need to do so, and without using "the least restrictive means."

It is clear that, in the absence of a constitutional amendment, Congress cannot directly overturn a Supreme Court decision. But last January a Federal appellate panel in New Orleans upheld the act as a legitimate exercise of Congress's independent authority under the 14th Amendment to enforce constitutional rights by granting broader protection than the Supreme Court has. The exact boundary of that authority is an unsettled issue. When the case was argued recently, several justices seemed concerned that the act trespassed on the Court's role as sole interpreter of the Constitution.

Fortunately, if the Court wants to strike down the statute, there are principled ways to do so without jeopardizing past holdings on civil rights or abandoning religious liberty. If the Court rejects the act, it can recognize the underlying concern, broadly shared, that the Court's current approach inadequately protects religious observance from government interference. A wise Court would heed the message, and find a better balance.

The Washington Times

DATE: 3-23-97

PAGE: A1

Case closed; wild horses still killed

Grand jury documents indicate BLM falsified records, blocked investigation

By Martha Mendoza
ASSOCIATED PRESS

DEL RIO, Texas — A federal grand jury has collected evidence that shows U.S. government officials allowed the slaughter of hundreds of wild horses taken from federal lands, falsified records and tried to prevent investigators from uncovering the truth.

The chief prosecutor and grand jury foreman in the investigation wanted to bring criminal indictments against officials of the U.S. Bureau of Land Management (BLM), but the case was shut down last summer after federal officials in Washington — including officials outside the investigation — intervened.

"I believe that my investigation was obstructed all along by persons within the BLM because they did not want to be embarrassed," the prosecutor, Alia Ludlum, wrote in a memo last summer. "I think there is a terrible problem with the program and with government agents placing themselves above the law."

Mrs. Ludlum's memo is among thousands of pages of grand jury documents in the case obtained by the Associated Press. Those documents also show that the grand jury foreman was incensed that federal officials were blocking the investigation, and that his requests to indict them were ignored.

Mrs. Ludlum, 35, formerly an assistant U.S. attorney, now is a federal magistrate judge at the Del Rio courthouse, which serves West Texas. She refused to be interviewed for this story but acknowledged the authenticity of documents obtained by the AP.

Spokesmen for the Departments of Justice and the Interior denied their agencies had done anything wrong but refused to answer questions. Interior Secretary Bruce Babbitt, who oversees the BLM and by law is responsible for protecting wild horses, also refused to be interviewed.

Wild horses and burros, which compete with domestic cattle for forage, have been protected by federal law for 25 years. The BLM decides how many animals can survive on public lands, rounds up the excess animals and lets people adopt them for about $125 apiece. After a year, an adopter can receive a title to an animal, if the BLM finds the animal is receiving proper care.

The law says it is a crime to kill a wild horse or burro taken from public land. It prohibits anyone who adopts one of the animals from selling it for slaughter.

Recent AP investigations have found that thousands of the horses are eventually sold for slaughter, and that the whereabouts of tens of thousands of adopted but never titled animals are unknown. The BLM has attacked the AP's reports, saying its investigations show that slaughter "is occurring to a far, far lesser degree than was alleged."

Although Mr. Babbitt refused to speak, the last person to serve as his chief at BLM said Mr. Babbitt has known all about problems in the wild horse program for a long time.

Babbitt said aware of turmoil

Jim Baca, who quit as BLM director in 1994 after a falling out with Mr. Babbitt, said in an interview that he discovered the program was in turmoil and wanted to take steps to correct it.

He said Mr. Babbitt told him to back off.

"The orders were: 'Don't make waves; we've got enough problems,'" Mr. Baca said, adding that his efforts to shake up the program went nowhere.

"Babbitt thought it might cause problems, and he didn't want any controversy. He didn't want to make anybody unhappy, and so this program just festered," Mr. Baca said. "When they wanted me to leave BLM, that was one of the reasons they gave me: 'Why the hell are you raising problems about horses?'"

At the time, Mr. Babbitt attributed Mr. Baca's departure to "different approaches to management style and consensus-building." Meanwhile, the federal investigation in Texas had begun.

Grand jury seeks charges

Records show that the grand jury saw evidence and heard testimony that:

- BLM agents placed 550 horses with dozens of people who were told they could do as they wished with the animals after a year, including sell them for slaughter to make money.
- The BLM ignored its own regulations and gave the Choctaw Indian Nation 29 newly born, unbranded colts to sell so the tribe could raise cash to pay the BLM for a mass adoption of 115 wild horses.
- A Texas BLM compliance officer, Don Galloway, arranged to keep 36 horses for himself and told two undercover investigators he planned to sell them for slaughter.
- BLM managers pressured employees not to talk to investigators. In one case, a BLM district manager tipped off the subject of a search warrant that law enforcement agents were about to visit his house.
- BLM officials falsified adoption documents and falsified computer records of brand identification numbers used to track adopted animals.

"We want these charges filed and we want to be notified of what was done, regardless of who these people are, please, ma'am," the grand jury foreman told Mrs. Ludlum, according to transcripts.

Federal agencies intervene

When the BLM in Washington realized the case was pointing in

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THE WALL STREET JOURNAL.

DATE: 3-1-95
PAGE: B-4

Lone Star Steakhouse Settles With the U.S. Over Disabilities Act

By a WALL STREET JOURNAL Staff Reporter

WASHINGTON – The Justice Department reached a settlement with Lone Star Steakhouse & Saloon Inc. that requires the chain to bring almost 100 of its restaurants into compliance with the Americans with Disabilities Act.

The agency said this is the first ADA settlement involving buildings that were constructed after the federal law went into effect. Lone Star, based in Wichita, Kan., has built or altered 97 restaurants since Jan. 26, 1992, when he ADA went into effect. The restaurant chain has a total of 105 restaurants.

Neither company officials nor a lawyer for Lone Star returned phone calls seeking comment on the settlement. In a news release, Lone Star said it was pleased that it was able to resolve the matter without "costly and time-consuming litigation."

Through a review of architectural blueprints and site visits, the Justice Department cited Lone Star for, among other things, insufficient parking and inaccessible bathrooms.

The settlement calls for Lone Star to make all of its restaurants fully accessible within 45 days. Lone Star also is required to donate $25,000 to four non-profit disability groups.

The Washington Post

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Robert J. Samuelson

'A Mild And Pragmatic Affirmative Action'

The tragedy of affirmative action is that something originally designed to bring us together is now pulling us apart. It suffers from a fatal contradiction: To cure discrimination, government must sanction, encourage or require discrimination—preferences in jobs, college admissions and government contracting—based on race, sex, ethnicity or national origin. Sooner or later, the contradiction was bound to bite, and it now has.

Affirmative action is corroding the nation's social climate without doing much else. The great job gains for women and blacks over the past three decades stem mostly from the outright ban on job discrimination and a shift in social norms. In 1960, only 7 percent of doctors were women; now 22 percent are. Blacks have also made large gains, and the remaining problems now have more to do with low skills and poor work habits than discrimination. Among men over 25, for example, 20 percent more of whites have full-time jobs than blacks.

Lawyers and reporters can always find individual victims of discrimination—or reverse discrimination. But affirmative action's collective help or hurt, especially in the workplace, appears modest. For example, the largest federal affirmative action program is run by the Office of Federal Contract Compliance Programs (OFCCP). It requires about 95,000 federal contractors, covering about a quarter of the labor force, to have affirmative action plans. These usually specify "goals" and "timetables" without invoking hard quotas.

In studies, economist Jonathan Leonard of the University of California found that employment of blacks and other minorities increased slightly faster at federal contractors than at non-federal contractors in the late 1970s. But it rose rapidly at all companies, and there was no effect for women. Whatever the modest benefits in the 1970s, they further diminished in the 1980s when the OFCCP's staff shrank by half. "I don't think people have any idea of how small the impact has been," says Leonard.

The best argument I ever heard for affirmative action came from the personnel director of a Fortune 500 Company about 15 years ago. "People," he said, "tend to hire people like themselves." Although his comment was (as I recall) simply an observation on how managers clone themselves, it explains why large organizations can discriminate. Companies and universities may unconsciously do so through habits and routines that, though understandable, are exclusionary.

In my view, this justifies a mild and pragmatic affirmative action that emphasizes aggressive recruiting among any groups that are poorly represented. It also justifies being aware of race and sex as opposed to pretending they don't exist. But it does not justify a lowering of standards for jobs or colleges. Nor does it justify all the federal, state and local laws and regulations that, in the name of "affirmative action," promote, permit or impose racial, sexual or ethnic preferences.

The Congressional Research Service has now counted 168 federal programs with preferences, including many purchasing "set asides," from pollution programs to defense. Many preferences will not pass a common-sense test that they advance social justice. Tax breaks to encourage "minority" broadcast ownership are merely one example. (These breaks would allow Viacom to sell TV properties to a "minority" firm and reap huge tax savings.)

On one level, what condemns preferences is that they offend most Americans morally. Asked whether "blacks and other minorities should . . . receive hiring preferences to make up for past discrimination," only 12 percent of whites agreed. Preferences have survived such disapproval only because, until recently, there were widespread taboos against criticizing them. "White males shut up—they were afraid of being called racist," says political scientist Frederick Lynch of Claremont College, who wrote a book on the subject. These taboos are now dissolving.

But affirmative action's problems transcend likes and dislikes. The basic flaw is its imagined ideal: Every group that can be counted by race, sex or ethnicity should be proportionally represented in every occupation or industry. People will never arrange themselves so conveniently. Talents, backgrounds and ambitions vary too much. True, past discrimination and custom barred some jobs to women and blacks. But even absent such history, the affirmative action ideal would not have occurred. Yes, women couldn't become carpenters; no, not enough want to be carpenters to raise their representation to 50 percent.

Because its premise is unrealistic, affirmative action in its present form is unworkable. If it is not abandoned or significantly modified, it must fail. It must become increasingly unpopular among both advocates and opponents. As the work force mixes more by race, sex and ethnicity, legally sanctioned preferences give many people—both intended beneficaries and potential victims—cause for resentment. Some think they've been denied preferences they deserve; other believe they've lost jobs (or college spots, promotions or contracts) they've earned.

Except as remedies for blatant discrimination, preferences (either explicit or implied) ought to end. This does not mean benign neglect. Discrimination would remain illegal and should be prosecuted relentlessly and ruthlessly. Likewise, com-

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Los Angeles Times

DATE: 4-18-95
PAGE: A-1

Two Reverse Bias Rulings Upheld by Supreme Court

Discrimination: Actions favoring white males indicate changing attitude toward affirmative action. A quota for promoting black firefighters is thrown out.

By DAVID G. SAVAGE, TIMES STAFF WRITER

WASHINGTON—In two victories for white men who claimed they had suffered reverse discrimination, the Supreme Court on Monday let stand rulings that threw out a quota for promotions of black firefighters in Birmingham, Ala., and awarded a white engineer $425,000 in damages because he was passed over for a promotion.

The outcome in the two cases shows an increased willingness by the federal courts to apply anti-discrimination laws in favor of white employees, as well as minorities. They also put employers on notice that they can be forced to pay damages even for undertaking a voluntary plan of affirmative action.

The court actions come amid a renewed national debate over affirmative action and reverse discrimination.

Indeed, the 21-year-old Birmingham firefighters case illustrates the evolution in the law. Where once the affirmative-action plan in Alabama's largest city was widely applauded as a needed remedy for blatant discrimination against blacks, the same plan later was struck down by judges who concluded that it unfairly discriminated against white workers.

"We are very pleased the Supreme Court has agreed the Birmingham quota plan involved an excessive use of racial balancing," said Raymond T. Fitzpatrick, who has represented the white firefighters for 15 years.

But a civil rights lawyer who defended the city's efforts to promote more minorities said that he was disappointed by the outcome.

"This puts a question mark of confusion over this whole field of law," said Richard T. Seymour of the Lawyers Committee for Civil Rights Under Law in Washington. Civil rights advocates had believed that the minority promotion plans in cities such as Birmingham could withstand attacks because they grew from an undisputed history of blatant discrimination in the Deep South.

On Monday, the Supreme Court simply rejected further appeals in the two cases and did not issue written opinions. However the outcome—especially in the Birmingham case—grew directly out of two earlier conservative rulings by the high court.

In 1974, the Lawyers Committee, the National Assn. for the Advancement of Colored People and the Justice Department filed suit against Birmingham, alleging the city continued to exclude blacks from the management ranks of its fire and police departments. After several years of litigation, the city agreed to adopt an affirmative- action plan that, among other things, ensured black firefighters would receive one of every two promotions available.

That 1981 consent decree won the support of virtually all parties, including the city, the Justice Department and the federal judge presiding over the case. The exception was the white firefighters whose promotional opportunities would be limited.

A group of 14 white firefighters claimed that they had suffered reverse discrimination because they were passed over for promotions despite having more seniority and higher test ratings than some black employees who were promoted. In response, the city contended that the disgruntled whites had no right to contest a valid consent decree, and a judge threw out their claim without a hearing.

But in a 1989 decision, the Supreme Court revived the claim of the white firefighters and ruled that white workers cannot be barred from challenging an affirmative-action order that puts them at a disadvantage.

That same year, the high court said in another ruling that cities may not use race as a basis for awarding contracts or jobs unless the efforts were "narrowly tailored" attempts to remedy clear past discrimination.

The first ruling gave the white firefighters a chance to get their claim into court, while the second gave them ammunition to win.

Last year, the U.S. Court of Appeals in Atlanta rejected Birmingham's promotion plan because it was not "narrowly tailored" to promote black firefighters who suffered discrimination earlier in their careers. Instead, the plan worked as "a rigid quota" that violates both federal anti-discrimination laws and the Constitution, the judges said.

"Given the odious nature of race-based decision-making, race-neutral alternatives should be considered before the government implements an affirmative-action plan that uses race as the sole criteria upon which promotions are based," the appeals court said.

The Atlanta ruling marked a sharp setback for civil rights advocates because Birmingham had an undisputed history of discriminating against blacks.

Both the Lawyers Committee for Civil Rights Under Law and the city of Birmingham appealed to the high court in February. If the ruling were allowed to stand, they said, it "puts at risk affirmative- action programs previously thought to be lawful that redress egregious discrimination."

But without comment or dissent, the high court denied both appeals in Arrington vs. Wilks, 94-1397, and Martin vs. Wilks, 94-1422.

Lawyers on both sides said the case now will return to a federal judge to decide whether the white firefighters are entitled to damages.

In the white engineer's case, a jury in Pittsburgh, Pa., hit the Duquesne Light Co. with the $425,000 verdict for promoting a somewhat lesser-qualified black employee.

Frederick Claus had a degree in electrical engineering and 29 years of experience with the utility when he sought promotion to a managerial job.

Six applicants—five whites and one black—were interviewed. At that time, only two of the 82 managers in that division were minorities. Operating under an affirmative-action plan based on federal requirements, the company chose the black employee for the promotion.

Claus sued and claimed that he was a victim of racial discrimination. During the

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trial, the company acknowledged that the black employee did not have a bachelor's degree or the required seven years of experience set forth in the job description. However, lawyers on both sides agreed that the black employee was an outstanding worker and qualified to be a manager.

Nonetheless, a jury concluded that Claus was discriminated against and awarded him $25,000 in compensatory damages and $400,000 in punitive damages.

The outcome carries an ominous note for civil rights activists, who pressed Congress in 1991 to authorize large damage verdicts in cases of job discrimination. In this case, lawyers for the white worker employed the new law to win damages from a largely white jury.

Last year, the U.S. Court of Appeals in Philadelphia upheld the verdict, and on Monday, the high court refused to hear the company's appeal in the case of Duquesne Light vs. Claus, 94-1502.

In other actions, the court:

- Refused to intervene in a San Francisco dispute over a longstanding state law that makes aggressive panhandling a crime. A federal judge ruled that city officials had violated the free-speech rights of a panhandler who was repeatedly arrested, and the city later reached a settlement with the man.

When state lawyers sought independently to appeal that ruling, the U.S. 9th Circuit Court of Appeals said the case was moot, and the justices refused to hear a further appeal in California vs. Blair, 94-1400. But lawyers say the statute is being enforced in other areas of the state.

- Agreed to rule on a money dispute growing out of the 1983 downing of a Korean Air Lines jet by a Soviet fighter. International flights are governed by the Warsaw Convention, which sharply limits damage verdicts.

But a New York jury ruled not only that KAL engaged in wrongful conduct, but that it gave large damage verdicts to the parents of young people killed in the crash. However, a federal appeals court threw out some of those verdicts on the grounds that the treaty allows damages only for "dependents" and the parents were not dependent on their children. In the fall, the court will hear the parents' appeal in Zicherman vs. KAL, 94-1361.

The New York Times

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PAGE: A-14

Court Lets Stand Ruling That Found Plan on Bias Unfair

By LINDA GREENHOUSE

WASHINGTON, April 17 — The Supreme Court ended one chapter in the long-running legal battle over the integration of the Birmingham, Ala., Fire Department today, when it refused to review a lower-court ruling that race-based promotions were unfair to 14 white firefighters.

Without comment, the Justices turned down appeals filed by Birmingham officials and by a group of black firefighters from a Federal lower court's decision invalidating the promotion plan, part of a 1981 consent decree that promoted white and black firefighters to the rank of lieutenant on a 1-to-1 basis until the number of black lieutenants equaled the 28 percent of the surrounding county's work force that was black.

That target was reached in 1989, leaving the white firefighters with claims to back pay for their delayed promotions but depriving the case of much continuing practical importance. Other important aspects of the Birmingham plan, including the validity of promotional exams, have not yet been resolved in the lower courts.

These circumstances may explain the Court's decision to pass on the case, despite the Justices' manifest interest in the issue of affirmative action. The Court already has one affirmative-action case awaiting decision, a challenge to a Federal Government contracting program, and others in the pipeline. A refusal by the Court to accept an appeal is not a judgment on the merits of the case.

The Birmingham Fire Department case began in 1974, when the city had only a handful of black firefighters and none in supervisory positions. The convolutions in the case since then have often mirrored the shifting public debate over affirmative action.

The Federal Government during the Administration of President Gerald R. Ford was the original plaintiff in the case, suing Birmingham in 1975 on the ground that the city and the county personnel board engaged in extensive and systematic discrimination.

During the Administration of President Ronald Reagan, the Government switched sides and supported a challenge by white firefighters who had not been parties to the original lawsuit or the subsequent negotiations. A 1989 Supreme Court decision permitted the white firefighters to intervene in the case to challenge the settlement. The white officers lost in Federal District Court in Birmingham but won an appeal last year before the United States Court of Appeals for the 11th Circuit, in Atlanta, which denounced the promotional plan as "outright racial balancing."

Black firefighters and Birmingham, Ala., lose an appeal.

Despite the fact that the plan's numerical goals have long since been reached and most aspects of the consent decree are no longer operational, the case was closely watched as it made its way back to the Supreme Court, both for its symbolic significance and because the appeals court used such strong language in denouncing the plan as "the perpetuation of discrimination by government."

The 11th Circuit found that Birmingham did have a "compelling" interest in remedying the effects of past discrimination, thus meeting the rigorous standard the Supreme Court has required as justification for state and local government affirmative action plans. But the plan was not "narrowly tailored" to achieve that compelling interest, the appeals court went on to say, and thus failed another aspect of the Court's standard.

The appeals court said that the plan did not contain sufficient justification for the 1-to-1 ratio of promotions of black and white firefighters and that the city had failed to consider less drastic alternatives for achieving the desired result.

In their appeals, Arrington v. Wilks, No. 94-1397, and Martin v. Wilks, No. 94-1422, the city and the black firefighters argued that the rapid rate of promotions had enabled the department to meet its numerical goal much earlier than would otherwise have been the case.

The consent decree would have continued years longer, they said, if blacks had been promoted only at a rate that reflected their distribution in the entry-level category of firefighter, which was 9 percent at the start of the plan in 1981 and 13 percent by the end in 1989. No white firefighters lost their jobs as a result of the plan.

The court, which returned today from a two-week recess, also took agreed to interpret a Federal law that imposes an extra five-year sentence on any who "uses or carries" a firearm "during and in relation to" a drug offense.

The Court accepted appeals by two residents of the District of Columbia who were convicted of drug crimes and who were given the extra sentences despite the fact that neither had used a gun in a conventional sense while committing their crimes.

One defendant, Ronald J. Bailey had a loaded 9-millimeter pistol in the trunk of his car when the police stopped him and found cocaine packets in the passenger compartment. The other defendant, Candisha S. Robinson, who sold crack cocaine to an undercover officer from her apartment, had a .22-caliber pistol in a locked trunk in a bedroom closet.

The United States Court of Appeals for the District of Columbia Circuit split 5 to 4 in ruling in October that the law was not limited to "the paradigmatic uses of a gun, i.e. firing, brandishing, or displaying the gun."

Rather, the appeals court said, the law also applied "whenever one puts or keeps the gun in a particular place from which one can gain access to it if and when needed to facilitate a drug crime."

Other Federal courts have taken different positions. The Supreme Court itself split two years ago over a narrower but related question: does a drug defendant use a gun within the meaning of the law if he barters it for drugs. In that case, Smith v. United States, the Court said yes by a 6-to-3 vote over a spirited dissent by Justice Antonin Scalia. Two members of the majority have since retired. The new cases are Bailey v. U.S., No. 94-7448, and Robinson v. U.S., No. 94-74492.

THE NATION'S NEWSPAPER
USA TODAY

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PAGE: 1A

High court puts 'nail in coffin for quotas'

By Tony Mauro
USA TODAY

White firefighters in Birmingham, Ala., won a Supreme Court victory Monday in their legal battle against an affirmative action plan they say unfairly favored unqualified blacks.

"It's the last nail in the coffin for quotas," says Fire Capt. Charles Brush. "Luckily, we're not in the coffin."

Justices let stand a lower court ruling against the plan, in which a black was promoted for every white promotion.

The decision is seen as a plus for critics of affirmative action, now under assault in Congress and the courts, and under study at the White House.

"The court is satisfied that the trend in this country against hard quotas is the correct trend," says Raymond Fitzpatrick Jr., lawyer for the white firefighters.

Birmingham ended the program in 1989 when the goal of 28% minorities in the lieutenant ranks was reached.

But for 45 white firefighters, the issue of pay they might have reaped if they had been promoted lingered. Their back pay and legal costs could total more than $1 million.

The city, meanwhile, wants some form of affirmative action — still possible under the lower court ruling.

"When you start from zero and you've been locked out for 50 years, it's hard to say there's no longer a need," says City Attorney Demetrius Newton.

Also Monday, the justices let a white man collect $425,000 from a Pittsburgh company he accused of denying him a promotion because of his race.

THE SUN
BALTIMORE, MARYLAND

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Court shuns affirmative action case

By Lyle Denniston
Washington Bureau of The Sun

WASHINGTON — The new spotlight on affirmative action flashed briefly on the Supreme Court yesterday, but the justices found it easy to step aside for the time being as they move toward a major ruling in coming weeks.

In a brief order, the court chose not to review a promotion plan for black firefighters that ended six years ago. White firefighters who felt they had to wait too long for promotions got the plan overturned in a lower court, an action that probably means they now will get back pay.

The case from Birmingham, Ala., was the first of its kind to reach the court since a renewed political controversy began surrounding affirmative action in recent weeks. Leaders of the Republican Congress, GOP presidential candidates and President Clinton have all questioned the need for public programs that make preferences based on race or sex.

The court has said little on affirmative action in the past five years, and two appeals in the Birmingham case were an attempt to draw the court back to the center of the issue. But the court, more cautious these days about what cases it takes on, apparently saw too little of significance in the case to spend time on it.

The justices will get into the midst of the issue again by early summer with a ruling that could curb the federal government's constitutional authority to adopt racial and gender preferences. Awaiting decision is a challenge to a federal highway program that favors minority-owned contracting companies.

Ala. firefighters challenged plan

As constitutional law now stands, state and local governments have less power to adopt affirmative action plans than the federal government does. The coming ruling could change that.

In yesterday's order, the justices offered no explanation for rejecting outright the pleas for new guidance on how far state and local government may go in using race as a factor in employment decisions.

The Birmingham dispute has been in the courts for 20 years, beginning with blacks' claims of racial bias in city jobs, especially in the fire and police departments. After an affirmative action plan took effect, white firefighters claimed reverse racial discrimination.

The plan was adopted in a 1981 settlement of lawsuits against the city by blacks and the Justice Department. Under the settlement, a 50-50, black-white promotion plan was put in place, aimed primarily at assuring black firefighters a chance to advance to the rank of lieutenant.

Before that time, Birmingham had never had a black firefighter with the rank of lieutenant. The Fire Department hired its first black — an entry-level firefighter — in 1968. It waited four more years before hiring a second. In that four-year interval, it hired 147 whites.

As a long-term goal, the affirmative action plan sought to give preference to blacks until the Fire Department became 28 percent black — equal to the percentage in the work force in the surrounding county.

Blacks were to get 50 percent of the annual promotions to lieutenant, until the overall 28 percent goal for lieutenants was reached. That goal was reached six years ago, and the 50-50 arrangement expired then.

The first black lieutenant was named under the plan in 1982, leading to a lawsuit by white firefighters, who said they feared they would be passed over under the 50-50 arrangement. Ultimately, all but one of the whites were promoted, but they claimed the delay amounted to an added legal affront.

A federal appeals court in May agreed with the white firefighters' challenge. It struck down the 1981 settlement.

Black firefighters and city officials in Birmingham urged the Supreme Court to reinstate the plan, but their appeals apparently met a tepid reaction among the justices.

In another order, the court agreed to decide an issue emerging from lawsuits based on the deaths of 169 passengers and crew members of a Korean Air Lines flight in 1983. The plane was shot down by Soviet jets after straying into Soviet airspace.

International airline crashes are covered by a 1929 treaty. The issue the court said it would decide was whether the treaty allows survivors to receive damages for the emotional loss of a relative.

The U.S. mother and sister of a dead passenger were among survivors who sued the airline. A jury awarded them $375,000 in damages; most of that was wiped out on appeal.

A ruling by the court is expected next year.

The Washington Times

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PAGE: A-1

Supreme Court declines to upset no-quotas ruling

Whites beat affirmative action

By Frank J. Murray
THE WASHINGTON TIMES

Two court victories by whites against on-the-job "affirmative action" were left standing yesterday when the Supreme Court refused to hear appeals of race-based decisions from Birmingham, Ala., and Pittsburgh.

Although the decisions, made without comment, have no direct effect on other cases, the lawyer who won a 14-year fight against Birmingham's plan predicted they will be crucial.

The major action formally ends a 50 percent black set-aside for promotion to lieutenant in Birmingham's fire department. It was heavy with symbolism for blacks striving for a place in a department recalled for turning fire hoses on civil rights protesters.

"The court's refusal to take the case means it is clear the lower courts are now correctly implementing the prior Supreme Court decisions to take a hard look at race-conscious goals and quotas, and, indeed, that is consistent with the current national agenda," said Raymond P. Fitzpatrick Jr.

He represented 14 whites who sued in 1981, claiming reverse discrimination in the 600-member fire department.

Lower courts were left to decide claims for about $1 million in back pay, and Mr. Fitzpatrick's claim for fees of $2.5 million.

Birmingham City Attorney Demetrious Newton said the unfinished business includes "whether some of the whites were really discriminated against."

"We're displeased by the decision, but it comes as no great surprise to us, given the direction of the court in the last few years," Mr. Newton said.

"You can't level a playing field that has had 200 years of discrimination," said Mr. Newton, who also conceded that Birmingham has changed. Fire Chief Oscar Brennan, hired recently from Miami, is black, as are the police chief, the finance director and the city attorney himself.

"One cannot get out of his consciousness the fact that a lily-white fire department turned hoses on very little children back in those days," Mr. Newton said in a telephone interview.

He expects the city to use personnel lists balanced for regional demographics, but not tilted exclusively to blacks as some have been.

The first black was hired by the fire department in 1967, but it was four years and 147 vacancies later, before the second came aboard. Under federal pressure, a lawsuit was filed and a consent decree for hirings and promotions set up. By 1989 with virtually all promotions earmarked for blacks, 28 percent of the lieutenants were black.

Calling the outcome "a complete victory for the white male plaintiffs," Mr. Fitzpatrick said no black firemen or policemen would be disrupted.

"We're not seeking to displace anybody out of a job or to reach over the promotion lists or anything of that sort. I don't see any harmful impact there. This is a beef with the city, not with black firemen," he said in a telephone interview.

The other race-based case involved a $425,000 judgment against a company that gave preference to a black candidate for promotion but denied that involved "racial animus" against Frederick Claus "or against white persons generally."

Lower courts ruled otherwise, however, and the Supreme Court's action without comment leaves Duquesne Light Co. of Pittsburgh liable for the judgment.

Mr. Claus was a 23-year veteran of Duquesne when he sought promotion in 1987 from director of engineering to manager of construction and engineering. The job went to James Griffin, who is black, under an affirmative-action plan to alter the 80-2 white-to-black ratio among the company's managers.

Justices also agreed to hear full arguments this fall:

- In a case arising from the 1983 Soviet downing of Korean Air Lines Flight 007 on whether survivors of people killed in the crash of international airline flights may collect damages for loss of companionship of a relative if they did not depend on that relative for support.

The mother and sister of Muriel Kole of Boston were awarded a total of $275,000 for mental injury and loss of companionship, plus $100,000 for pain and suffering, but the airline claims the Warsaw Convention shelters them from such payments.

- On whether D.C. residents Roland J. Bailey and Candisha S. Robinson were improperly convicted and sentenced under a law that adds five years in prison for anyone who "uses or carries" a gun while engaged in drug trafficking.

The unrelated convictions were upheld, 5-4, by the full D.C. Circuit Court of Appeals in October. Bailey got four years and three months on a 1988 arrest for cocaine and gun possession and an additional five years added on under the disputed federal law. Robinson got 13 years for a crack sale, including five for having a gun that police found locked in a trunk in her bedroom closet.

The Washington Times

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PAGE: A-8

DLC favors ending set-aside programs

By J. Jennings Moss
THE WASHINGTON TIMES

The "third way" of dealing with affirmative action would be an end to set-aside programs, a new emphasis on gearing preferential programs to the poor and a strong focus on improving education.

These were the conclusions reached in a series of articles published by the Democratic Leadership Council, the home for conservative Democrats that once had Bill Clinton as its chairman.

By weighing in on the contentious issue of affirmative action before the Clinton White House finishes its own governmentwide review of its related programs, the DLC could have an impact in charting a path for Mr. Clinton.

So far, the debate has been defined by two polar opposites: conservatives, who believe the federal government should end all affirmative-action programs because they lead to reverse discrimination, and liberals, who view the attack on the programs in purely political terms and argue against any significant changes.

"Neither side is right. Conservative ploy or not, the debate over affirmative actions is real. And liberals, try as they might, cannot put the genie back in the bottle: Change is coming," said the New Democrat, the DLC's magazine, which devoted its May-June issue to affirmative action.

As part of the magazine, 11 scholars and analysts offer their views on what to do with affirmative action. All but one. National Urban League President Hugh B. Price, suggest significant changes.

Will Marshall, president of the DLC-affiliated Progressive Policy Institute, said change is inevitable, but he cautioned policy-makers not to rush. "Instead, we should start replacing them with new actions that subsume the claims of racial and other minorities within a broader agenda for economic empowerment," he said.

Mr. Marshall laid out four steps for a new agenda: Phase out numerically driven prefences in government like set-asides that act as de facto quotas; increase enforcement of anti-discrimination laws; keep affirmative action for college admissions but gear it to economic need; and invest in empowerment initiatives.

Carol M. Swain, a professor at Princeton University who described herself as a successful black academic, said some affirmative-action policies "can have the paradoxical effect of undermining initiative and self-confidence."

"Returning to what the drafters of the 1964 Civil Rights Act originally had in mind, Democrats should move swiftly in the legislative arena to dismantle the current policy of race-, ethnicity- and gender-based preferences and replace it with one of aggressive anti-discrimination," she wrote.

Part of the reason for the national debate on affirmative action is an initiative set to be voted on next year in California to repeal state programs. One of the measure's two authors, Thomas E. Wood, said the problem with affirmative action can be seen in higher education, where the policies are used to admit more minorities to colleges but do nothing to prepare them.

"Our nation must summon the will to deal with these kinds of problems with real rather than bogus solutions," Mr. Wood wrote. "Relying on policies that divide and classify and favor and disfavor Americans on the basis of their race, sex and ethnicity will only impede this important national effort."

Paul Starr, a Princeton University professor, said the support no longer exists for affirmative action as a public policy.

"Even its long-time defenders should face up to the realities, fight to preserve narrowly tailored affirmative action as a legal remedy for discrimination and begin exploring what else we can do to achieve equal opportunity and justice," Mr. Starr wrote.

He said what is needed is "the promotion of broad policies for economic opportunity that benefit low- and middle-income Americans, black and white alike."

Diane Ravitch, a senior research scholar at New York University, described affirmative action as a "good idea that went bad." But she said America still owes a debt to blacks and they should be the only recipients of special education and training programs.

THE NATION'S NEWSPAPER
USA TODAY

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Silent message

The Supreme Court sometimes speaks volumes by its silence. Without uttering a word Monday, it sent a message to both advocates and critics of affirmative action.

The justices left intact two lower-court victories won by white men who said they were victims of reverse discrimination. As is customary in declining to hear a case, the court gave no reasons. But by refusing to hear appeals, it reinforced earlier decisions: Affirmative action that becomes discriminatory will not stand.

The court will rule soon in the one affirmative action case it took this year. Meanwhile, the court's history — like its most recent actions — paints a picture that stands in stark contrast to arguments that affirmative action is a policy run amok.

A year after passage of the Civil Rights Act of 1964, it was apparent that merely outlawing discrimination was not going to wipe out the effects of centuries of slavery, segregation and abuse. President Lyndon Johnson ordered federal contractors "to take affirmative action to ensure that applicants are employed without regard to their race, creed, color or national origin."

As a nation, we needed that step so employers would reach out to those history had excluded — blacks, Hispanics, women and others — and consider them in hiring, promotion and contracting.

We needed it because the nation was squandering human talent and forsaking its commitment to equal opportunity.

We needed it because it was right.

But just as the Supreme Court had reminded us in 1954 that legal segregation was an affront to the Constitution, so has it reminded us since 1978 that redress for past discrimination must be done with care. Others have rights, too.

The court ruled then in the *Bakke* case that rigid quotas for affirmative action violated the civil rights of non-minorities. Later, the court knocked down a few other numbers-oriented approaches as unjustified in their particular circumstances. Monday's silence echoed those decisions.

America still needs affirmative action to make sure minorities and women get a fair shake. And the court has declared it legal when done properly. But those who defend anything that parades under the label affirmative action have been warned: Arbitrary numbers games won't pass muster.

Similarly, those concerned that affirmative action has run amok should be reassured: Excesses will be reined in.

Thoughtful legislators, judges and government officials can resolve these conflicts. Political demagogues need not apply.

The Washington Times

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PAGE: A14

MICHAEL FUMENTO

Distortions in the discrimination lens

As humorist Dave Barry might write, "I swear I am not making this up." Robert Reich's Labor Department has released a report saying reverse discrimination — discrimination against whites or males because of race or gender — is practically non-existent.

If you have trouble buying that, the media didn't. The Washington Post headline ran: "Study Finds Little Evidence of Reverse Discrimination," while the Associated Press story was titled, "Report: Reverse Bias is Rare." Also rare, indeed non-existent, was anybody quoted in rebuttal.

For every person given a position who would not have gotten it on individual merit, someone else who did merit it has been denied.

It certainly would have been nice to hear the reaction from the two California professors who wrote that state's anti-reverse discrimination initiative. How silly they — and the great majority of Californians polled who say they support the initiative — must feel to find they're seeking to outlaw a figment of their imagination.

On the other hand, reporters were able to find people supporting the report. AP quoted executive director of the Leadership Conference on Civil Rights, Ralph Neas, as saying, "It further shatters one of the myths about affirmative action, that reverse discrimination is widespread."

The report's author, Rutgers University Professor Alfred Blumrosen, wrote, "This research suggests that the problem of 'reverse discrimination' is not widespread." He refers to it in quotes, emphasizing that the very term is questionable. You know, like when the liberal media writes about "the liberal media."

Yet how did Mr. Blumrosen reach his conclusion? It boils down to this: Reverse discrimination claims are rarely filed with the federal government. Moreover, even when they are filed, they rarely succeed.

Apparently it never occurred to Mr. Blumrosen, Mr. Neas, nor any of the reporters who covered the story that maybe, just maybe, the reason there are so few official complaints about reverse discrimination is that the practice is legal. It's the law of the land.

A person denied a job or promotion in 1994 because he's a white male is no more likely to file a complaint than would a black man denied a job or promotion back in 1954. Mr. Blumrosen is like a 1950s Southern sheriff saying, "Yup, our Negroes here are happy as pigs in slop. They most never complain. And when they do, they's always wrong."

Reverse discrimination is in fact so routine that we hardly even notice it. You probably don't even think twice about it when that employment application you fill out asks your race and ethnic background, do you? But no, it wasn't because they're trying to identify black people to give them free sickle cell screening.

Government employers, especially colleges and universities, routinely give jobs and promotions to women and minorities who lack the qualifications of white males. (The University of Wisconsin's program of restricting employment opportunities for white males was set up by a lady named Donna Shalala.)

Whites are discriminated against by various federal and local contracting programs — including those of the Transportation Department. It is the Transportation Department's program that is now being challenged before the U.S. Supreme Court by a white-owned Colorado Springs, Colo., construction company. The agency bypassed his bid to build federal highway guard rails in favor of a higher bid from a Hispanic-owned firm.

While reverse discrimination in police department hiring can sometimes be justified on racial grounds because there can be advantages to having minorities serving in minority areas, it's the mandated hiring of women that has put the squeeze on white male police applicants. In the Los Angeles Police Department at one point a woman could get hired with an exam score of 94, a black male 95, and a Hispanic male 96. But a white male had to score more than 100 on an exam that only went up to 100!

College applications programs, though not covered by Mr. Blumrosen's review, almost universally discriminate against whites. One of the few universities that has released its affirmative action application acceptance data is the University of California at Berkeley. In 1989, it turned away about 2,800 white students with perfect 4.0 grade point averages, while half the minority students it admitted that year had scores below a 3.53 GPA.

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The key to surviving a court challenge with such discrimination is to just use the right terminology for your program. "Quota" or "preference" might get you in trouble. But use the words "goals," "set-asides," and "timetables," and you'll be hard to beat.

How to explain such foolishness as this report?

Simple. Affirmative action is Mr. Blumrosen's baby. Yes, the newspapers forgot to tell you that Mr. Blumrosen is former director of the federal Equal Employment Opportunity Commission and a longtime promoter of programs that favor minorities over males and whites.

Assigning Mr. Blumrosen to evaluate reverse discrimination was the equivalent of Judge Lance Ito dismissing the jury and replacing it with 12 people wearing T-shirts reading, "O.J, we still love you."

There are arguments to be made that reverse discrimination is necessary, especially in some highly limited instances. What is not debatable is that reverse discrimination is the inherent flip side of affirmative action. For every person given a position who would not have gotten it on individual merit, someone else who did merit it has been denied. Mr. Blumrosen himself says 12 million Americans have benefited from affirmative action. If so, that's the number of Americans who have suffered reverse discrimination: 12 million.

Black author James Baldwin once observed, "Not everything that is faced can be changed, but nothing can be changed until it is faced." Apparently that's just what Professor Blumrosen and the Labor Department are counting on.

Michael Fumento is an associate of the Competitive Enterprise Institute.

THE WALL STREET JOURNAL.

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The Long Road Up From Segregation

By JOSEPH N. BOYCE

A short memory can be a curse, especially when it comes to fashioning social policy. So it is with increasing alarm that I have watched the debate over whether to scale back affirmative action or eliminate it altogether, replacing it with a "colorblind" society. Short memories seem in abundance in this controversy.

I am of sufficient years and recall to remember how things were for blacks and why the country thought a program like affirmative action was needed. It was required to remedy the unfairness of another affirmative action policy—one that had been in place ever since we became a republic—that affirmed the supremacy of white males in government, commerce, education, even religion and the arts.

Some might argue persuasively that it was a system that nonetheless made us a great nation. But we will never know how much greater we would have been had not that system excluded the contributions in talent and ability of more than half our population on the bases of race and sex.

In the 1950s, when I was growing up in the Midwest, the landscape of opportunity for blacks, regardless of education and ability, was barren. Corporations would hire blacks as janitors and couriers but never as bank tellers, accountants, salesmen or other positions of stature and responsibility. Many young blacks were encouraged by their parents to limit their career aspirations to professions or businesses in which they served their own people or to jobs in government.

Blacks didn't need affirmative action to compete. They just needed to be allowed to play the game under the same rules as everyone else. My mother earned a master's degree from the University of Illinois in the late 1920s. Yet she recalled being treated differently, including by a professor who told her that, while she deserved an A on her paper, he'd given her a C, because "as everyone knows, colored students don't make As."

I remember an older cousin who had a Ph.D. in engineering who spent his life teaching in a black college, not because education was his chosen career, but because virtually all engineering firms were white and they didn't hire blacks as engineers. Such stories of rejection abound among black families: the graduate student in chemistry who gave up and worked all his life in the post office; the talented draftsman who despaired of ever becoming an architect and eventually dropped out of college.

In 1967, before affirmative action's spread, I became the first minority staff reporter in the then 120-year-old history of the daily Chicago Tribune. Prior to that time, the paper ran a column deep inside of social news in the black community. It was submitted by a free-lance black reporter who left his copy with a security guard seated outside the city room. The $100 the reporter received for each column was mailed to his home.

The original intent of affirmative action was and should continue to be to assure everyone, regardless of race or gender, the same access to education, jobs, housing and the other rights and benefits of citizenship. What seems to stick in the craw of opponents are those affirmative action programs that place race or gender above experience and performance in hiring, promotion and contracting decisions.

I agree that such arrangements should be eliminated or limited in time and scope to making up for past imbalances where discrimination existed. Programs that don't put merit first have convinced many whites and, unfortunately, even some blacks, that blacks cannot compete on a level playing field. The result has been the assumption—erroneous but comforting to some—that black achievement is due solely to affirmative action.

I have a son who graduated from Harvard and a daughter who graduated from Smith. Both were admitted as transfer students after finishing two years of community college. Some of my friends, both white and black, have simply assumed my kids were the beneficiaries of affirmative action. But it was their high grade-point averages, participation in student government and leadership abilities in community college that made them the equal of virtually any applicant to the Ivy League—not their skin color.

Now that they are in the work force, they want more than ever to be judged on the basis of their performance, not their race. That way, they know they'll have a better chance to move up. Despite the outcries of reverse discrimination, white males still hold 95% of the top corporate jobs, and, interestingly, are the ones with the final say on how affirmative action is developed and implemented.

Most black people I know favor a system based on performance. But those with memories longer than a gnat's believe that, despite our oft-stated intentions and resolutions, as a nation we are far from colorblind. They fear, regardless of assurances, that eliminating affirmative action is a regressive step, politically, socially and morally. And they doubt the loss will be compensated for by some miraculously emerging colorblindness that heretofore was nonexistent.

The realization should surface somewhere in this debate that the stakes are different today than they were 50 or even 25 years ago, when affirmative action became institutionalized. The U.S. is much more diverse today. It is hard and sometimes impossible for government and public institutions to accommodate each group's racial or cultural idiosyncrasies, despite the best democratic intentions.

That's neither the role of government nor of corporations. In a democracy, their mission is to develop policies designed to ensure equality of opportunity. In a true meritocracy, which the affirmative action naysayers claim to want, that would mean not only an end to quotas but to the kinds of subtle discrimination practiced by unions, corporate old boy networks and the "glass ceiling" that restricts upward mobility of people of color and women beyond a certain point, regardless of ability.

Achieving that kind of meritocracy would necessitate some regulatory sanctions, possibly limited in scope and term. But leaving the question of fairness to the free market, with the notion that some sort of colorblind society will suddenly emerge to redress the inequalities of racial discrimination and the less-than-perfect solution of present-day affirmative action is either naive or perfidious.

Let's stop lying to ourselves about ourselves. We have never, ever been a colorblind society. In fact, we too often have been preoccupied by issues of color and race to the detriment of our national character and democratic ideals.

Our country's racial past should have taught us many lessons by now. Let's not let selective amnesia cause us to repeat mistakes that will lead to a more divisive, regressive and, ultimately, weaker nation.

Mr. Boyce is a Journal senior editor.

The Washington Post

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Haitian Minors Seek Order to Enter U.S.

High Court Plea Affects 258 at Guantanamo

By Anne Day
Special to The Washington Post

MIAMI—Attorneys for the Haitian Refugee Center here have petitioned the Supreme Court to order admission to the United States for 258 Haitian children still being held in a camp at the U.S. naval base in Guantanamo Bay, Cuba, without their parents.

The petition alleges Attorney General Janet Reno discriminated against the Haitians by refusing them parole while extending it to 321 Cuban children at Guantanamo last October. A federal appeals court backed her decision, prompting the high court petition.

"The attorney general explained her parole of the [Cuban] children as freeing them from the 'extraordinary hardship' of life in the camps," said Ira Kurzban, the center's attorney. "The Haitian children are still living in those same conditions that she deemed too harsh for the Cubans."

The suit is designed to help children such as Dorcile Alexis, 16, whose father, Odelin, said he is waiting for her to come live with him in Florida. "She is the only family I have," said Alexis, who has a green card and works as an orange picker in Palm Beach. "She doesn't want to go back to Haiti. Her mother is dead. She is scared. She wants to come here, to live with me and go to school."

Administration officials, insisting they have no intention of keeping Haitian children from their parents, say the United States is working with the U.N. High Commission on Refugees in Guantanamo and the International Red Cross in Haiti to determine how best to resettle each child. "U.S. policy is not to keep unaccompanied Haitian minors at Guantanamo," said a Justice Department official who asked not to be named.

"The process has been very slow because of the difficulty of verifying whether a child has an able parent in Haiti to care for him," the official said. "Just because they say that they have nobody in Haiti doesn't necessarily make it so."

ATTORNEY GENERAL JANET RENO
. . . petition says she discriminated

Advocates for Haitians here charge that in several cases children who have parents in the United States have been sent back to Haiti to people who are not their parents. "Mistakes have been made," said Cheryl Little, an attorney with Florida Rural Legal Services, who said she knows of at least three such cases. "Many of these unaccompanied minors in Guantanamo have parents here in the United States who are willing and able to care for them."

To date U.S. officials say 42 unaccompanied Haitian minors have been repatriated to Haiti—19 in the latest load aboard a Coast Guard cutter last week. Another 24 reached the age of 18 while in camp and were sent back to Haiti as adults, and 19 have been paroled to the United States.

Little said her group has identified relatives in the United States, in some cases a parent, for almost all of the 258 children still in Guantanamo. She contends these relatives are able and willing to take the children. She said she has a list of more than 100 people who would sponsor the remaining children.

During the spring and summer of 1994 thousands of boat people poured out of Haiti, fleeing the military regime of Lt. Gen. Raoul Cedras. They were diverted to Guantanamo, where last September there were 21,638 Haitians. Following the U.S. military occupation and the restoration of President Jean-Bertrand Aristide's civilian government, nearly all of the adults and accompanied minors have been sent back to Haiti. Only 518 remain in the camps.

By contrast, some 500 Cuban refugees per week are being admitted to the United States through Miami, according to the U.S Catholic Conference. Among them have been 321 unaccompanied Cuban minors, including Lizbet Martinez, who played the "Star-Spangled Banner" on her violin for President Clinton when he visited Tallahassee last week. Clinton has invited her to perform at the White House.

The Haitian children, according to Little and other advocates, are not so lucky. Little's office has received dozens of calls from despondent children in Guantanamo and reports of suicide attempts by Haitian minors in the camp. No minors have killed themselves, and U.S. officials at the camps called the attempts "gestures."

"I don't know of any other group that is discriminated against by U.S. immigration policy as much as the Haitians," said Little.

An administration official said the difference in policies for Haitians and Cubans is due to Cuba's refusal to accept the refugees' return. "It

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Los Angeles Times

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Affirmative Action Gains Often Come at a High Cost

■ **Rights:** Preference policy helps foster better lives. But opportunity sometimes has been mixed with fear, doubt.

By SHERYL STOLBERG
TIMES STAFF WRITER

Jessie Sherrod began picking cotton in the fields of Mississippi when she was 8 years old, earning $1.60 for 12 hours of dirty, sweaty work. She didn't have much choice: Her father drove a school bus to avoid sharecropping, and with 11 children to feed, her parents needed the money.

When she wasn't farming, Sherrod was studying—at an all-black elementary school that calibrated its class schedule to the rhythms of the harvest.

Today, at 45, Sherrod is a Harvard-educated pediatrician with a sub-specialty in infectious disease and a masters in public health from UCLA. She wears a business suit and half-moon spectacles to work as an administrator at King Drew Medical Center in Los Angeles. But she still refers to herself as "a little black girl . . . a cotton picker from Mississippi."

AFFIRMATIVE ACTION
Fairness or Favoritism?
■ One in an occasional series

The force that helped lift this "little black girl" from the dusty cotton farms of the segregated South to the pristine laboratories of Harvard was a grand and controversial social experiment called affirmative action. This was a contract with America of a different sort, one that promised to reverse the damaging heritage of slavery and segregation through economic opportunity—and, eventually, equality—for all.

But in the eyes of Sherrod and others who have benefited from it, the experiment has fallen short of that initial promise. The contract, they found, had an escape clause.

As the nation engages in what President Clinton euphemistically calls a "national conversation" about race and gender preferences in education and hiring, critics are portraying affirmative action as a free ride for people like Sherrod. But the reality, beneficiaries say, is far more complicated.

That affirmative action has transformed lives is beyond question. But it has hardly delivered a no-questions-asked ticket to the good life. At best, Sherrod and others say, it has offered an economic and social opportunity that was alloyed with fear and uncertainty, defiance and resentment, sadness and even rage.

"This is not the golden age," declared an angry Daryl Michael Scott, who teaches black history at Columbia University. "This," he said acidly, "is a sad reparations program at best."

Scott once applied for an opening teaching American history at another university—only to be steered to a different job, teaching black history. Jaime Sanchez, a Latino computer programmer, says his company paid him to obtain management training but never made him a manager.

So too, Donald Clark, who broke the color line through affirmative action to become a fireman, has struggled against the most primitive of racial stereotypes. And Christopher Francis, a black architect who designs schools, has learned it is futile to seek commissions in white neighborhoods.

For these five, as for countless others, the question of whether affirmative action has gone too far has a bitter ring: How could something done so grudgingly, and evaded so cynically and so often, have possibly gone too far?

And why, as polls clearly indicate, are minorities—and in particular African Americans—shouldering the burden of the backlash against affirmative action when statistics show that white women are the major beneficiaries?

And what does the promise of affirmative action mean when, for many, it has offered the symbols of advancement but often not the substance: A title on the door, but not line authority. A vice presidency, perhaps, but only for minority affairs, not finance or production.

□

Sherrod began her career with neither the money, the connections nor the grades to get into the most prestigious medical school in the land. She scored 200 points lower on the MCAT—the standardized medical school admissions test—than the average white Harvard student. But she was given special preference because Harvard wanted to boost its enrollment of blacks.

Now, two decades later, she has all the trappings of success: a house in the Ladera Heights section of Los Angeles, a neighborhood of spectacular views that is home to many well-to-do black professionals; a job that comes with a private office and a secretary; a wardrobe of elegant clothes. Many days, she marvels at how far she has come in just one generation.

"I look back," she says, "at my mother's plight. She didn't have an education. She had all these kids to care for. So it's a great opportunity to have a career and to be able to take care of myself."

Yet Sherrod's gratitude is mingled with a darker truth. Every day of her life, she says, she must confront slights and indignities simply for being a black woman in a white man's world—racism that may be more subtle but no less painful than what she encountered in the South as a child.

There could be other factors at work here, wholly unrelated to race. But this is Sherrod's reality; she views the world through the prism of her skin color.

There was the time that a local hospital denied her privileges, concocting phony reasons, she suspects, so that a group of white doctors could keep their lock on the infectious disease business.

There was her experience with a medical society whose officials talked a good line about being committed to minority advancement and then brazenly urged a white woman to run against her when she sought a seat on the executive board.

And there are the disturbing stories she hears when she gets together with other black physicians—like her friends who got kicked out of a health maintenance organization they had joined.

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losing their patients to the white doctors who remained behind.

Now, there is what Sherrod sees as the final indignity: The effort by conservatives to undo the policy that got her where she is today.

"You can't make up for 400 years of slavery and mistreatment and unequal opportunities in 20 years," she says angrily. "We had to ride the school bus five miles to school and pass by a white school to get to our black elementary school. Our books were used books. Our instructors were not as good. We didn't have the proper equipment. How do you make up for that?"

□

Not everyone sees it this way, which is precisely why Clinton's "national conversation" is fast turning into a shouting match. Critics of affirmative action argue that the policy has more than made up for America's history of slavery and civil rights abuses, that it has gone too far the other way.

As Senate Majority Leader Bob Dole (R-Kan.) said in a television interview last month: "The people of America are now paying a price for things that were done before they were born."

Affirmative action has its roots in an executive order signed by President Lyndon B. Johnson in 1965, which simply barred federal contractors—including universities—from discriminating.

While initial programs were aimed at African Americans, affirmative action has since evolved into a broad effort by universities and employers to assure opportunities for women and minorities of all ethnic backgrounds. So sweeping has this social engineering program been that it is difficult for some people today—particularly those in their 20s and 30s—to tell whether affirmative action has benefited them directly or not.

"I've never felt that I've ever gotten anything because of my race," said one 30-year-old black lawyer who studied law at Harvard and went to college at Yale. "I've done it all on my own, with what I've brought to the table."

Nonetheless, he said: "But for affirmative action, there wouldn't be African Americans at Harvard and Yale. My father's a lawyer. He's a sole practitioner. He probably couldn't have even worked as a messenger at the firm where I work."

Yet if the goal of affirmative action was to throw open the doors of America's institutions to those who had not previously been privileged to walk through them, the reality—especially for African Americans—is that the doors have opened, but they have scarcely opened wide. And somehow, many of those who pass through do not quite find themselves inside.

The numbers tell part of the story.

In 1960, 4.4% of all doctors in the United States were black; the current figure is 3.7%, based on 1993 numbers, the most recent available. In 1960, 4.4% of college teachers were black; today it is 4.8%. Lawyers have made greater strides—from 1.3% in 1960 to 2.7% today—but considering that blacks make up 10% of the work force, the percentage is startlingly small.

"In certain fields, for example police departments, affirmative action has definitely worked," says political scientist Andrew Hacker, who wrote "Two Nations," a book about race relations in America. "But generally it has been in public employment—education, health welfare, that sort of thing. In the business world, very few blacks have real executive jobs. A number of them have show executive jobs, vice president for diversity or community relations. . . . Generally speaking, it's been tokenism."

The winners, if there have been any, have been women. And even there, the gains have been slim.

A recent survey found that while 4% of corporate executive vice presidents were women in 1982, the figure more than doubled to 9% by 1992. In the same period, the percentage of senior vice presidents who were women grew from 13% to 23%. By comparison, blacks at the vice president level or above accounted for 1% in 1982 and 2.3% a decade later. Latinos accounted for 1.3% and then 2%.

Those figures come from the Glass Ceiling Commission, a 20-member panel appointed by former President George Bush. It recently released a report concluding that while affirmative action has enabled minorities and women to enter the workplace, it has done little to help them advance once they got there.

It also is clear that affirmative action has not erased deep-rooted prejudices. It just may have reinforced them.

Fred Lynch is a sociologist at Claremont McKenna College and the author of one of the few studies on how white men feel about affirmative action. He says the policy has created dishonesty in the workplace, enabling managers to blame affirmative action for decisions made for other reasons.

"The old criteria may not have been perfect, but when you open the door to holding out opportunities to people on the basis of race and gender, it makes a mess of trust," Lynch says. "What affirmative action does is muddy the waters. It creates doubt and suspicion in everybody's mind."

What follows are the stories of four who, like Sherrod, have charted their own courses through these muddy waters. Their voices reveal sorrow, anger and frustration, as well as the fear that the doors that took so many years to open may soon be clanging shut.

The Engineer

Some days, Jaime Sanchez feels as though he is living the Glass Ceiling Commission's report.

The Latino engineer has spent the last 13 years working as a computer programmer for Hughes Aircraft—a job he got as part of the firm's effort to diversify its work force. Hughes even paid for him to obtain a masters degree in business administration from UCLA, presumably so that he could qualify for a management job.

He got the degree in 1986 and the raise that went with it. But the promotion never came. When Sanchez looks around, he cannot help but notice that he is not the only Latino engineer cooling his heels in line for a management slot. Something tells Sanchez that he has been pigeonholed—viewed by his superiors as a token, an affirmative action hire who is good enough to get in the door but not good enough to advance.

There is no one person he can blame, no single incident he can point to. But he suspects things might be different if there were more Latino managers at Hughes. He does not sound angry or resentful. He has simply accepted it, acknowledging that if he wants a better job, he will have to look someplace else.

"What bothers me," he says, "is that the automatic perception is that you were hired for that reason [race] and you are not qualified."

It also bothers him to work in an environment where people like him are tracked by the affirmative action bean counters, their hiring and promotion chalked up like points in some kind of game that nobody wants to admit to playing.

Were he to do it all over again, Sanchez says, he would never have listed himself as Latino on his job application. He doesn't want to be

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counted that way. He doesn't believe it has done him any good.

The Academic

In his book "Reflections of an Affirmative Action Baby," Yale law professor Stephen Carter explores the notion that affirmative action has stigmatized minorities by depriving them of the ability to say they have achieved success on merit alone.

This debate is the current rage among some black intellectuals. It is a thesis that Daryl Michael Scott, the Columbia University historian who declared affirmative action "a sad reparations program," would find downright laughable if he were not so disgusted by it.

"Somebody ought to give Stephen Carter a hug," he says sarcastically, "and tell him it's all going to be all right."

If anyone is an "affirmative action baby," it is Scott. He grew up poor, on the South Side of Chicago. Today, he teaches history at one of the nation's most prestigious universities.

"I've been hired in part because I'm black," the 36-year-old professor says, "and I've been denied jobs because I'm black."

He is referring to an incident two years ago, when he applied for a job at Ohio State University. The opening was to teach post-World War II history. But when he got to the interview, Scott was asked if he would consider teaching black history instead.

He refused.

"It was wrong, it was discriminatory, it was anti-black and indeed patently racist," he fumes.

"The fellow that they hired, I'm told, is a very good historian. But I guarantee you my book will be more important than his. . . . Some people say affirmative action marks you as inferior. . . . Hell, I'm not God's gift to historians, but I'm better than most of these folks who think I shouldn't have a job."

The Longshoreman

The first fire was the worst.

It was in 1972. Donald Clark was 30 years old, and one of the first black men to become a firefighter in Tacoma, Wash., under a plan that forced the integration of the department.

What would happen, he worried, when his life was on the line with only white people there to save him? The white guys didn't want to eat the same food he did. They didn't want to sleep in the same room with him. They didn't want to ride on the same truck. And in a job where "the buddy system" is your ticket to survival, nobody wanted to be Clark's buddy.

For that first fire, Clark was the hose man. His buddy was the nozzle man. If either let go, the other could have been killed.

"Once I got in that fire," Clark recalls, "it didn't matter. Fire burns blacks, whites. But what was really important was that you needed one another for your existence. He changed how he treated me after that because I was right there . . . with him in flames, and I stood by him."

Clark spent five years fighting fires in Tacoma. "In that five years, things made a big change," he says. "They found out that sleeping with a black, you wouldn't turn black, you wouldn't get no disease. They began to find out that a black was just another human being."

Clark eventually left the fire department for more lucrative—and equally dangerous—work as a longshoreman. Today, at 43, he is a heavy equipment driver at the Port of Los Angeles, where he is fighting to help blacks advance within his union, Local 13 of the International Longshoremen's and Warehousemen's Union.

The union local was forced to integrate in the late 1960s. Today, as a result of what Clark likes to call "the nudge from the judge," 13% of the members—including the foremen—are black.

But African Americans are noticeably absent from certain key positions; the local has never had a black officer, and currently has no black dispatchers.

"There was a time when they said blacks could never be anything here, that we could never drive any equipment," Clark says. "No, we have not arrived and we're not where we want to be. But thank God we're not where we used to be, either. Today, I have a boss and he's black. And he's letting me talk to you."

The Architect

Christopher Francis has learned the hard way that it doesn't pay to go after work in a white neighborhood if you are a black architect.

Francis, 36, makes his living designing schools. In 1991, with 13 years of experience and several design awards under his belt, he founded his own company. The idea was to cash in on so-called "minority business enterprise" programs, designed by the federal government and the state of California to encourage public agencies to hire firms owned by minorities and women.

"It hasn't worked," Francis declares. "And we don't see it ever working."

In the four years since he set out on his own, Francis has been commissioned for 12 major projects. Just two came through MBE programs, both from school districts with large African American populations. His wake-up call, he says, came in 1993, when he bid on a job in Orange County.

The officials of this district—he declines to name it—told him that the job would likely go to one of his local white competitors, since that firm "was due" for an assignment. Francis wouldn't give up. He hooked up with one of the best-known school design firms in the nation and submitted a bid.

But he didn't even get called for an interview. The local competitor got the job.

"There's a notion out there that everything is fine, that there's parity," Francis says. "Nothing could be further from the truth."

Times researcher D'Jamila Salem in Washington contributed to this story.

The New York Times

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PAGE: A20

Class Notes

Peter Applebome

California mother's lawsuit puts a personal spin on the debate over affirmative action.

"My name is Janice Camarena," begins the statement given by the 25-year-old woman from Crestline, Calif. "I'm a student at San Bernardino Valley College. Getting an education is especially important for me. I'm a widowed mother of three young children who will depend upon me for food, support and shelter for many years to come."

What followed that arresting introduction, made at a news conference in California, was an accusation in the form of a lawsuit that Ms. Camarena became a victim of racial discrimination when she was not allowed to take an English course at her junior college because she is white and the course was reserved for black students.

The lawsuit, filed by the Pacific Legal Foundation, a conservative public law organization, has struck many educators as a measure of the hysteria surrounding affirmative action programs, so heated that even the most innocuous race-based programs are now under assault. It was unveiled at a news conference by California conservatives seeking to end affirmative action.

The program Ms. Camarena is challenging, which is geared to helping black and Hispanic students get into four-year colleges, had existed for 20 years in a conservative Southern California community without any controversy, and college officials say her suit is totally off base.

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Ms. Camarena's story would be easy to dismiss entirely if it came more from her politics than from her heart. But she says that when she looks at her children — two whose father is white and one whose father was Mexican-American — she is looking at complications that can put race-based programs on shaky ground. Her late husband was the Mexican-American, which means the child she had with him could participate in the program, but the two children she had with the other man could not.

Ms. Camarena's story began on Jan. 19, 1994, when she attended the first session of an English 101 class. Of about 34 sections of basic English, the class was the one that best fit her schedule. She had not registered for the course, which requires an instructor's signature for enrollment, but she figured she could attend and enroll during the university's drop-add period.

As it turned out, the section in question was designated as part of what is called the Black Bridge Project, a single section of English 101 designed for black students who are having academic problems but want to go on to a four-year college. As with a similar program for Hispanic students called the Puente program, the idea is to provide mentors and readings geared toward minority students as a bridge to a general curriculum. It is the only such program tailored for minority students, and there are other programs for any student needing extra help.

Still, Ms. Camarena resented being advised that she should find another English section (she later did), and after conferring with teachers and advisers, a year later she filed suit.

What bothered her most was that she thought the course's premise rang false. She said there were black students in the Bridge program from more advantaged backgrounds than her own, including one whose parents were doctors. Indeed, her status as a widow with three children made her wonder who was disadvantaged in the class and who was not. Although she is not seeking compensation for damages, she is seeking to block the program from admitting people on the basis of race.

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Her lawyer might just be trying to score debating points when he cites the famous dream of the Rev. Dr. Martin Luther King Jr. that one day people would be judged by the content of their character, not the color of their skin. But Ms. Camarena says she had only to think of her own children to feel that her college was not living up to his words.

"It's hard for me to accept that on the one hand I try to teach my daughters that God created them equal and they should be judged on their merits, and then it turns out they can't even attend the same college class together," she said.

But the college contends that no one is saying that. Over the years, officials there say, some nonminority students have been placed in the Bridge or Puente classes, and they suggest that late registration may have been a reason she was steered away from the class.

What is more, they say, the issue is not about resegregation, as her lawyers contend, but about a limited program that has been proved to work educationally. Officials say 66 percent of the students in the Puente program go on to four-year colleges and universities, compared with 7 percent of non-Puente Hispanic students. They say the two courses are tiny concessions worth making to redress social ills built up over decades.

"This suit is conveniently timed, and it makes for great press, but I don't think it's going to make great justice," said Dr. Stuart Bundy, chancellor of the San Bernardino Community College District.

Still, when Ms. Camarena looks at her children she sees a germ of truth that brought her to court. And a germ of truth is often all it takes to generate passions for a long time when the subject is race.

The Washington Times
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PAGE: A-23

Review panel with affirmative accents

ERIC BREINDEL

President Clinton is in a quandary about affirmative action. The activist core of the Democratic Party remains passionately attached to racial preferences. Meanwhile, most folks believe that any failure to judge people as individuals — in accordance with merit-based criteria — is inconsistent with the American way.

An unmistakable unwillingness to continue a regime — created without any input from the electorate — in which race and gender give rise to special preferences has come to inform national political discourse. The president is a political pragmatist. As a result, even without grasping the unfairness inherent in giving group "claims" primacy over individual rights, he sees affirmative action isn't an issue that's going to disappear.

Thus, Mr. Clinton has decided to order a review of federal affirmative-action regulations. As always, he apparently means to try to please everyone. Indeed, he's promising a "national conversation" on affirmative action. But, for evidence of the fact Mr. Clinton just doesn't get it on issues related to race, we need only look to see whom he's asked to take part in the "review." Participation — it seems — is limited to affirmative-action proponents.

True, no complete list has been published, and most of the ostensible reassessment work will likely be carried out by pro-affirmative-action White House aides. But the few names that have surfaced tell us a great deal.

Mr. Clinton is taking counsel from the Rev. Theodore Hesburgh, president-emeritus of Notre Dame University, where affirmative action is a way of life; from Elliot Richardson, a liberal Republican who served as U.S. attorney general when many of the programs now in place were initiated; and from Mary Frances Berry, who heads the U.S. Civil Rights Commission under Mr. Clinton (more on Miss Berry later).

The president, it should be noted, has also been meeting with prominent black politicians, including the Rev. Jesse Jackson and California Assembly Speaker Willie Brown — both of whom oppose any "retreat" from reverse discrimination.

Critics of affirmative action, let alone actual foes, have not been invited to take part in the "conversation."

Professor Thomas Sowell of Stanford University's Hoover Institution hasn't been asked to present his argument that affirmative action demeans blacks — like Mr. Sowell — by creating the illusion that they can't succeed in colorblind competition. Harvard Professor Nathan Glazer, an early and prophetic critic, is likewise nowhere to be seen among the consultants.

There's no reason for surprise here. After all, in choosing the Justice Department's top civil-rights officer, Mr. Clinton went first for Lani Guinier — a champion of both quotas and proportional, race-based political representation. When it became clear that Miss Guinier's radical sensibility would render her confirmation a political impossibility, Mr. Clinton replaced her with Deval Patrick, a Harvard-trained lawyer whose views are roughly identical.

Mr. Patrick, wisely, had left no paper trail that might have undermined his confirmation prospects.

Scarcely noticed, meanwhile, was the appointment of Mary Frances Berry. Yet it's arguable that an administration inclined to appoint this particular woman to head the U.S. Civil Rights Commission has already told us everything we need to know in this realm.

Mary Berry is a genuinely special case. An assistant secretary in the Carter administration's Department of Health, Education and Welfare — as well as a member of the commission she now heads —she and John Blassingame published a book called "Long Memory: The Black Experience in America" in 1982.

At one point in this magnum opus, Miss Berry and Mr. Blassingame comment on Great Society efforts to promote family planning among inner-city blacks during the Johnson years: "Although most historians have dismissed the claims of Afro-Americans that the United States had inaugurated a campaign of genocide against black people ... as unfounded [and] hysterical, the threat of genocide was real."

How real?

"It was roughly comparable to the threat faced by Jews during the 1930s," Miss Berry and Mr. Blassingame report.

Having thus established their credentials as serious historians, the authors go on to grapple with another issue that genuinely perplexes them: Why, they wonder, didn't more American blacks recognize the extraordinary promise of communism and the Soviet Union? In their view, blacks were "subjected to a massive barrage of propaganda from American news media ... [so that] few of them knew about Russia's constitutional safeguards for minorities, the extent of equal opportunity or the equal provision of social services to its citizens."

Don't count Mary Berry among the ignorant. She understood that the Soviet Union was a bastion of "constitutional safeguards." And while the Soviet state is dead, there's no evidence that Miss Berry is ill-disposed towards importing its "equal opportunity" guarantees here.

There's likewise no evidence that Mr. Clinton regrets appointing her to head the U.S. Civil Rights Commission. As for the "review" in which she's meant to take part, the New York Times has just published a front-page story headlined: "Broad Group Visits President on Affirmative Action's Future." Some in the "broad group" reportedly urged Mr. Clinton to keep in place all preference programs focused on blacks, others advanced a special plea for programs that benefit women, and many, it seems, simply urged the president to stand his ground and retain the entire affirmative-action regime.

Members of this "broad group" were asked not to comment on the session. Mary Berry hasn't broken the rules. But it's a safe bet she was part of the third faction.

Eric Breindel, editorial editor for the New York Post, is a nationally syndicated columnist.

THE WALL STREET JOURNAL.

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Justice Agency Enters Arkansas to Sue In Stephens Family Newspaper Case

By ANDREA GERLIN
Staff Reporter of THE WALL STREET JOURNAL

In an unusual move, the Justice Department sued two companies controlled by Arkansas's powerful Stephens family, alleging that their recent acquisition of a tiny newspaper in the state violates antitrust laws.

The suit, filed in federal court in Fayetteville, Ark., alleges that the Stephens companies' purchase in February of the Northwest Arkansas Times (circulation: 13,000) will lessen competition and unreasonably restrain the newspaper business in the Ozarks. One Stephens company owns another paper in the area, the Morning News of Northwest Arkansas, with circulation of about 29,000.

The suit is the latest move in an odd battle among some of Arkansas's biggest powerbrokers for control of the media in a rural area best known for towns like Fayetteville, Rogers and Springdale.

Son of Sam Walton

On one side is the Stephens family, which owns an investment and commercial banking empire. Jackson Stephens, chairman of the media companies, has been a large financial supporter of President Bill Clinton. Challenging the sale is Community Publishers Inc., a company controlled by James C. Walton, a billionaire son of Wal-Mart Stores Inc. founder Sam Walton. His company publishes the rival Benton County Daily Record (circulation: 7,800) in Wal-Mart's home of Bentonville. He, too, has a Clinton connection: Hillary Clinton is a former Wal-Mart director.

Why the government chose to intercede in a case involving a newspaper with a smaller readership than many student-run college papers isn't entirely clear. The Justice Department hasn't intervened in such a case since it successfully blocked the Orlando Sentinel in Florida from acquiring a small weekly in the early 1980s.

A Justice Department spokesman said the action is meant to protect the "vigorous competition" that currently exists and to keep citizens of Fayetteville and Springdale from paying higher prices for their papers and for advertising.

Suit Includes Thomson Newspapers

But Washington antitrust lawyer Garret Rasmussen of the law firm Patton Boggs says such intervention is unusual in communities like Fayetteville, which are so small that they shouldn't be expected to support more than one newspaper. In addition to the Times, the Morning News and the Daily Record, the Arkansas Democrat-Gazette of Little Rock circulates in the area.

Community Publishers last month sued the Stephens companies, Donrey Media Group and NAT L.C., charging that the purchase gave the Stephens companies about 75% of the local newspaper market of 60,000 actual subscribers. Community Publishers, which also sued the seller Thomson Newspapers Inc., claimed the agreement was reached before it could bid.

In seeking to buy the paper, Community Publishers had joined Walter E. Hussman, whose media company publishes Little Rock's newspaper. A few years ago, his Arkansas Democrat trounced the competing Arkansas Gazette; he ultimately bought the Gazette from Gannett Co. and combined it with his own paper.

Jerry C. Jones of Little Rock, a lawyer with the Rose Law Firm who represents one of the Stephens companies, said that Community Publishers and Mr. Walton "solicited" the Justice Department and appear to be using antitrust laws as a smokescreen to gain control of the Times. "I don't think it has anything in the world to do with antitrust issues," he said. "It's about who can own the paper." Mr. Jones said his clients believe the court will find they did nothing wrong.

Community Publishers' president, Steve Trolinger, issued a brief statement noting that the Justice Department "reached the same conclusion that we did" about the acquisition. "The Justice Department's lawsuit is to protect newspaper competition in northwest Arkansas, and that is the object of our suit, too," the statement said.

The Justice Department, which is asking the court to force the new owners to sell the Times within two months, has asked that its suit be combined with that of Community Publishers.

Community Publisher's suit is scheduled to go to trial on Monday, although the defendants have asked U.S. District Judge Franklin Waters to postpone it to allow them to prepare for the government's suit. The judge is expected to consider their request at a hearing today.

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THE NEW YORK
DAILY NEWS

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A case of black and white

FIRING A QUALIFIED WORKER BASED ON RACE is a perfectly legal and appropriate course of action when an employer is forced to slash its payroll. So says the Clinton administration Justice Department in a stunningly wrong-headed New Jersey civil rights case that tramples on fairness in pursuit of diversity.

The case involves the Piscataway school board, which, facing a financial crunch in 1989, decided to lay off one teacher in its high school business education department. The choice came down to two staffers deemed equal in every way — they had even been hired on the same day — except for one difference: Sharon Taxman is white and Debra Williams is black. For that reason alone, Taxman got the ax. She sued and Clinton's Justice Department has now sided against her.

The word "now" is important in that sentence because for several years the department's Civil Rights Division had supported Taxman's court battle, helping her even to win back pay and interest last January. The school board, though, is appealing and, in an unprecedented move, the division has suddenly taken its side. What changed?

Nothing, except that in the wake of the Lani Guinier fiasco, the division was taken over by civil rights lawyer Deval Patrick, who has chosen to make this his first high-profile case. And chosen badly, boding ill for his tenure.

It should be plain that what happened to Taxman was unfair. The Bush administration Justice Department thought so and filed suit for her, alleging a violation of the 1964 Civil Rights Act. When President Clinton came into office the department continued to press the matter. Since the facts were undisputed — including that the school board had no past discrimination to make up for and had an excellent minority hiring record — there was no trial. A federal judge ruled in Taxman's favor, saying that the board should have followed its previous practice, which called for deciding who was let go by lot.

Patrick, though, threw the case into an uproar by asking court permission to switch sides. He has since backpedaled, dropping his bid to represent the board — perhaps recognizing that the department couldn't ethically battle its own former client. Still, he has filed a brief on the board's behalf. And his thinking is astounding. Instead of supporting the fair, color-blind way of resolving which teacher to let go, he argues that if the aim is to preserve diversity it's okay to do real harm to someone solely because of the color of her skin. Which is a perverse way of viewing what the civil rights movement was all about.

The New York Times

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In Peril: Black Lawmakers

By Elaine R. Jones

The Ku Klux Klan has long been the tip of an iceberg in American society: the racial views it expresses so brazenly are shared quietly by many others. Thus it should have been cause for notice and alarm last month when the former imperial wizard David Duke voiced delight that a Federal court had redrawn the Congressional district lines in Louisiana.

Some of his glee reflected personal political ambition. The Federal court order abolished a black-majority district, virtually guaranteeing the defeat of the black incumbent, and replaced it with a new white-majority district that Mr. Duke described as "tailor-made" for him. His approval of the court's plan was undoubtedly based on the fact that, in his 1990 race for the U.S. Senate, he had carried 15 of the 20 parishes making up the new district.

But Mr. Duke's comments reflect a more fundamental recognition — that the Louisiana decision, and a similar decision last month by a Federal court in Texas, provide a potent basis for rolling back much of the civil rights progress of the last 40 years.

During the Reconstruction era, after the Civil War, a substantial number of blacks were elected to Congress from the South; by 1901 they had all been removed. No new black representative was elected from any of the former Confederate states until 1973, and until last year most Southern Congressional delegations were all white.

The practical question at issue in the Louisiana and Texas decisions, and in similar cases in Georgia, North Carolina and Florida, is whether the Constitution should be construed to forbid the creation of black-majority districts. To the extent that the courts conclude that the Constitution prohibits the creation of such districts, it would, in the South at least, virtually preclude the election of blacks to public office.

The importance of these cases is demonstrated by a single fact. In 1990 there were 12 million blacks living in 113 white-majority Congressional districts in the 11 states of the old Confederacy, yet every single representative elected from these districts was white. Even today, the only Southern Congressional districts represented by African-Americans are districts with a black majority. Elimination of black-majority districts in these 11 states would purge blacks from Southern Congressional delegations as effectively as Plessy v. Ferguson, the Supreme Court's 1896 "separate but equal" ruling, excluded blacks from Southern railroad cars.

The result in the rest of the nation would be only slightly less dramatic. Of the 22 black members of the House from outside the South, only three were elected from white-majority districts.

The racial composition of these districts has a substantial, at times decisive, impact in Congress. In August, white members of the House voted against banning assault weapons by a margin of 212 to 180; Southern whites voted against the ban 89 to 49. The prohibition passed the House only because 36 of 38 black representatives voted for it. Last year, a majority of whites, and a majority of white Southerners in the House, voted against passage of the Federal budget; the budget passed, 219 to 213, thanks only to the votes of all 17 Southern black representatives.

The Louisiana decision holds that the existence of a black-majority district could well be found unconstitutional unless that result was inadvertent. But there is not a black-majority district in the nation whose composition was an unintended consequence, just as there are no coincidentally Democratic or Republican districts. Race, like party, has a decisive effect on the outcome of elections, and is always considered when district lines are drawn.

General application of the startling decisions in the Texas and Louisiana cases would eliminate most black-majority Congressional districts, and most black representatives, from the South. Many districts and black representatives outside the South would not survive. Unlike the 19th-century purge of blacks from Congress, which took place over decades, the wholesale removal of racial minorities from Congress under these decisions could be achieved in a single election.

It is easy to understand why David Duke would rejoice at a return to all-white Congressional delegations. But surely that is not a result most Americans would welcome. It certainly is not what the Supreme Court intended in its 1993 decision Shaw v. Reno, which precipitated the Louisiana and Texas litigation.

The Shaw decision, unlike the Louisiana and Texas cases, carefully refused to hold that the deliberate creation of a black-majority district was actionable, narrowly recognizing a Constitutional question only in the case of those rare districts that were especially bizarre.

The Louisiana and Texas decisions, by contrast, fashion an arsenal of weapons for eradicating black-majority districts. Districts that are, say, 55 percent black are labeled "segregated," while districts with a white majority of 55 or even 75 percent are regarded as integrated. In this Orwellian view, "segregated" is now a euphemism for "black majority," while "integrated" means "white majority." One judge referred to the North Carolina district plan, which for the first time in over 90 years included blacks in the state's Congressional delegation, as a return to "separate but equal."

Court decisions only David Duke could love.

According to these decisions, a state cannot enact a black-majority district merely because it believes in good faith that the Voting Rights Act requires that result, or in compliance with a Justice Department determination under the act. Rather, they hold, the equal protection clause of the 14th Amendment effectively requires states to *challenge* that determination rather than obey it. Resistance to Federal law, once considered a Constitutional infraction, has become a Constitutional imperative.

Several of these cases are already on appeal to the Supreme Court, which will certainly decide one or more of them in the term beginning in October. The Court's decision will quite literally affect the complexion of American politics for generations to come.

(cont.)

At the end of the Civil War, the nation enacted the 14th and 15th Amendments to give blacks an equal opportunity to elect candidates of their choice. The Texas and Louisiana decisions pervert these amendments into a Constitutional guarantee of an electoral system that will enable whites to prevent the election of black officials. Fortunately, last month the Supreme Court stayed the Louisiana decision. It should go further and make clear that while David Duke may regard black-majority districts as suspect, the Constitution does not. □

Elaine R. Jones is director-counsel of the NAACP Legal Defense and Educational Fund.

The Washington Times

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PAGE: A 16

Racial spoils system disguised as justice

MONA CHAREN

We have all heard distinguished members of the press lamenting the advent of the so-called "new media" — talk radio and such — and warning, as Newsweek's Jonathan Alter did last week on C-SPAN, that information gleaned from the new media is not nearly as accurate as that provided by the old.

Well, maybe some of the talk-radio meisters out there are a little slipshod with facts, but so are the major, mainstream, old media — in spades.

Look at the reporting last week on the World Population Conference in Cairo. Most of the major media in America reported the following story: The world's population is exploding. This represents an unprecedented threat to the planet. The solution is birth control and abortion, but the darn pope and those fundamentalist Muslims are getting in the way.

Is that what Jonathan Alter thinks is reliable reporting? I call that ideologically astigmatic reporting. The real story, covered in U.S.News & World Report and on the Wall Street Journal editorial page, is that (a) increases in population do not necessarily betoken disaster — the world's population has increased dramatically in the past 30 years, but so has the world's standard of living; (b) food production has more than kept pace with expanding population; (c) population growth tends to slow following economic development, not the other way around; and (d) efforts to control population growth through voluntary use of contraceptives have not been successful where they have been tried.

Maybe Rush Limbaugh gets some of the small things wrong, but he gets the big picture right. The same cannot be said of ABC or the New York Times.

Another example? Almost all reporting on questions of "civil rights" presupposes that virtue and truth are on the side of plaintiffs or alleged victims of discrimination. But a recent case in which the Clinton Justice Department has interested itself points to something else entirely — a racial spoils system.

Chevy Chase Bank does not have branches in the majority-black neighborhoods of Central D.C., and for that, it is being punished by the full power of the federal government.

Janet Reno's Justice Department has obtained a consent decree from Chevy Chase requiring the bank to advertise on black-owned radio stations and buy advertising in black-owned newspapers. Further, the bank is required to open at least one new branch in Anacostia, hire more blacks and adjust its lending practices to ensure that blacks get proportionately as many loans as whites. Miss Reno had the gall to suggest this was an overlooked business opportunity for Chevy Chase.

Why didn't the bank fight back? Because as Jonathan R. Macey, a law professor at Cornell, points out in the Wall Street Journal, the government has enormous leverage over banks, regulating whether they can expand, merge or close branches. Banks are, in a sense, the caged animals of the political class.

The notion that lenders are intentionally withholding loans from black people — popularized by a Federal Reserve Bank of Boston survey in the late 1980s — has been debunked.

There is no evidence that banks in general or Chevy Chase in particular have discriminated against qualified black loan applicants. But the Clinton administration is using the pretense of rectifying discrimination to force Chevy Chase to hire by quota, open a branch in a neighborhood that is neither safe nor profitable and give a windfall to black-owned newspapers and radio stations.

That's what is happening, but you will not see a story in the mainstream press saying "New Democrats Betray Promise to Be Anti-Quota." For that, you just might have to tune in to Rush Limbaugh.

Mona Charen is a nationally syndicated columnist.

AFFIRMATIVE ACTION

THE EDUCATION OF DEVAL PATRICK

Justice's civil-rights chief is drawing fire from the Right

Deval L. Patrick didn't see it coming. In one of his first major moves as chief of the Justice Dept.'s Civil Rights Div., Patrick forced Chevy Chase Federal Savings Bank this summer to spend $11 million to open up branches and offer low-interest loans in black neighborhoods it had refused to service. Bankers were outraged because the thrift hadn't discriminated against any loan applicants. They denounced the case as extremist and complained that Justice was overstepping the law. "Patrick was surprised by our strong reaction," says industry official Kenneth A. Guenther.

To assuage his critics, the Civil Rights chief invited 10 top bankers to discuss the controversial case. A rare droll moment in the 2½-hour meeting in mid-October came when a squeaky cart rolled by the meeting room. One of the executives joked that it was the body of another banker going by.

TREADING LIGHTLY. So goes the painful political education of Deval Patrick. And the 38-year-old former corporate lawyer is likely to face a lot more rough spots in the months ahead. At his post barely eight months, Patrick must delicately implement a civil-rights agenda without making the already vulnerable Clinton Administration look like it's bending over backwards for minorities. Upcoming issues are potentially explosive, such as one challenging college scholarships reserved for minorities (table). "Anything that can smack of quotas could get Patrick caught up in a tempest," notes John P. Relman, a public-interest civil-rights lawyer in Washington.

Patrick knows he has to tread lightly. But he's optimistic that civil rights can flourish, particularly in areas such as voting rights, lending discrimination, and bias against the disabled. "We view ourselves as a law-enforcement office, not a law-reform office," Patrick says. After the conservative sweep in November, Patrick sent his staff an inspirational E-mail message telling them not to despair. But some aides are worried. "[The Administration] doesn't want us to do anything that will turn into a bumper sticker in 1996," grumbles one Justice lawyer.

The political climate is so dicey that a watchdog of sorts is overseeing Patrick's office. Since this fall, Deputy White House Counsel Joel I. Klein has been reviewing significant affirmative-action cases now before the government. He says the Administration is trying to work out "a consistent, coherent view" of affirmative action that could distance the President from the dangerous "quota" label. Some controversial cases may reach the Supreme Court during the 1996 Presidential election campaign. "The line between quotas and forms of legitimate actions can be thin," says White House Counsel Abner J. Mikva. "It's important that they be separated out." Patrick declines comment on Klein's new watchdog role.

PATRICK: *"Being a lightning rod takes getting used to"*

The Civil Rights chief is certainly viewed more moderately than Clinton's first choice for the civil-rights post, University of Pennsylvania law professor Lani Guinier. Her nomination in 1993 was dropped after conservatives labeled her a "quota queen" for her academic writings. With Patrick, who was sworn in in April, the Clintonites got a clean-cut, moderate-sounding Boston corporate lawyer with a compelling life story. He grew up poor on Chicago's South Side after his saxophone-player father ran off to join jazz musician Sun Ra when Patrick was just 4 years old. He went to the prestigious Milton Academy on scholarship and then to Harvard College and Law School. He worked a short stint as a civil-rights advocate at the NAACP Legal Defense & Educational Fund before joining Boston law firm Hill & Barlow.

"OUTRAGEOUS." But nothing in his background prepared him for the Washington limelight. GOP lawmakers already are calling for hearings on several of Patrick's decisions. Some of his moves "appear to be outrageous," railed incoming Senate Judiciary Committee Chairman Orrin G. Hatch (R-Utah) in a recent TV interview.

Exhibit No. 1 for conservatives is Patrick's friend-of-the-court brief filed in an affirmative-action case at the U. S. Court of Appeals

HOT AFFIRMATIVE-ACTION CASES

MINORITY CONTRACTS The U.S. Supreme Court is taking up the case of white-owned Adarand Constructors. Adarand contends that a federal program encouraging contractors to subcontract to minority-owned companies is unconstitutional.

HIRING AND FIRING A district court ruled that the Piscataway (N.J.) education board acted inappropriately in 1989 when it laid off an equally qualified white teacher instead of an African American teacher. The Clinton Administration supports the board's action. An appeal will be heard in January.

RACE-BASED SCHOLARSHIPS The Fourth Circuit Court of Appeals ruled in favor of a white Hispanic student who was denied a scholarship for African Americans at the University of Maryland. The school is seeking a rehearing.

HERINE LAMBERT

Employers 'test driving' applicants as temp workers

'Temp-to-perm' arrangements gaining

By Kim Clark
Sun Staff Writer

For Doris Finch, hiring a permanent worker based on a standard interview is like buying a car on a salesman's pitch.

Consequently, the human resources manager of Columbia-based Martek Biosciences Corp. no longer offers permanent jobs to most new laboratory technicians or scientists without a test drive.

She "rents" new employees from a temporary services agency for several months before deciding whether to take them on permanently.

If a potential hire doesn't work out, she doesn't have to fire him or her, then worry about a lawsuit. She tells the person the temporary job is over, and gets another applicant from the temporary agency. "It is the thing to do," she said.

A growing number of managers apparently agree.

At the Baltimore offices of Snelling & Snelling Inc., for example, only one in 12 temporary openings offered the prospect of permanent employment in 1991. Today, nearly half the jobs listed at the local offices hold out that promise, according to Linda Kaestner, managing director for the Baltimore area's Snelling offices.

While there are indications some employers are using temp-to-perm arrangements in an effort to get around anti-discrimination laws, many employers say they're simply reducing the hassle of hiring.

Many small companies are using the temporary try-outs so that they don't have to hire their own recruiters and personnel managers. Others feel burned by applicants who dazzled them during interviews but fizzled on the job, Ms. Kaestner said.

"Employers don't have time to waste" with hiring mistakes, she said.

Even the hiring experts are turning to "rent-to-own."

Susan Meisinger, vice president of the Society of Human Resource Managers (SHRM), said the Virginia-based trade association of personnel managers filled about 20 percent of its own openings this year through temp-to-perm arrangements.

See TRYOUT, 3E

The reason: The growing complexity of regulations preventing discrimination on the basis of race, age, gender, disability or the like has made it very confusing for those who are supposed to interview job applicants.

SHRM sends out warnings to its members that, for example, interviewers may open themselves to lawsuits if they ask seemingly innocuous questions such as "How old are you?" or "Do you have any children?"

And it is hard to verify an applicant's claims because most large employers won't provide references any more for fear of slander suits.

Interview process

"The interview process is a land mine" field, she said.

"It's a lot easier" to let a temporary agency screen out the hundreds of resumes and send an applicant in for a probationary period, she said.

For many job seekers, the boom in temp-to-perm jobs is just fine.

Craig Creamer, controller of Partners Management, a Baltimore-based real estate company, got his permanent job after a stint as a temporary accountant.

"I was working for a bank and my job was eliminated. I didn't know what was going to happen, so I temped just to keep my hands in the business and get some money coming in," he recalled.

He didn't mind having to prove himself all over again, he said.

Not everyone is confident that the trend is a good one though.

Dora McCray, laid off by Citibank this summer, signed up with temporary agencies even though she fears that employers may let factors other than job performance decide who gets coveted permanent jobs.

She said she knows of fellow temporaries who have done good jobs, but were denied permanent positions.

'Sense of bias'

"There can be a sense of bias," she said.

But she's going for temporary jobs, because that's all she can find.

"I've sent out 60 or 70 resumes and had six interviews in the last six months," she said. "I just don't seem to be getting connections. . . . [Temping] might help me get inside" a company.

"It's a crazy job market right now. Four years after graduating from college I've been laid off twice."

Having to settle for temporary work only adds to her anxiety, she said.

"Here I am, 30 years old, and things should be looking up for me. I should be taking the world by storm. But now I'm worried: Am I going to find a job?"

Some experts worry her fears may be well-founded.

Lynn Jenkins, counsel and policy analyst for the Washington-based National Commission on Employment Policy, said some employers may be using temporary work arrangements "to get around regulations" protecting workplace fairness for permanent employees.

Courts have allowed, for example, employers to fire temporaries for trying to unionize a workplace — even though permanent workers may not be fired for similar organizing activities, she said.

And other courts have indicated that some kinds of temporary workers may not be protected by laws banning sexual harassment.

'Two-tier work force'

"You are creating a two-tier work force, a core work force with rights and privileges, and then a second tier" of workers who can be mistreated or even fired unfairly, she said.

At Martek, though, Ms. Finch insists that the trend is simply a way for managers to cut down on hiring hassles and costs, as well as ensure that all new hires are hard workers.

When she hired on her own, Ms. Finch would place a help wanted ad, then would get swamped with 300 resumes and would ask all the top scientists at the company to help sift through them and interview the finalists.

Now, she just phones an agency, "and they send somebody over who already knows chromatography," for example, she said.

Working hard

Martek, which has seen its staff more than double to 73 since 1991, has offered permanent jobs to almost all the temps it has tried out because they have worked hard.

The temp managers have told the applicant: " 'You do not have this job, you are going to have to earn it,' " and they tend to keep working hard even after they get the permanent job, Ms. Finch said.

"Once they've worked hard for three months, the ethic is there."

in Philadelphia. Patrick reversed the Bush Administration's position in support of a white teacher who was fired by the Piscataway (N.J.) school board in favor of a black teacher who had the same seniority and qualifications. Patrick argued that employers should be free to use affirmative-action goals to determine which of two equal candidates to terminate. Otherwise, private employers could be prevented from voluntarily integrating their workforces. "Piscataway is not a quota case," says Patrick.

But the decision has set off a furor on the right. "It suggests this Administration is back to playing the numbers game in civil rights," charges Clint Bolick, vice-president of the conservative Institute for Justice. If the charge sticks, Patrick's moves could give conservatives more ammunition. According to a poll last spring by the National Opinion Research Center, 54% of Americans are against special treatment for minorities, while only 16% are clearly for it. Even though Clinton and Patrick both oppose quotas, the Republicans are still likely to try to score points on the issue.

BRAVE FACE. There already are signs that the Administration is getting more cautious. Two days after the election, it declined to support the University of Maryland's scholarship program for black students. The university wants a rehearing of an appellate court decision that ruled the program unconstitutional. Initially, the Education Dept. recommended siding with the university, says a Justice attorney. But the Administration hasn't backed up the university's request for a rehearing—a move that school advocates contend is aimed at pleasing middle-class voters. "If there was a decision not to pursue the case, it was a political one," says Janell M. Byrd, a lawyer for the NAACP Legal Defense & Educational Fund. Patrick declines comment on the case.

Despite Patrick's brave public face, friends say that he was stung by the fallout from the Piscataway case. But they insist that he can withstand the shifting political currents. Days after the election, Patrick called Hatch and joked that he had barely had time to congratulate the senator on his new committee chairmanship before the attacks against him began. Still, Patrick is keenly aware that he's in a hot spot. "Being a lightning rod takes getting used to," he concedes. "If I walked on water, certain of my critics would still say that Patrick can't swim." If he wants to avoid sinking, Patrick will have to keep not only the law but also politics foremost in his mind.

By Catherine Yang in Washington

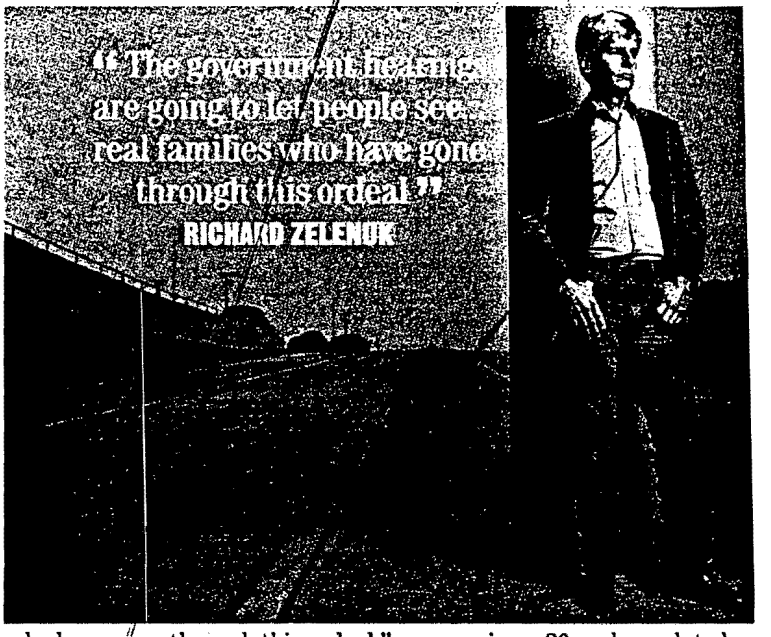
Legal Affairs

COMMENTAR

By Kathleen Kerv

GM PICKUPS: THE ISSUE IS SAF

Richard W. Zelenuk wants to tell the world how, in 1989, his father burned to death inside a Chevrolet Silverado. He will receive his chance on Dec. 6, as will other victims of an alleged defect in certain General Motors Corp. pickup trucks. That's when the Transportation Dept. begins public hearings into whether the company ought to be forced to recall up to 6 million 1973-87 C/K pickup trucks because of their propensity to catch fire in high-speed side collisions. "The government hearings are going to let people see real faces, real families who have gone through this ordeal," exclaims Zelenuk.



The wrenching personal tales are certain to be powerful. That prospect has led GM to threaten to boycott the hearings if it determines it won't get a fair shake. GM believes Transportation Secretary Federico F. Peña is biased in part because he overruled a staff recommendation to drop the GM matter. The company has also taken the government to court. In a lawsuit filed on Nov. 17, GM charged Transportation and Peña with engaging in illegal "retroactive rule-making." The trucks had met every existing government safety standard when they were rolled out in 1972. But now, GM says, Peña wants to apply new, unstated standards—two deca er—to hold the auto maker ble for its vehicles' alleged p

At first glance, GM's positi suasive. The company indisp complied with all federal reg when it introduced its then- size pickups. At the time, th no side-impact crash standa in 1978, when a 20-mph test acted, GM's trucks, whose "si gas tanks were mounted out frame rails, passed the test a fuel leak. If, at the time, th ment considered a truck that survive a 20-mph crash to be how dare it change the rules GM lawyers. Why blame GM if ment standards were too lax?

Other auto makers have ru GM's side. They claim they wo longer be able to rely on gove standards in designing new ve the government prevails in th rent case. A Peña victory coul affect other regulated industri chemicals to airplanes. Says L rence Fineran of the National ation of Manufacturers: "It's a precedent."

True enough—if that's what were really up to. But the issu ter-the-fact rulemaking is a re ring. Legally, Peña is on solid

USA Today 12/6/94

'DISCLOSURE' STARS: INTERVIEWS, 4D

Q. What's the closest you've come to being a victim of sexual harassment?

By H. Darr Beiser, USA TODAY

A. 'I remember doing a picture many years ago. ... My director (a woman) would say to me, "You're such a dish." I loved it.'

— Michael Douglas

By Mark Peterson, Sygma

A. 'There was one moment ... (when) someone said ... "Let's put you in bed to rehearse. And why don't you go ahead and take your top off."'

— Demi Moore

Stars give the issue full 'Disclosure'

Superstars Douglas and Moore offer an inside view of Hollywood practices

By Karen Thomas
and Ann Oldenburg
USA TODAY

Ever since Anita Hill testified at Clarence Thomas' confirmation hearings, sexual harassment — its definitions and issues — has been analyzed, discussed and debated between the sexes.

With this week's opening of *Disclosure*, the film based on Michael Crichton's best seller in which a male executive accuses his female boss of sexual harassment, the issue will be explored from fresh perspectives.

We talked independently to stars Michael Douglas and Demi Moore to get male and female perspectives on sexual harassment and its relation to the entertainment industry:

Cont'd 1/2

THE WALL STREET JOURNAL WEDNESDAY, AUGUST 10, 1994

Thresholds of Pain

By CLARK S. JUDGE

Like a canary in a mine, an obscure, high-technology entrepreneur named E.O. Schonstedt may have been a warning signal to the U.S. economy. In the 1970s, he learned that a friend of his, in complying with civil-rights reporting demanded of government contractors with 50 or more employees, had been required to submit eight pounds of paperwork. Mr. Schonstedt, believing he could not afford to divert his attention or capital from the productive work of his business, decided to halt his firm's expansion. Until Mr. Schonstedt's death last year, Schonstedt Instruments never had more than 49 employees.

Since first appearing in the 1964 Civil Rights Act, thresholds have proliferated to more than a dozen federal laws, with most added in the past decade. More still are in state law, and soon health care legislation may add yet another. The health care plan put forward last week by Sen. George Mitchell includes mandated insurance payments by employers of 25 or more people if 95% of the country has not received coverage by the year 2000. (Companies in states with 95% coverage would be exempted.) The House Democratic leadership's plan includes subsidies for businesses of fewer than 50 employees.

Thresholds reflect the recognition of legislators that, while big businesses may be able to carry the cost of most mandates and regulations, they could force many small businesses to lay off employees or go out of business. The answer has been to exempt businesses under a certain size, varying with the actual law. But as thresholds have accumulated, so too have stories of companies like Schonstedt Instruments that have stopped growing rather than face the costs and uncertainties of becoming subject to added regulations.

No wonder, either. The list of federal laws with thresholds reads like a Who's Who of regulatory horror shows. (See box nearby.) For example, the Equal Employment Opportunity Commission enforces Title VII of the 1964 Civil Rights Act. In recent years, it has taken to suing companies that employ mostly minority workers. Their sin? The wrong mix of minorities. Compliance has become a matter of hiring exactly the same percentage of minorities or other favored categories as live in the community—if one can determine the EEOC's definition of "the community," or today's favored categories.

Thirty years after the Civil Rights Act's passage, standards should have become clear and compliance routine. Just the opposite has happened. Federal discrimination law suits increased by 20 times between 1970 and 1989. And from the passage of the Americans With Disabilities Act in 1990 and the Civil Rights Act Amendments in 1991 to early 1993, discrimination case filings jumped an added 30%. Hiring a 15th employee draws a company into this legal Russian roulette, exposing owners to vast new risks, if not immediate costs.

One entrepreneur who will not play with that pistol is Kelly Herstedt of United Truck Body, a truck body and school bus distributor in Duluth, Minn. In business for more than 20 years, he now employs seven full-time, two part-time and one temporary worker. Though his company is too small for most of these laws, he has tried to live by them, particularly in the OSHA and civil-rights areas. The result: Several years ago it took him a full month to follow the procedures required for one new hire. Fearing the complexity of the rules and the penalties that go with violations, he resolves never to hire more than 10 employees, even though the market would allow it. Last year each worker logged 500 hours of overtime.

Many companies have, of course, found ways to grow without crossing thresholds—hiring temps, part-timers and outside contractors. All three categories are expanding rapidly. President Clinton decried this trend in the last election as he promised "good jobs at good wages."

But now, in health care reform, Mr. Clinton is working for a powerful new threshold that would put another brake on the small-business job machine that has accounted for so many of the truly "good jobs at good wages" of the past 15 years. An employment threshold is not the answer to the crushing burden that any of the employer health care mandates now under consideration would impose on small businesses. Instead, it would simply seal in place another pane in the glass ceiling that Congress has unwittingly lowered on small business and entrepreneurs.

Mr. Judge is a managing partner in the White House Writers Group, a communications consulting firm based in Washington.

At 15 Employees or More . . .

Federal laws that, however well-intentioned, impose burdensome compliance costs on businesses whose number of employees goes beyond a certain "threshold":

- **Civil Rights Act of 1964 (Title VII):** banned race discrimination in employment but, despite assurances to the contrary by its sponsors, became the legal basis of quotas; applies to companies of 15 or more employees.
- **Age Discrimination Employment Act of 1967:** banned forced retirement before 65, raised to 70 in 1978; applies to companies of 20 or more employees.
- **Employee Retirement Income Security Act of 1974 (ERISA):** set forth rules for pension and welfare benefit plans and established federal pension fund insurance; reporting requirements are of such complexity that it has become known as the "lawyer's relief act"; applies to companies with 100 or more employees.
- **Occupational Safety and Health Act of 1970 (OSHA):** now a regulatory monster that some studies suggest does little for worker safety while adding billions of dollars in costs to the economy; current threshold for required reporting and eligibility for famously arbitrary inspection, 11 employees or more.
- **Omnibus Reconciliation Act of 1986:** bans terminating a still-working employee's pension accrual because of age; applies to companies of 20 or more employees.
- **Immigration Reform and Control Act of 1986:** on one hand, bans hiring illegal immigrants; on the other, makes it an offense to refuse employment to anyone who the employer believes may be an illegal immigrant but turns out not to be; applies to companies with four employees or more.
- **Worker Adjustment and Retraining Notification Act of 1988 (WARN):** the controversial plant closing legislation passed over President Reagan's veto requires 60 days' written notice of large-scale layoffs and plant closings; applies to companies with 50 or more employees.
- **Emergency Planning and Community Right to Know Act of 1986:** requires reporting of toxic chemicals used in manufacturing; applies to companies of 10 employees or more.
- **Americans With Disabilities Act of 1990:** a remarkably sweeping, vaguely constructed piece of legislation, already giving rise to thousands of suits against businesses; applies to companies of 15 or more employees.
- **Civil Rights Act Amendments of 1991:** increased employer exposure to discrimination suits; applies to companies of 15 or more employees.
- **Older Workers Benefit Protection Act of 1990:** as of April 1991 brought employee benefits, pensions and early retirement incentives under the Age Discrimination Employment Act; two years later, under 1986 amendments, ADEA coverage was extended to everyone over 40; applies to companies of 20 or more employees.
- **Family Medical Leave Act of 1993:** mandates 12 work weeks of leave for either husband or wife upon birth or adoption of a child or sickness in the family; applies to companies with 50 or more employees.
- **Clean Air Act Amendments of 1990:** as of October 1995 will require companies in target regions and states to implement plans increasing the average occupancy of their employees' commuting vehicles by 25%; projected costs to employers go as high as $1,000 per employee; applies to companies with 100 or more employees.

—*Clark S. Judge*

B

Power Lines Are Homely, Not Hazardous

By William R. Bennett Jr.

Five years ago, author Paul Brodeur published a series of sensational articles in The New Yorker that raised public concern about alleged health risks from the electromagnetic fields created by power lines in most urban areas. The resulting controversy quickly became a textbook case of how hysteria fed by special interests can outrace scientific certainty.

After the Brodeur articles appeared, other authors began warning of the possible health risks from computer display terminals, microwave ovens, television sets and other devices. Responding to growing concern, several government agencies and the electric power industry have sponsored multimillion-dollar studies of the problem. The Denver studies linking power lines with leukemia among children—which Mr. Brodeur cited in his articles—now have been extended to Los Angeles, Sweden, Canada and France, with increasing budgets and sample sizes.

The studies haven't produced any definitive evidence of harm caused by electromagnetic fields, but that hasn't stopped a host of companies from cashing in by doing more costly studies of the phenomenon. Also benefiting are a growing number of companies selling special gaussmeters designed to measure the fields from power lines. Lots of people are now roaming the urban landscape measuring fields that are so weak as to be hard to determine accurately even in a physics lab. In several instances, these findings have led parents to pull their children out of classrooms; they have even forced the abandonment of newly constructed public schools.

Hastily contrived legislation in a number of states has limited the fields from power lines to the present levels, and there is the threat of still more ill-thought-out legislation on the horizon—for example, warning labels on microwave ovens and TV sets similar to those now found on cigarettes. D. Allan Bromley, President Bush's science adviser, has estimated the total cost from this scaremongering has already exceeded $23 billion—almost all spent by utilities to move high voltage power lines and transformer substations.

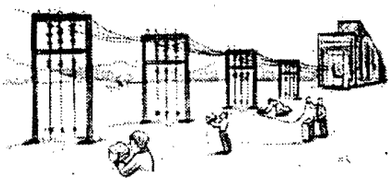
This public hysteria is easily understandable, if not excusable. Everyone has heard of the dangers of X-rays and ultraviolet radiation (which are also forms of electromagnetic energy, but at enormously higher frequencies), and there is a natural tendency among the lay public to assume that a large, ugly, fenced-in transformer substation must be emitting some harmful substance. Should six people on the same block come down with cancer by chance, this belief becomes unshakeable.

Yet this runs counter to medical knowledge. Consider a power substation on a short street in Guilford, Conn., which The New Yorker's Mr. Brodeur blamed for a rash of stomach cancer, brain cancer, skin cancer and brain tumors. As any doctor could tell you, the existence of such diverse types of cancer in such a "cluster" is a strong argument in itself against any one specific cause in the environment.

It is important to realize that direct destruction of tissue by X-rays and ultraviolet light occurs because the frequency is large enough so that a single photon (the basic unit of energy for an electromagnetic field) has enough energy to tear the molecule apart. But power lines emit photons at frequencies billions of times too small to harm any biological molecules.

In fact, the electromagnetic emissions of power lines are dwarfed by natural sources. The Earth's magnetic field is hundreds of times larger than any power distribution line field at ground level. Riding a bicycle or driving an open car through the Earth's magnetic field creates at least as much electric field inside the body as do power lines.

Electromagnetic alarmists might be interested to know that every person has enormous thermal electric fields present at the cell level. Enormous fields are also produced naturally by biological activity. In some cells of the body, these fields can



be millions of times greater than those resulting from power lines.

Thus it's no surprise that the epidemiological studies linking power lines with cancer are highly inconclusive—even though various press reports have given the impression that they've established a conclusive linkage. There are two basic problems with the studies: marginal statistical accuracy and extreme susceptibility to systematic error.

Because a disease like childhood leukemia is extremely rare (a few cases per 100,000 people annually), it is hard to obtain large enough samples to permit meaningful analysis. Some studies report effects based on a difference of one or two cases between the exposed and control groups. But as the size of the sample groups has increased in these studies, the percentage "effect" has declined.

The sources of systematic error in the epidemiological studies are numerous. The population groups are often of different ages, socio-economic classes and races. Leukemia primarily attacks older people and white male children under the age of five. Without sorting the people in the exposed and control groups according to such categories, the epidemiological data are not meaningful.

Economic factors also must be taken into account. Poorer folk are generally more subject to disease of all kinds and are often forced by economic circumstance to live near eyesores such as transformer substations and power lines. Hence there is a natural tendency for disease to be correlated with such locations—a tendency ignored by all the studies.

Further, the populations sampled usually have different work environments and spend unequal amounts of time in the "exposed" area, and we seldom know what they are exposed to elsewhere. If someone spends his working hours exposed to carcinogenic solvents, it is irrelevant that he lives near a power line.

Another source of systematic error: All of the studies to date have been retrospective, not prospective. Records have been reconstructed and are subject to the vagaries of individual memory, inaccuracy of public records and personal prejudice. In no instances have actual individual exposures to electromagnetic fields been monitored on a day-to-day basis.

Faced with the inadequacies of epidemiological studies, alarmists have fallen back on a far-fetched hypothesis. They suggest that there might be some biological resonance process that magnifies people's sensitivity to magnetic fields—and that this sensitivity might be triggered by the frequency of power lines' fields. But to overwhelm naturally occurring thermal fields, such a resonance would have to be extremely sharp. No plausible physical explanation for such an effect has yet been given. Although a few biological experiments reported frequency "windows" at marginal signal levels, those results have been inconsistent and have not been duplicated by independent observers. At any rate, the resonance explanation could not work simultaneously in the U.S. and Europe, where the power line frequencies are different.

One other perplexing aspect of the epidemiology studies is the tacit assumption that the dosage should be proportional to the *magnitude* of the field over time, rather than the total power. If the field magnitude goes up by a factor of 10, the power goes up by a factor of 100. If fields of two milligauss really are a serious threat in Denver, Los Angeles and Sweden, then commuters on East Coast electric trains—where the fields at power line frequencies can be hundreds of times larger—ought to be dying like flies.

So much for the electromagnetic hoax. To grasp how much damage it's caused, consider what useful developments in cancer research, in education, or in any other field, could have been accomplished with the $23 billion already squandered on this scare. That ought be more shocking to people than any electromagnetic field.

Mr. Bennett, professor of engineering, applied science and physics at Yale University, is author of "Health and Low-Frequency Electromagnetic Fields" (Yale University Press, 1994).

THE WALL STREET JOURNAL WEDNESDAY, AUGUST 10, 1994

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USA TODAY

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Court kills blacks-only scholarship

By Andrea Stone
USA TODAY

In a move certain to heat up the debate on affirmative action, the Supreme Court Monday refused to allow the University of Maryland to reinstate a scholarship program limited to black students.

The high court turned away, without comment, arguments the Benjamin Banneker scholarship was needed to combat lingering effects of racial bias.

A lower court last fall called the program unconstitutional and "reverse discrimination."

The court's refusal to hear the case could have far-reaching effects.

About two-thirds of colleges offer race-based scholarships, although most are left untouched by this specific action.

But it "means any race-based scholarship any place in the country can now be challenged," said Melvin Urofsky, Virginia Commonwealth University historian.

The NAACP Legal Defense and Education Fund's Theodore Shaw, which represented black students in the case, predicted little effect.

"There are scholarships for Dutch students, Greek, Armenian, Italian, gender-specific, for people who can trace their ancestry back to Confederate soldiers," Shaw said. "If you can have all these, they ought to be able to have a few scholarships for (black) students."

Maryland's program, named for a black scientist, was created to boost black enrollment.

Hispanic student Daniel Podberesky sued in 1990 after he was denied one.

The action is "a discouraging message to those working to remedy the present effects of past discrimination," Maryland president William Kirwan said.

ment argued that formerly segregated universities "have an affirmative duty" to take whatever steps are needed to dismantle those systems.

But despite the department's view, the justices refused to even hear the appeal.

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High Court Declines to Review Ruling Striking Down Blacks-Only Scholarship

By BARBARA CARTON
And PAUL M. BARRETT
Staff Reporters of THE WALL STREET JOURNAL

The Supreme Court let stand a ruling that struck down a blacks-only scholarship at the University of Maryland, increasing the likelihood of fresh challenges to similar programs around the country.

Colleges and civil rights groups expressed disappointment at the court's decision not to hear the case. But they pointed out that the refusal to disturb a decision by the U.S. Fourth Circuit Court of Appeals in Richmond, Va., wasn't a ruling on the merits of such preferences and set no precedent.

Most U.S. colleges have some sort of financial aid targeted at minority students. At least some of these programs may be targets of separate lawsuits, legal experts said.

"I'm terribly disappointed and very distressed for the university," said William E. Kirwan, Maryland's president. "But quite frankly, I'm also distressed by the larger implications for our nation."

Other Colleges Assess Decision

Several colleges in the five-state Fourth Circuit region – Maryland, Virginia, West Virginia, and North and South Carolina – said it was too early to tell whether their programs are vulnerable to challenges. For example, the University of Virginia has two black scholarship programs. But while it is a public school, both scholarships are privately funded, unlike the state-funded Maryland program. Louise Dudley, a spokeswoman, said the University of Virginia was assessing its program in light of yesterday's development.

"My first reaction is that it's a Fourth Circuit matter," said Thomas Eakman, vice president for academic affairs at the University of Illinois, which also offers minorities-only scholarships. "I don't see how it could be the law of the land, since they refused to hear the case."

But David Price, an attorney with the Washington Legal Foundation, a conservative public-interest firm that represented the plaintiff, Daniel J. Podberesky, said, "We expect other federal courts around the country to find the Fourth Circuit decision persuasive." In a statement, the foundation said "the legality of the hundreds of race-based scholarship programs" remain in doubt.

Reverse Discrimination

The high court made no comment in declining to review the appeals court's finding that Maryland's Benjamin Banneker Scholarship program was a form of unconstitutional "reverse discrimination." The University of Maryland must now revise or end the program, which gave full scholarships to 30 incoming black students each year.

"I'm really in shock," said Ifey Arah, 19, a biochemistry major and Banneker scholar who hopes for a career in medicine or public health. "I had hoped the highest court in the land would see the dire need for the Banneker scholarship."

Mr. Podberesky, who is Hispanic, challenged the Banneker program in a 1990 lawsuit. The university defended the scholarship as a remedy for past exclusion of blacks. But the appeals court ruled that the program was unconstitutional because the school had failed to provide sufficient justification for its use of race as a basis for financial aid.

The appeals court said that there were factual questions about black underrepresentation in the student body and low black graduation rates but that the Banneker program wasn't "narrowly tailored" to address these problems. The court found that the program effectively recruited only high-achieving blacks and that they weren't the group historically discriminated against.

Supreme Court inaction is "not a ruling on the merits or legality of minority scholarships generally," said Janell Byrd, assistant counsel at the NAACP Legal Defense Fund. Sheldon Steinbach, general counsel for the American Council on Education, the largest association of colleges, added: "There's no reason that institutions should abandon their present efforts to achieve a diverse student body."

(Kirwan vs. Podberesky)

The Washington Times

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PAGE: A

UMd. loses appeal to keep blacks-only scholarships

By Frank J. Murray
and Maria Koklanaris
THE WASHINGTON TIMES

The Supreme Court yesterday rejected the University of Maryland's appeal to keep a scholarship program available only to black students.

The court denied a hearing, upholding the 4th Circuit Court of Appeals decision without explanation or comment, in the latest setback for advocates of affirmative action in schools and the workplace.

At a news conference on the College Park campus, university President William E. Kirwan said he was "deeply saddened" that the court refused to review the ruling.

About 138 current Benjamin Banneker scholars may graduate, but new recruiting will involve a companion program that takes "diversity" into account instead of race.

Because the court did not issue an opinion, the appeals court ruling is binding in Maryland, West Virginia, Virginia, North Carolina and South Carolina, the states in the the 4th judicial circuit.

The fate of race-specific scholarships elsewhere remains in a legal limbo.

More than a dozen civil rights groups and interest groups representing about 10,000 institutions of higher learning had urged the high court to resolve confusion over race-based scholarships by hearing this case.

The victory pleased the Washington Legal Foundation, which represented University of Maryland honor student Daniel J. Podberesky of Riva, Md., in appeals after his father, a lawyer, brought the case in federal district court.

"The fact that there were dozens of civil rights groups asking the Supreme Court to hear this case indicates the importance of today's decision. We think this will put an end to segregated scholarships in our nation's universities," said Paul Kamenar, the foundation's executive legal director.

Supreme Court rejection was a blow against campus "diversity for diversity's sake," said Michael L. Williams, who as assistant secretary of education in the Bush administration took a public battering for declaring that race-based scholarships were not legally permissible.

In a telephone interview from Fort Worth, Texas, where he is in private practice, Mr. Williams said he feels a "great deal of vindication."

Mr. Podberesky, now a first-year medical student at the university's Baltimore campus, expects a $35,000 check, the value of the scholarship he was not allowed to apply for, Mr. Kamenar said.

"From the beginning, this case has been clear-cut — publicly funded academic scholarships awarded on a race-exclusive basis are unconstitutional," Mr. Podberesky said.

The Banneker scholarships funded 30 to 40 black students with high grades each year, while about 30 Francis Scott Key scholarships were funded from the same money pool without the restriction.

The university has awarded 482 Banneker scholarships totaling $4.1 million. For the 1994-95 school year, it received 278 applications and gave out 36 scholarships.

Before Mr. Kirwan announced the "diversity" standard would replace the racial restriction, Mr. Kamenar predicted the state would claim that scholarships for blacks contribute to diversity in the student body, an argument raised unsuccessfully in the appeal rejected yesterday.

According to the Washington Legal Foundation, the university's black enrollment now is the second largest among major state universities nationwide.

Mr. Kirwan said the Banneker scholarships helped attract and retain black students, but blacks are still "underrepresented" in a state where they make up 25 percent of the population.

Last year, a record 9.4 percent of College Park's 5,097 undergraduate degree recipients were black.

Advocates of race-based scholarships, led by the American Council on Education, an umbrella organization for higher education, argued that the goal of diversity was a legitimate reason for race-based scholarships.

Banneker scholar Monifa Brooks of Baltimore, a junior premed student who has a 3.25 grade point average and is active in student government, said the program was a strong factor in her decision to attend College Park instead of the University of Virginia or Virginia Tech.

Miss Brooks said the university will lose not only good students, but also "wonderful recruiters" for the Bannekers. "When [black applicants] are visiting campus, Bannekers are usually the students they see," she said.

But Miss Brooks remained loyal to the university. "I think that it's a wonderful place, and I am telling everyone that."

Among other groups backing Mr. Kirwan were the Lawyers Committee for Civil Rights Under Law, the American Civil Liberties Union, the NAACP, the Mexican American Legal Defense Fund, the Puerto Rican Legal Defense Fund, the United Negro College Fund and the National Women's Law Center.

• *Carol Innerst contributed to this report.*

The Washington Times

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Race-based scholarships face review in Maryland

By Shawn Donnan
ASSOCIATED PRESS

BALTIMORE — The Maryland Attorney General's Office will review all race-based scholarships in the state pursuant to the Supreme Court's refusal yesterday to let the University of Maryland reinstate a blacks-only scholarship.

"At a minimum it requires us to look at any scholarship that's out there," said Evelyn Cannon, chief of litigation in the Attorney General's Office. "Potentially it knocks all of them out of the ballpark."

The Supreme Court, without comment, refused yesterday to hear an appeal of an appellate court's decision that effectively ended the Benjamin Banneker scholarship program at the University of Maryland. The scholarship was created in the late 1970s to help boost black enrollment at the university's College Park campus.

Daniel J. Podberesky, a Hispanic student, sued the university in 1990 after he was denied a Banneker scholarship.

Ms. Cannon said yesterday's ruling would prompt a review of all other race-based scholarships in the state but will not affect athletic or academic scholarships that are not race-specific.

About 2,500 students in the University of Maryland system receive an estimated $6.3 million through publicly funded race-specific scholarships each year, said John Lippincott, spokesman for the system.

Officials will review each of the more than 30 publicly funded race-specific scholarships targeting a variety of ethnic groups, said Mr. Lippincott.

USA TODAY

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PAGE: 6D

Re-evaluating race-based aid

Some laud, others lament scholarship ruling

By Tamara Henry
and Dennis Kelly
USA TODAY

Only days after graduating from the University of Maryland as a top scholar, Maisha Herron found her ride on cloud nine cut short by a thunderbolt.

The Supreme Court refused Monday to let the university reinstate its Benjamin Banneker Program, which has given 482 high-achieving black high school graduates $4 million in four-year scholarships in 16 years. The program, created to boost black enrollment at the College Park campus, was ruled unconstitutional by a federal appeals court last October.

Banneker scholar Herron says she is haunted by the thought thousands of similar bright students no longer will get aid.

"I believe it will create a wave of anti-affirmative action to emerge from the public," says a passionate Herron, who graduated *cum laude* in general business and management.

Michael Williams, former assistant education secretary for civil rights under President Bush, says he feels "vindicated." Williams set off a national furor in 1990 when he pushed for a ban on financial aid targeted to minorities.

Williams, now a Fort Worth, Texas, attorney, says educators and politicians should now focus on "the real problems ... the failure of public education in K-12.

"I've always thought that the reasons our college campuses don't 'look like America' has nothing to do with financial aid and minority scholarships," Williams says. "It is because we are wholly failing to produce a large enough pool of minority youngsters who can meet the rigors of a collegiate education."

But Robert Atwell, president of the American Council on Education, representing all segments of higher education, says the decision's reach is limited. He believes it will affect only states under the 4th U.S. Circuit Court of Appeals — Maryland, North Carolina, South Carolina, Virginia and West Virginia — which declared the program unconstitutional.

He also says minority-targeted scholarships — in which race is one factor among many in a selection — won't be affected, only those in which scholarships are set aside exclusively for one race.

Even then, Atwell says, his organization is advising colleges not to dump programs automatically, but to assess how their scholarships differ from the Banneker program.

"We don't think it's a final ruling on the issue of minority scholarships and certainly doesn't invalidate other programs out there," Atwell says.

Many colleges contend the scholarships are a fraction of all financial aid, yet an important boost to racial equality.

Two-thirds of all four-year colleges award minority-targeted scholarships. But in a January 1994 report, the U.S. General Accounting Office said such scholarships represent no more than 5% of all scholarship dollars. Financial aid based solely on race is less than 1% of the total, GAO said.

Not everyone buys that study, including Stephen H. Balch, president of the National Association of Scholars, a group of academic professionals with a traditional bent, based at Princeton University. Balch says granting admission and awarding financial aid with a notion to creating a campus with a proper racial mix is a "widespread" practice.

"The advice to any university is 'get rid of (race-based awards), change them, re-evaluate your programs, redesign your programs in a race neutral way,'" Williams says.

But University of Maryland's Humphrey Atiemo thinks that would be a mistake. Banneker scholars, he says, are leaders.

"If you look at the top students in each of the schools at the university, at least one or two are Banneker scholars."

Atiemo, who earned a degree in biological sciences and a full scholarship to Maryland's medical school in Baltimore, speculates "in the year 2000, when you look at the résumés of top doctors and lawyers, heads of corporations and leaders in other fields, they will be Banneker scholars."

Banneker program director Patricia Thomas-Walton says about 125 scholars remain in the pipeline and will receive aid until they graduate.

"I think the current political climate has a kind of mean-spiritedness," she says. "It's a blow to equity in education. I'm hoping that there is a way that we can constructively overcome the damage."

AP Associated Press

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Chicago Settles 911 Complaints Probed by Justice Department
By TOM STRONG
Associated Press Writer

WASHINGTON (AP) - A Chicago woman who is deaf was suffering from abdominal pains, so her friend tried calling 911 via a special device for the deaf.

They got no response and ended up taking a cab to the hospital, where a doctor said an hour's more wait could have been fatal.

As a result of that incident and two others complaints under the Americans with Disabilities Act, the city pledged in a settlement with the Justice Department on Monday to provide better emergency services for the hearing impaired.

The deal means the deaf and others with hearing problems will have equal access to 911 services in Chicago, said Deval L. Patrick, assistant attorney general for civil rights.

The department has similar 911 settlements with Los Angeles, Fort Lauderdale, Fla., and Berkeley, Calif.

Leading up to Monday's settlement, Chicago has improved emergency services for the hard of hearing and it also has:

-Installed two telecommunication devices for the deaf, or TDDs, at each of 13 answering stations and several other sites.

-Begun a public education program to promote 911 use by people with TDDs.

-Trained emergency dispatchers to handle TDD calls.

-Agreed to semiannual audits of the quality of service for TDD users.

A city spokeswoman a new 911 center opening later this year will exceed the requirements from Monday's settlement.

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Wage law fight: Civil rights at issue

By Bob Minzesheimer
USA TODAY

When Congress passed the Davis-Bacon Act, Rep. Miles Allgood, D-Ala., warned about "cheap, colored labor" competing against "white labor."

Sixty-four years later, conservatives are using Allgood's words to show the law — which they want repealed — discriminates against minority workers while driving up the cost of construction.

The act requires federal construction contractors to pay "prevailing wages" — which often translates into union wages. And minority workers are more likely to be unskilled and nonunion.

Backed by business interests, the GOP targets repeal as one of the recommendations for balancing the budget.

But liberals, unions and civil rights groups say whatever the racist origins, the law now protects all construction workers. Unions have made its retention a top priority, and a test of their waning clout in Congress.

Both sides portray the battle as a civil rights issue.

Saying that "times have changed," Charles Henson, 48, a black business manager of the sheet metal workers union in Suitland, Md., calls repeal a "threat to minorities and all other workers."

"All the work would go to low-bidders that don't have quality training or apprenticeship programs," he says. "I can't see how it helps minorities if they and other workers have their wages cut."

But Art Pearson, 55, a black electrical contractor in Tacoma, Wash., says the law creates obstacles to hiring "inner-city kids" to work on his highway and street lighting projects.

"Because of Davis-Bacon, I end up excluding blacks, not intentionally, but because I'm caught up in the same system that protects those with high paying jobs but excludes others," Pearson says.

Peason, required to pay prevailing wages calculated by the Labor Department, says if he must pay $25 an hour, even for semi- or unskilled jobs, he can't hire "kids from the streets" at $10 an hour, to "let them work their way up."

Pearson and other minority contractors are plaintiffs in a lawsuit that charges the law has a "disparate impact" on minorities. Trial: September.

By then, Congress may have acted on GOP plans to repeal the law, perhaps in a budget bill. President Clinton says he will veto any repeal.

Davis-Bacon, named for its GOP sponsors during the Depression, was aimed at contractors paying itinerant workers substandard wages.

Now it's opposed by a powerful business coalition, including the U.S. Chamber of Commerce, Associated Builders and Contractors and National Association of Manufacturers.

They say it raises the cost of $60 billion in federal construction projects by up to 15%. The Congressional Budget Office says repeal could cut costs by $2.6 billion over four years.

Unions, the NAACP and other civil rights groups argue that repeal would not only cut wages, but quality and productivity.

They dispute the idea of overpaid workers. Prevailing wages vary: Ironworkers get $8.41 an hour in Nashville but $22.53 an hour in Chicago.

The average construction worker makes $578 a week, or $30,058 a year, "assuming he or she is lucky enough to work 50 weeks a year," says Robert Georgine, head of AFL-CIO's building trades department.

The law's supporters include Norman Hill, head of the Philip Randolph Institute, predominantly black trade unionists.

"Those who want to repeal Davis-Bacon seem to think the only way to get more minorities into construction jobs is at low wages in less skilled jobs," Hill says. "That turns the whole thrust of the civil rights movement upside down."

The Census Bureau says 7% of construction workers are blacks, and 11% are Hispanics. But most minorities in construction are laborers, the lowest paid, lowest skill job.

Caught between the unions and big business interests, the National Association of Minority Contractors, a group of 3,500 mostly non-union shops, favors revision, not repeal.

That group wants the law to apply only to contracts worth $500,000 — the current limit is $2,000 — and to allow semi-skilled "helpers" to be paid less than prevailing wages.

The Split Society

Some 30 years after the civil rights movement's march on Washington, segregation has all but disappeared as a pressing issue on the national agenda, despite evidence that the chasms between black and white may be growing wider.

BY ROCHELLE L. STANFIELD

"This is America, and there is racism in this country," Delores A. Irvin said matter-of-factly. "Being black in America has been—and still is—very hard."

Irvin runs a program in Chicago that helps poor black families from the city's public housing projects rent apartments in its predominantly white suburbs. She ostensibly was describing her program, but the subtext was clear: For blacks, regardless of income, segregation driven by racial animosity remains an immutable fact of life.

While Irvin may be the image of a middle-class professional, "if I went to certain of these areas, I would get rebuffed," she said. "Being an African-American, it goes with the territory."

It's been 40 years since the Supreme Court declared that separate education for blacks isn't equal, and 30 years since Congress passed the 1964 Civil Rights Act. But integration is still a fragile exception; segregation the sturdy rule. The desegregation of America's public schools, which continued through the 1980s despite the hostility of the Reagan Administration, has now reversed. Residential integration, for the most part, has hardly happened at all.

"If you thought that segregation of blacks was a problem in 1960, the numbers you're seeing today would indicate that it's still a problem," Roderick J. Harrison, chief of the Census Bureau's racial statistics branch, said. "If you were hoping that civil rights, fair-housing laws, the growth of the black middle class would, over a 20-30 year period, really change the picture, I think everybody would agree" that they haven't.

For more than two decades, Presidents did little to push for the vigorous enforcement of antidiscrimination laws. Desegregation became a word rarely, if ever, spoken in public, regardless of the race of the speaker or the audience.

"We don't talk about race anymore," Mayor Sharpe James of Newark, N.J., acknowledged at a recent question-and-answer session with *National Journal* reporters. "We don't understand that it's as fundamental as motherhood and apple pie, and we will never be a great nation until we recognize the fact that our diversity is our strength." *(For more on that session, see NJ, 3/26/94, p. 726.)*

Not all black leaders agree with James. Indeed, black nationalists and some black politicians see advantages in racial concentration. But surveys show that an overwhelming majority of blacks desire integration.

For the first time in decades, a President and some members of his Cabinet are talking about desegregation. So far, however, their rhetoric speaks louder than their deeds.

It started with Housing and Urban Development (HUD) Secretary Henry G. Cisneros, who, from virtually his first day on the job, began speaking openly and passionately about desegregating housing, especially in cases where federal policies caused the segregation in the first place.

"This is offensive wherever it occurs," he said recently, referring to segregated HUD-owned housing. "It is just wrong."

Cisneros has promised to desegregate HUD housing programs and has made the enforcement of fair-housing laws a high priority. He's even backed up the rhetoric with some money to establish programs similar to the one Irvin runs in Chicago.

Next came Attorney General Janet Reno. She quietly began beefing up the housing section of the Justice Department's Civil Rights Division when she arrived in Washington. In December, she spoke out on the subject of fair lending, telling leaders of financial institutions that they must stop their long-standing, subtle but pervasive discrimination in making mortgage loans.

Together, Reno and Cisneros—with the cooperation of Eugene A. Ludwig, the Comptroller of the Currency—engineered a fair-lending agreement between the two departments and eight other federal bodies that regulate financial institutions. On March 8, the top officials of all 10 entities stood before a jam-packed press conference to announce, in effect,

PRESERVATION PHOTOCOPY

that they would for the first time consistently enforce a law that's been on the books for 26 years.

"It restates the current law, so there's nothing new in that," Roberta Achtenberg, the assistant HUD secretary for fair housing and equal opportunity, acknowledged in an interview. "But it's pretty remarkable in the annals of banking history."

As for President Clinton, civil rights activists praise him for talking about integration. To commemorate Martin Luther King Jr. Day on Jan. 17, Clinton signed an executive order to create a Cabinet-level interagency council on fair housing and ordered it to get moving on antidiscrimination initiatives.

Eight days later, in his State of the Union message, Clinton said, "We must continue to enforce fair lending and fair housing and all civil rights laws, because America will never be complete in its renewal until everyone shares in its bounty."

Civil rights activists said that they couldn't recall the last time a President made such a specific plea about civil rights enforcement in a State of the Union speech—at least not since President Johnson's 1965 message.

But Clinton has been very slow to act. An assistant attorney general for civil rights has just been confirmed, and other key civil rights posts in the Administration have gone unfilled. Vacancies remain at the Equal Employment Opportunity Commission, which continues to tread water as it has for 12 years.

Despite the promises, strong policy directives and personal intervention of Cisneros and Achtenberg, however, civil rights activists complain that much of HUD's bureaucratic machinery has yet to gear up to implement fair housing.

And desegregation seems to have missed the elementary and secondary education arena altogether. At Justice's Civil Rights Division, the education section remains a backwater.

And Education Secretary Richard W. Riley has been silent on the subject, though he's pushed for higher standards at urban schools where minority youths are concentrated. That is somewhat of a surprise because Riley has one of the strongest civil rights backgrounds in Clinton's Cabinet. In 1970, as South Carolina's governor, for example, he took an active role in promoting school desegregation in Greenville.

School desegregation activists haven't complained too bitterly, however, taking some comfort in the renewed drive for fair housing. "We've gone from full reverse to neutral," said Gary Orfield, a professor of education and social policy at Harvard University who has designed school desegregation plans ordered by the courts. "And that's some progress."

LIVING ARRANGEMENTS

The post-World War II civil rights drive started with the schools and got its first big push with the Supreme Court's 1954 ruling in *Brown v. Board of Education*. But if American society is ever to become racially integrated, activists and researchers agree, it will have to happen by desegregating housing. That's still a long way away, even though Congress passed the Fair Housing Act in 1968 and strengthened it 20 years later.

Richard A. Bloom

Assistant HUD secretary Roberta Achtenberg "Sometimes HUD has been the problem."

Some progress on the integration front, however, is under way.

Reynolds Farley, a professor of sociology at the University of Michigan, created a mild flurry of excitement in civil rights circles in February when he reported "modest" but "pervasive" declines in residential segregation across the United States in the 1980s. He looked at Census Bureau data from the 232 metropolitan areas in which blacks make up at least 3 per cent of the population and found a decrease in segregation in 194 of them.

Farley also highlighted a trend that may augur significant future declines in segregation. He found the biggest upticks in integration in small but growing metropolitan areas in the South and West—Orlando, Fla., and Riverside, Calif., for example—where a large proportion of the housing was built after the 1968 Fair Housing Act and not subject to the segregated patterns set in northeastern and midwestern cities before World War II. *(See box, p. 764.)*

But even Farley, who's among the most optimistic of the researchers who follow these trends, acknowledged that the changes were far from dramatic. "It is a small movement that is creeping along," he said in a recent interview.

And it doesn't really affect most blacks where they live now, which is in the large metropolitan areas of the old Industrial Belts of the Northeast and Midwest, the most segregated places in the nation.

Douglas S. Massey, a professor of sociology at the University of Chicago, and Nancy A. Denton, an assistant professor of sociology at the State University of New York (Albany), examined segregation in the nation's 30 largest metropolitan areas, where 60 per cent of urban blacks reside. They found very little change in the past 20 years; most of the decline that did take place occurred during the 1970s.

In six major metropolitan areas (Chicago; Cleveland; Detroit; Gary, Ind.; New York City; and Newark, N.J.) in 1990, for example, the average black family lived in a highly segregated neighborhood (one in which at least 80 per cent of the black households would have to move to predominantly white neighborhoods to achieve full integration). The biggest sustained drops over the two decades were in Boston and Los Angeles, but by 1990 both metropolitan areas were still highly segregated.

Researchers have also found that black residential segregation is fundamentally different from that of other racial and ethnic groups. Blacks are more concentrated and isolated in center cities (many would have to go clear across the city to find a white family, for example), a condition that Massey and Denton call "hyper-

PRESERVATION PHOTOCOPY

MOST AND LEAST

The greatest segregation of blacks occurs in the old industrial centers of the Northeast and Midwest, where segregated housing patterns were established before World War II and not broken, according to Reynolds Farley, a sociologist who's studied patterns of segregation in 232 metropolitan areas with substantial black populations. The least segregation is in newer, generally smaller, metropolitan areas in the South and West, particularly in communities that have big military bases or universities. This table lists the 15 most segregated and least segregated metropolitan areas in 1990, and the percentage of black households that would have to move to predominantly white neighborhoods to achieve full integration.

Most Segregated	
Gary, Ind.	91%
Detroit	89
Chicago	87
Cleveland	86
Buffalo, N.Y.	84
Flint, Mich.	84
Milwaukee	84
Saginaw, Mich.	84
Newark, N.J.	83
Philadelphia	82
St. Louis	81
Ft. Myers, Fla.	81
Sarasota, Fla.	80
Indianapolis	80
Cincinnati	80
Least Segregated	
Charlottesville, Va.	45%
Danville, Va.	45
Killeen, Texas	45
San Jose	45
Tucson	45
Honolulu	44
Anaheim, Calif.	43
Cheyenne, Wyo.	43
Ft. Walton Beach, Fla.	43
Clarksville, Tenn.	42
Lawrence, Kan.	41
Fayetteville, N.C.	41
Anchorage	38
Lawton, Okla.	37
Jacksonville, N.C.	31

SOURCE: Reynolds Farley, Population Studies Center, University of Michigan

segregation." Neither Hispanics nor Asians live in hypersegregated neighborhoods.

At the current rate of integration, the Census Bureau's Harrison predicted, it could take as long as 100 years for black segregation to fall to the level of Hispanic segregation.

During the 1980s, the segregation rates for Hispanics and Asians increased because immigration was so great and the first stop for most newcomers is a neighborhood settled by their compatriots. But as soon as Latinos or Asian-Americans assimilate and acquire some money, many move into majority-white neighborhoods. That's not the case with African-Americans.

"Levels of segregation for the black nonpoor are very close to those of the black poor," Harrison said. "In most other groups, there is a sharp difference in segregation, with the poor being much more segregated."

Even when blacks move into the suburbs, most of them end up in predominantly black enclaves. The close-in Washington suburb of Prince George's County, Md., for example, became 51 per cent black in 1990. But the distribution was far from even. Bowie remained 94 per cent white, for example, while Hillcrest Heights was 88 per cent black and Suitland was 84 per cent black.

Perhaps such statistics show that blacks prefer to live in segregated communities, some observers have suggested. After all, there's been a rise in black nationalism with the increasing prominence of the Nation of Islam. Black politicians cultivate predominantly black cities and congressional districts. And on many university campuses, black students are demanding their own African-American dormitories.

There's even a name for new middle-class black suburbs and neighborhoods: "zones of emergence." The phrase was coined by Richard P. Nathan, a longtime urban researcher who's now the provost of the Rockefeller College of Public Affairs at the State University of New York (Albany).

"There is something of a movement in the African-American community away from integrationist perspectives," said David A. Bositis, a senior research associate at the Joint Center for Political and Economic Studies, a Washington think tank that's devoted to African-American issues.

If there is such movement, however, it apparently hasn't touched most blacks. Polls consistently show that the overwhelming majority of blacks would prefer to live in an integrated neighborhood. A recent survey for the National Conference of Christians and Jews, for example, showed that although blacks, Hispanics and Asian-Americans had little good to say about one another or about whites, most of them—including 71 per cent of the blacks—supported "full integration."

Farley studied the housing preferences of blacks and whites in the Detroit area—the second-most-segregated metropolitan area in the nation, with a long history of bitter racial animosity—in 1976 and 1992. In both years, the vast majority of the blacks opted for integrated neighborhoods, with a 50-50 ratio their ideal. Most blacks ranked an all-black neighborhood very low on their preference list, and only 25 per cent said that they would be willing to move into such a neighborhood.

In the 15 years between the studies, whites became much more accepting of integration, but not to the point, apparently, of a 50-50 mix. In 1992, 56 per cent said they would be comfortable living in a neighborhood that was a third black, up from 43 per cent in 1976. In 1992, 53 per cent of the white respondents said that they would try to move out of a majority-black neighborhood, down from 64 per cent in 1976.

So, if everybody is for integration, why doesn't it happen? Government officials and civil rights activists answer in unison: Discrimination in the housing industry is remarkably tenacious.

"Markets, when left alone, don't generate integrated outcomes very often, even when there are people out there who would prefer them," John Yinger, a professor of sociology at Syracuse University who conducted housing discrimination studies for HUD in the late 1980s, said.

Yinger and most of his colleagues argue for a concerted policy to speed racial integration.

"I would hate to see us move toward a separate but equal society, even if it were possible to have that equality," said George C. Galster, a visiting senior research associate at the Urban Institute who has written extensively about desegregation. "I think that's a lousy public policy goal."

"You can't attack urban problems unless you come to terms with segregation and the forces that produce it," Massey said in a recent interview. "Whatever you try to do in the realm of education or job training or community investment is going to be overwhelmed by these disastrous neighborhood conditions, which follow fairly axiomatically from segregation."

Florence W. Roisman, a longtime civil rights activist who now teaches law at Georgetown University, had a direr prediction. "I think integration is an idea whose time must be now," she said, "because if it isn't, what happened to what used to be Yugoslavia is going to happen to us."

PRESERVATION PHOTOCOPY

TAKING ACTION

If Cisneros and Reno have their way, the federal government will aggressively promote housing integration. That would reverse decades of practice because, despite the fair-housing laws on the books, the federal government itself has erected some of the highest barriers to housing desegregation for both the middle class and the poor.

"Sometimes HUD has been the problem," Achtenberg said. "We are not the cause of all segregated housing patterns in America today, but we have all too often played some role even by virtue of the way we have allowed our programs to reinforce racially restrictive neighborhood patterns."

Nowhere is that truer than in the suburbs, which since the early 1950s the Federal Housing Administration (FHA) has helped to build and finance as white necklaces around increasingly black cities.

In FHA-assisted projects, developers are required to search out minority buyers but rarely do.

"HUD is doing zip, *nada*, nothing," Roisman said. "HUD's own studies show that a lot of the projects that are supposed to have affirmative fair-housing marketing plans don't have them and even when they have them, they're not followed and the people who work there don't know about them or laugh them off."

Acknowledging that "the affirmative marketing requirements are quite minimal," Achtenberg said that HUD is "in the process of revising the entire affirmative marketing program."

As long as many middle-class black families can't get mortgages, however, no amount of marketing will help. That's where the new fair-lending agreement should come into play.

"We're devoting a lot of resources to obtain voluntary compliance [by the financial institutions]," said Paul F. Hancock, the chief of the Civil Rights Division's housing section at the Justice Department. "But we're also telling the industry that for those that don't get the message and continue to discriminate, we will use the full extent of our enforcement powers."

Hancock's office has already begun to do so. In the past 18 months, it has taken four banks to court and in several cases obtained settlements of about $1 million.

"The statistics on fair lending are easy to show," John P. Relman, the director of the fair-housing project of the Washington Lawyers Committee for Civil Rights and Urban Affairs, said. "Four cases in the last year and a half—three of them in the last half-year—and before that, zero."

For the poor, on the other hand, action by the Clinton Administration is slower, despite the resolve of top officials.

Last September, Cisneros swooped down on the small all-white town of Vidor, Texas, a longtime Ku Klux Klan stronghold, and with federal marshals took over the Vidor public housing project and forcibly integrated it.

In the intervening six months, 12 black families have moved into the Vidor project, and so far, Achtenberg explained—superstitiously knocking on the wood of her desk—all has gone well. "But our work is not over by a long shot," she said.

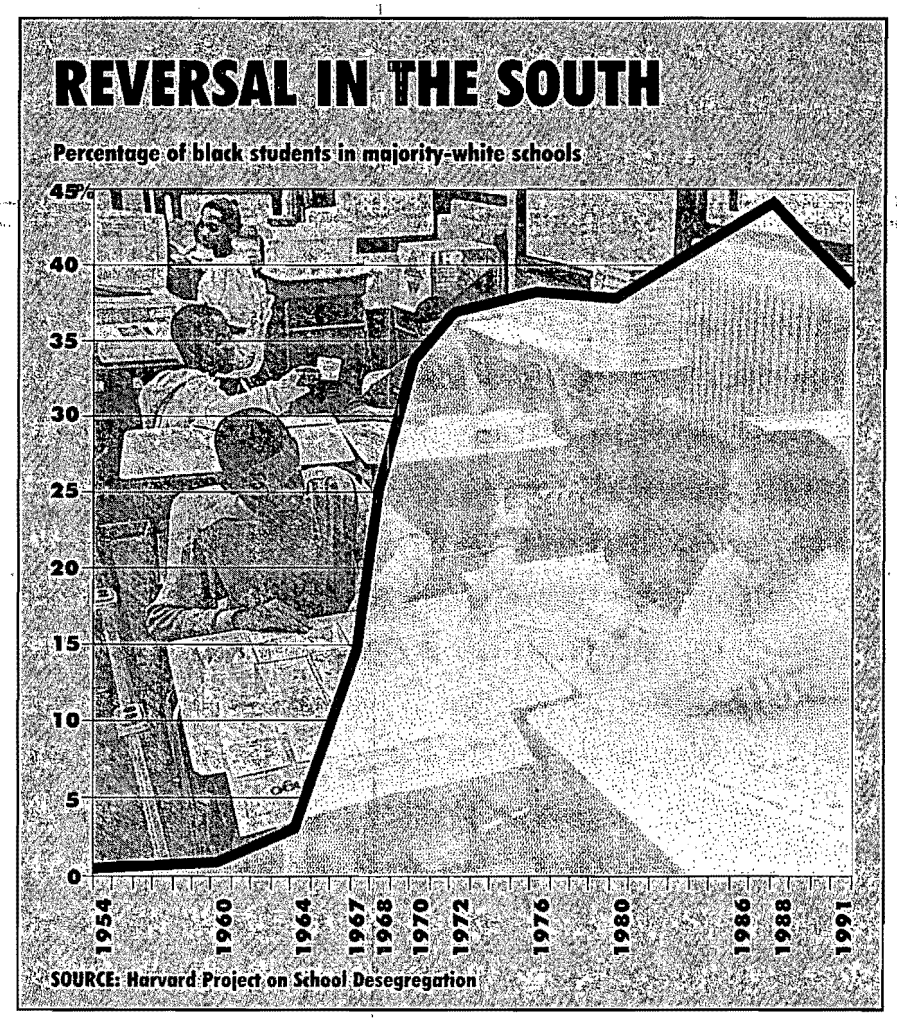
That's for sure, civil rights activists say. Vidor is a tiny fragment of a sprawling, 14-year-old segregation case against HUD in East Texas, and Texas is but one small example of a nationwide problem of segregated HUD-owned and subsidized housing for the poor.

In 1980, Dallas lawyer Mike Daniel sued HUD for allowing segregation in public housing projects in 36 Texas counties. HUD and the Justice Department's Civil Division fought the case. Daniel won, but little was done. Now, more than a decade later, Cisneros is trying to remedy the situation and integrate the housing projects. But he's apparently running into as much resistance from the federal bureaucracy as he is from the local segregationists.

Cisneros, for example, formed a federal-local task force to come up with a desegregation plan. The plan used racial data by census tracts, each of which contains about 4,000 people. That might have been a logical desegregation unit in Achtenberg's hometown of San Francisco, where a census tract covers a typical neighborhood, but "in most East Texas towns, a census tract includes the whole town and sometimes extends for 80 square miles out into the country," Daniel explained.

As a result, the housing projects appeared on paper to be a lot less segregated than they really are. "So they could use that analysis to basically say they don't have to do much more," Daniel said. "Declare a victory that HUD housing in East Texas is desegregated."

So Daniel complained and demanded that the plan be based on census blocks, statistical designations that are about the size of city blocks. "The Justice Department lawyers said, with a straight face, that they couldn't get block data and pro-



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duced a HUD intellectual who also said it," Daniel said. "I just don't see how anybody who [knows about census data] could possibly fall for that crap."

The complaint eventually reached Achtenberg on a Thursday. On Friday, she ordered that the plans be reworked. But that wasn't the end of the fight, Daniel said. "On Monday, the task force met to discuss *whether or not* to make any changes," he said. "It just goes on and on."

Meanwhile, the Administration's fiscal 1995 budget requests several small pots of money to encourage integration in assisted housing. One proposal seeks $149 million to establish programs, such as the one in Chicago, to help families who live in subsidized housing in inner cities look for apartments in the suburbs. Another would allocate $24 million to demonstrate one-stop shopping for subsidized housing in an entire metropolitan area, merging what are now separate, segregated housing programs for cities and their suburbs.

The Buffalo (N.Y.) metropolitan area, for example, has two housing voucher programs—one for the city and one for all its suburbs. The one for the suburbs has a residency requirement that makes it just about impossible for blacks from the city to get a subsidized apartment in the predominantly white suburbs. Achtenberg acknowledged the problem and said that she is trying to fix it.

"They've taken some fine first steps," said Thomas J. Henderson, the deputy director of the Lawyers' Committee for Civil Rights Under Law. "But we have yet to see whether the folks over there are up to the task of really coming to grips with the terrible legacy of institutionalized segregation that has been built into our housing system."

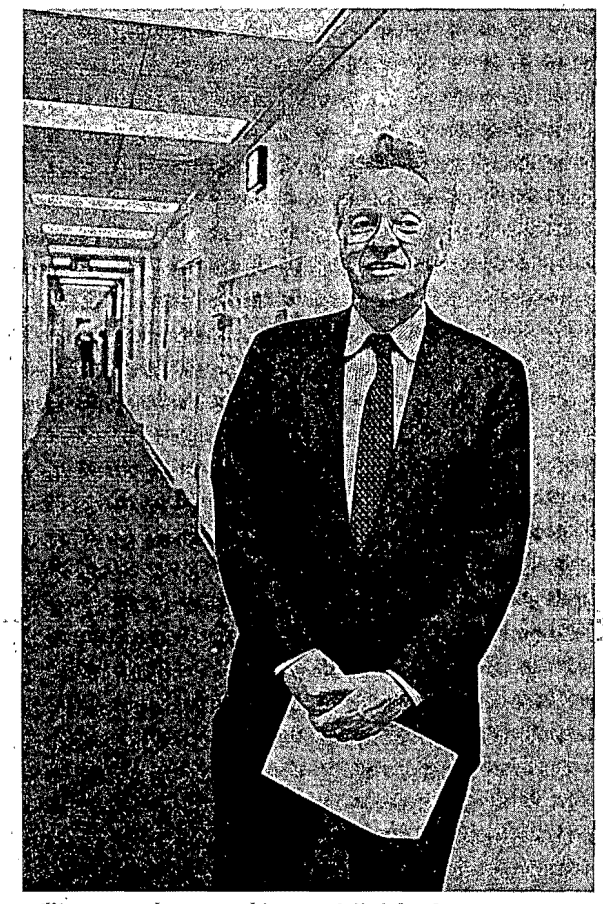
SEPARATE AND UNEQUAL

Until housing integration is achieved, real school desegregation is unlikely. And so far, the Clinton Administration's education policies don't change the equation.

An end to the institutionalized segregation of education was what much of the civil rights movement was about in the 1960s and 1970s. The civil rights activists won, state-enforced segregation requirements ended and considerable integration took place. *(See chart, p. 765.)*

But that was mostly in the South, where housing generally was less segregated than in the North, and where many school districts covered whole counties, so that a district's school desegregation plan included white suburban students.

The issue is much trickier in the North, where schools have remained much more segregated. In a recent study for the National School Boards Association, for example, Harvard's Orfield found that 50.1 per cent of black students in the Northeast attended schools that were 90-100 per cent minority during the 1991-92 school year; the comparable proportion in the South was 26.6 per cent. For more than a decade, Illinois, Michigan, New Jersey and New York have topped the list of states with the most segregated school systems.



Richard A. Bloom

William L. Taylor, a Washington civil rights lawyer "It's yet to be seen what the Clinton Administration will do."

The Supreme Court, which facilitated southern desegregation, complicated northern integration efforts with its 1974 ruling in *Milliken v. Bradley*. Its decision overturned a desegregation plan for the Detroit schools that included busing to the suburbs. Afterward, northern whites found that they could hide from desegregation, and their flight to the suburbs picked up speed.

Black families are moving to the suburbs, too, but for black children, that doesn't necessarily mean going to an integrated school. Orfield found, for example, that of 1.3 million black students in the suburbs of the nation's 33 largest metropolitan areas, three-fifths went to predominantly black schools.

Since the 1970s, neither Congress nor five Presidents have done much to integrate the nation's public schools. In 1972, Congress enacted the Emergency School Assistance Act, which pumped billions of dollars into schools undergoing desegregation. But in 1981, at President Reagan's request, Congress abolished the program. Meanwhile, Congress has routinely attached an anti-busing rider to the Education Department's annual appropriation, prohibiting the use of any federal education funds for busing to achieve integration and making it difficult for the department to cut off assistance to schools that don't desegregate.

Nonetheless, the desegregation that was achieved in the late 1960s persisted for nearly two decades, primarily because the courts retained control over the school districts they had ordered desegregated. In the mid-1980s, however, William Bradford Reynolds, then the assistant attorney general for civil rights, intervened in several cases in an effort to remove the school systems from court supervision. Orfield and others attribute the resegregation that began during the Bush Administration partly to Reynolds's move.

What's more, many civil rights activists no longer look to the federal courts for help in achieving school integration. "We are not bringing any new school desegregation cases," said David S. Tatel, a Washington-based civil rights lawyer. "We are spending a lot of time with school districts that are trying to keep [old] desegregation plans going."

So far, the Clinton Administration has been all but mum on the subject of desegregating the nation's public schools, although it has actively promoted the desegregation of institutions of higher learning through lawsuits and minority scholarships. As for elementary and secondary schools, however, about all it has done is to propose, in its fiscal 1995 budget, increasing assistance to magnet schools from $108 million to $120 million. A less controversial alternative to mandatory busing to achieve some integration, magnet schools—often in poor city neighborhoods—receive extra funds to provide special programs to attract

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students from outside the neighborhood or even outside the city.

"I think it's yet to be seen what the Clinton Administration will do," William L. Taylor, a Washington-based civil rights lawyer, said. "I think it is reasonable to expect that this battering that went on during the Reagan and Bush Administrations will cease, but absent any kind of affirmative policy, I think the trend toward resegregation is likely to continue."

Because the school systems in many of the large old northern cities are predominantly black, the only way meaningful desegregation can occur is to transfer city students to suburban schools and vice versa. Naturally, there is a lot of controversy and considerable disagreement about the value of such transfers.

Orfield and others point to studies that show that poor black students do much better in white suburban schools. James E. Rosenbaum, a professor of education and social policy at Northwestern University, studied children involved in the Chicago program that Irvin runs, for example. That program began in 1976 as the result of a court case, *Hills v. Gautreaux*. In 1989, Rosenbaum compared the records of children who had moved out to the suburbs with those of similar children who had remained in the city. The differences were striking.

Where 20 per cent of the city students had dropped out, only 5 per cent of the suburban students had. A similar pattern prevailed for college attendance. Among those who moved to the suburbs, 54 per cent attended college—and 27 per cent of them a four-year college. The comparable figures for those who remained in the city was 21 per cent and 4 per cent. Of those who didn't go to college, 75 per cent of the suburban students had a full-time job, compared with only 41 per cent of the city students.

But Rosenbaum acknowledged that the dramatic results didn't happen overnight. "We found that suburban movers initially had difficulties adapting to the higher expectations in the suburban schools, and their grades suffered in their first years there," he wrote in an article in the June 1993 issue of the *North Carolina Law Review*.

The same is true for a massive city-suburban magnet program in St. Louis and its suburbs. "I think it's accomplishing a lot," said Susan Uchitelle, the executive director of the Voluntary Interdistrict Coordinating Council, which runs the decade-old program. "But it's going to take more than 10 years" for the impact to show up in test scores.

Under the program, 14,000 young St. Louis residents take buses out to suburban schools while 1,100 suburban youngsters travel in the opposite direction to magnet schools in the city. Tests have shown that the black elementary school students who travel out to the suburbs haven't done much better than children who remain in the city. But by 10th grade, the achievement of the city students begins to decline while that of the suburban students begins to improve.

St. Louis Mayor Freeman R. Bosley Jr., who is black, has expressed his misgivings about this plan in particular and busing in general.

"Even though I appreciate white kids and black kids going to school together, it has not been good for the neighborhoods," he told editorial writers at the *St. Louis Post-Dispatch* last fall. "If you don't have good neighborhood schools, people won't live there. If you live there and send your kids to school somewhere else, there's no sense of commitment."

Bosley also complained about the $25 million that the city must spend to bus its children out to the suburbs. He said he'd rather use the money to improve the city's schools.

Bosley's concerns seem to jibe with the Clinton Administration's policy of putting a high priority on improving schools and saying nothing about integrating them. But the debate continues as to whether that policy can be implemented. Apparently separate but equal was not really decided once and for all in 1954.

A state court judge in Pennsylvania recently ordered Philadelphia's schools to both desegregate and improve the education achievement of poor students. The ruling is the latest development in a case that was brought under Pennsylvania's human relations law in 1970. "It remains the Pennsylvania Human Relations Commission's position that physical desegregation of schools is required," said Michael Hardiman, the lawyer who argued that side of the case. "But it doesn't stop there."

"Our view is that you could stop looking at the issue of mandatory busing and physical integration and start focusing on educational quality issues," responded Michael Churchill, a lawyer for the Public Interest Law Center of Philadelphia, which intervened in the case. "Desegregation is not disappearing as an issue, but it's not going to be the preeminent issue. Quality is going to be."

The prospects don't look good for achieving integration through new plans to bus city students to the suburbs. The Minnesota State Board of Education has recommended doing just that. Minnesota has long been known as the state that can peacefully accomplish the kind of difficult social experiments that would provoke riots in other states. But when the board's plan was announced, there was an explosion of protest. "We took phone calls for two solid days from the community," said Barbara Stillwell, an employee who worked on the plan. "It was quite challenging to sit and listen politely to some of the comments we got."

A color-blind society is still a very long way off. The Clinton Administration seems willing to address the issue of housing integration, but it has done little, if anything, to eliminate school segregation—the condition that started the civil rights movement 40 years ago. ■

John Eisele

Paul F. Hancock, who heads the Civil Rights Division's housing section at Justice In the past 18 months, his office has sued four lenders and obtained big settlements.

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NOTES

RACE-BASED EQUAL PROTECTION CLAIMS AFTER *SHAW V. RENO*

ROBERT A. CURTIS

INTRODUCTION

In *Shaw v. Reno*,[1] the U.S. Supreme Court held that the North Carolina legislature's creation, pursuant to the Voting Rights Act,[2] of a majority-minority voting district[3] of "dramatically irregular shape"[4] gave rise to an equal protection claim under which relief could be granted.[5] Given the convoluted nature of the Court's opinion,[6] coupled with the prominence accorded by the Court to the appearance of the district, many commentators have concluded that *Shaw* is an anomalous decision of limited applicability, relevant only to cases in which voting districts are of highly irregular shape.[7] This Note refers to this interpretation of *Shaw* as the "irregular shape" rationale. If the observations of such commentators are correct, then *Shaw* should have little effect on equal protection jurisprudence generally. This Note argues that these commentators have misinterpreted the rationale of *Shaw*. Following the Court's landmark affirmative action case *City of*

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1. 113 S. Ct. 2816 (1993).
2. 42 U.S.C. § 1973 (1988).
3. A majority-minority district is one in which the majority of voters are of an ethnic or racial minority.
4. *Shaw*, 113 S. Ct. at 2820.
5. *Id.* at 2828.
6. "*Shaw* is challenging intellectually precisely because it is so puzzling legally. Untangling its reasoning requires considerable effort." Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 486 (1993).
7. *Id.* at 495 ("*Shaw* is best read as an exceptional doctrine for aberrational contexts rather than as a prelude to a sweeping constitutional condemnation of race-conscious redistricting."); *see also* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 602-03 (1993); Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 654 (1993) ("North Carolina's Twelfth District was simply too ugly to be legal.").

Richmond v. J.A. Croson Co.,[8] *Shaw* is the next logical step in the development of the Court's equal protection jurisprudence. Under this interpretation, which this Note refers to as the "traditional" rationale, *Shaw* stands for the proposition that any official racial classification creates a presumption of invidiousness that can be rebutted only if the classification passes strict scrutiny.[9] Under the traditional rationale, the Court's opinion explains how the facts of *Shaw* satisfy the traditional requirement for stating an equal protection claim: that a state policy or law has been enacted with an invidiously discriminatory purpose.[10] Essential to this argument is a subsidiary argument: *Shaw*'s contribution to equal protection jurisprudence is the recognition that racial classification is, in itself, presumptively invidious.[11]

Part I of this Note briefly sets out the relevant factual background of the case. Part II argues that the irregular shape inter-

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8. 488 U.S. 469 (1989) (holding that the City of Richmond's plan to award a fixed number of city construction contracts to minority-owned business enterprises was subject to strict scrutiny).

9. To pass strict scrutiny, the state must prove that the legislation is narrowly tailored to attain a compelling state interest. *E.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

10. *E.g.*, Washington v. Davis, 426 U.S. 229, 240 (1976) (stating that it is a "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"). Since the Supreme Court decided *Shaw*, two district courts have had to apply the rationale of *Shaw* to irregularly shaped districts. In Shaw v. Hunt, 1994 U.S. Dist. LEXIS 11102, at *4 (E.D.N.C. Aug. 1, 1994), the district court substantially adopted the traditional rationale, but it nevertheless held that the plan passed strict scrutiny. Also confronted with an extremely irregularly shaped voting district, the district court in Hays v. Louisiana, 839 F. Supp. 1188, 1206–07 (W.D. La. 1993), adopted the irregular shape interpretation by holding that the *Shaw* cause of action depends on the extremely irregular shape of the district. The court in *Hays* found that the redistricting plan at issue failed strict scrutiny. *Id.* at 1209.

11. Korematsu v. United States, 323 U.S. 214, 216 (1944), recognized that race-based classification is presumptively suspect, but it did not make the further claim that the classification is itself a constitutionally cognizable harm. Brown v. Board of Education, 347 U.S. 483, 493–94 (1954), recognized that race-based classification in the field of public education is harmful, but not that race-based classification in and of itself is harmful. The cognizable harm in *Brown* was the stigmatization or feeling of inferiority caused by the classification, not the racial classification itself. *Id.* at 494; *see also* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 154 (1992) ("Taken at face value, the opinion necessarily implied that there was nothing wrong with racial segregation in and of itself: 'separate but equal' facilities, were they only attainable, would be as constitutional as ever."). Under the traditional rationale, *Shaw* goes beyond both of these cases in that it recognizes the very fact of racial classification, without anything more, as a cognizable harm. Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993).

pretation is untenable. First, it is inconsistent with important parts of the opinion itself. Second, it requires the adoption of an unworkable theory of harm.[12] Moreover, it is incompatible with the law of standing.[13] Part III sets out the traditional rationale interpretation of *Shaw*. The discussion briefly outlines the requirements of a traditional equal protection claim, explains how the Court's opinion is structured to meet these requirements, and then explores the *Shaw* Court's implicit theory of harm, which is the next logical step in the Court's equal protection jurisprudence. The discussion then considers and responds to the principal objections to the traditional rationale interpretation of *Shaw*. The Note concludes that the importance of *Shaw* goes far beyond voting districts with irregular shapes. *Shaw* makes it much easier for plaintiffs to survive motions to dismiss in race-related equal protection claims. All that is required in post-*Shaw* equal protection jurisprudence is to allege official, purposeful, racially motivated classification.

Shaw is the first case to depend on the theory that racial classification itself is presumptively harmful.[14] Prior to *Shaw*, stating an equal protection claim based on a racial classification required alleging both purposeful racial discrimination and separate harmful effects.[15] The traditional rationale interpretation of *Shaw*

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12. *See* Pildes & Niemi, *supra* note 6, at 506–08.

13. The Supreme Court has announced that three factors, derived from Article III of the Constitution, are required for standing. First, the plaintiff must allege that she has suffered, or is under imminent threat of suffering, an injury. Second, the plaintiff must allege causation: that the injury is fairly traceable to the defendant's conduct. Third, the plaintiff must allege that a favorable decision by a federal court is likely to redress the injury. Valley Forge Christian College v. Americans for the Separation of Church & State, 454 U.S. 464, 472 (1982). The irregular shape interpretation cannot meet the injury requirement. This interpretation requires a theory of nonpersonalized harm that runs afoul of the ban on generalized grievances. *See infra* note 55 and accompanying text.

14. Professors Aleinikoff and Issacharoff claim that "[i]t is noteworthy that *Croson* is the first case to invalidate an affirmative action program in which the Court did not identify any individual who had been deprived of a vested interest or expectation as a result of the plan." Aleinikoff & Issacharoff, *supra* note 7, at 599. The operative language here is not "vested interest or expectation" but rather "individual," for the *Croson* Court noted that "[t]he Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion). *Croson* clearly was a case in which the plaintiffs alleged a deprivation of a vested interest or expectation, namely, the opportunity to compete. In contrast to *Croson*, *Shaw* is the first case in which the Court has recognized a harm that was not the deprivation of a "vested interest or expectation." *See infra* notes 84–121 and accompanying text.

15. *See infra* notes 28–29 and accompanying text.

merges these categories. Alleging purposeful racial discrimination is enough to state a claim; the harmful or invidious quality follows analytically from the existence of discrimination.

A hypothetical voting rights case demonstrates the importance of deciding between the competing interpretations. Suppose plaintiffs have filed a complaint alleging that their state's racially motivated vote-districting plan violates the Equal Protection Clause, but are unable to show either that the voting strength of their group has been diluted or that the district at issue is of a highly irregular shape.[16] Under the irregular shape interpretation, the complaint should be dismissed for failure to state a claim. Although the plaintiffs would have sufficiently alleged a discriminatory purpose, there would be no grounds on which to claim harmful or invidious effects because there would be neither vote dilution nor a district of highly irregular shape. Under the traditional rationale interpretation, however, the complaint would survive a motion to dismiss because *Shaw* recognizes that racial classification is itself presumptively invidious.

I. FACTUAL BACKGROUND

The event giving rise to *Shaw* was the redistricting of North Carolina into twelve congressional districts, including one majority-minority district.[17] Because forty of the state's one hundred counties are covered by section 5 of the Voting Rights Act,[18] the North Carolina General Assembly submitted its original redistricting plan to the U.S. Attorney General for preclearance. The Attorney General's office, however, formally objected to the plan.[19] In response, the General Assembly adopted the revised plan

16. *See, e.g.*, United Jewish Org. v. Carey, 430 U.S. 144, 165–66, 180 (1977) (dismissing suit for failure to state claim on grounds that in absence of vote dilution, state's consideration of race in its districting decisions does not present an injury).

17. Shaw v. Reno, 113 S. Ct. 2816, 2820 (1993).

18. The Voting Rights Act of 1965, Pub. L. No. 89–110, § 5, 79 Stat. 437, 439 (codified at 42 U.S.C. § 1973c (1988)). In jurisdictions covered by the special provisions of § 5, any change in "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" must be submitted to either the U.S. District Court for the District of Columbia or the U.S. Attorney General for approval. *Id.* Such changes are not to be approved if the changes have either the purpose or effect of denying or abridging the right to vote on the basis of color or race. *Id.*

19. *Shaw*, 113 S. Ct. at 2820.

(hereafter the "Plan") at issue in *Shaw*. The Plan included a second majority-minority district.[20]

The First Congressional District, the original majority-minority district, is hook-shaped. Centered in the northeast portion of the state, it moves southward, until "with finger-like extensions, it reaches far into the southern-most part of the State."[21] The second majority-minority district, the Twelfth Congressional District, is described in the opinion as "approximately 160 miles long and, for much of its length, is no wider than the I-85 corridor."[22]

The plaintiffs in *Shaw* filed an action in federal district court claiming, among other things, that the Plan was unconstitutional under the Equal Protection Clause.[23] The three-judge district court[24] dismissed the action for failure to state a claim.[25] On appeal, the Supreme Court reversed,[26] holding that the plaintiff's allegations were sufficient to state an equal protection claim.

II. THE IRREGULAR SHAPE INTERPRETATION

A. *The Arguments for the Irregular Shape Interpretation*

Any plausible interpretation of *Shaw* must not only make sense of the text in its own terms, but also explain how the plaintiffs stated an equal protection claim.[27] Under the standard formulation, to state an equal protection claim, a plaintiff must allege two things: first, that she was the object of purposeful discrimination;[28] and second, that the discrimination was invidious, i.e., that it has injured her.[29]

Under the irregular shape interpretation, discriminatory purpose is not problematic.[30] The irregular shape interpretation as-

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20. Brief for Appellee at 4–5, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92–357).

21. *Shaw*, 113 S. Ct. at 2820.

22. *Id.* at 2820–21.

23. Shaw v. Barr, 808 F. Supp. 461, 469 (E.D.N.C. 1992) (three-judge court), *rev'd sub nom.* Shaw v. Reno, 113 S. Ct. 2816 (1993).

24. 28 U.S.C. § 2284(a) (1988) requires a three-judge court when there is a challenge to the apportionment of a congressional district or any statewide legislative body.

25. *Shaw*, 808 F. Supp. at 473.

26. *Shaw*, 113 S. Ct. at 2830, 2832. 28 U.S.C. § 1253 (1988) provides for direct appeal to the Supreme Court from a three-judge court.

27. *Shaw*, 113 S. Ct. at 2832 ("Today we hold only that appellants have stated a claim under the Equal Protection Clause . . . .").

28. Washington v. Davis, 426 U.S. 229, 238–39 (1976).

29. *See id.* at 243 (affirming racial impact of the law as a necessary factor).

30. *See* Aleinikoff & Issacharoff, *supra* note 7, at 608 ("[T]here can be no doubt

sumes that purposeful compliance with a federal statute apparently requiring race-consciousness is no different from race-consciousness per se. Consequently, North Carolina's intent to comply with the Voting Rights Act constituted the kind of racially discriminatory purpose necessary to state an equal protection claim.

It is more difficult under the irregular shape interpretation to define an acceptable theory of harm. Given the Court's fixation[31] on the shape of the Twelfth District, however, the visual appearance of the district is a natural candidate for the theory of injury embedded in *Shaw*. In reapportionment cases, the Court claimed, "appearances do matter."[32] Thus, under the irregular shape interpretation, appearances matter in determining whether the discrimination has been harmful. According to the Court, districts of highly irregular shape bear "an uncomfortable resemblance to political apartheid."[33] Moreover, such districts reinforce "the perception that members of the same racial group," regardless of other significant demographic differences, "share the same political interests, and will prefer the same candidates at the polls."[34] Consequently, districts of highly irregular shape "may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract."[35] The signals these districts send are "altogether antithetical to our system of representative democracy."[36] Thus, one plausible way to account for the harm in *Shaw* is to conclude that voting districts of highly irregular shape generate unacceptable perceptions and that these perceptions injure the members of the district in question.[37]

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that, on the record before the Court, the decision to create the challenged district was race dependent.").

31. In the first part of the opinion, setting out the facts of the case, the Court devoted 50 lines of text to a description of the voting districts involved. Shaw v. Reno, 113 S. Ct. 2816, 2820–21 (1993). As Professors Aleinikoff and Issacharoff remark, "The shape of the district seems quite clearly to lie at the core of the Court's judgment." Aleinikoff & Issacharoff, *supra* note 7, at 609. The Court referred to the district as "bizarre on its face," *Shaw*, 113 S. Ct. at 2825, and as "extremely irregular on its face," *id.* at 2824.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Pildes & Niemi, *supra* note 6, at 493 (arguing that the injury in *Shaw* involved expressive, rather than material, harms focusing on the perceived legitimacy of political structures, rather than on the actual distribution of political power).

The type of harm relied on by the irregular shape interpretation can be usefully referred to as "expressive," rather than "material." Expressive harms are caused by ideas or preferences expressed through government action, as opposed to material harms, which result from the more tangible consequences of government action.[38] Because expressive harms focus on social perceptions, "they involve the government's symbolic endorsement of certain values in ways not obviously tied to any discrete individualized harm."[39] On the other hand, *City of Richmond v. J.A. Croson Co.* involved a classic material harm because the plaintiff alleged denial of an opportunity to compete for a fixed number of city contracts.[40] This type of harm is concrete, individualized, and material. In *Shaw*, by contrast, no voters suffered a dilution of their voting power; consequently, the harm to the *Shaw* plaintiffs was fundamentally different from the harm suffered in the typical equal protection case.[41]

Consequently, the irregular shape interpretation is able to offer a full account of how the plaintiffs in *Shaw* stated an equal protection claim only by relying on an expressive harm. The legislature's specified purpose of complying with the Voting Rights Act was tantamount to the intent to reapportion based on racial criteria. Moreover, this purpose was invidious: the highly irregular shape of the district reinforced the perception that in the voting context, race is all that matters.

The strength of the irregular shape interpretation emanates not merely from its ability to provide a theory under which the plaintiff stated a claim, but also from its ability to explain how *Shaw* is consistent with *United Jewish Organizations (UJO) v. Carey*.[42] The *UJO* Court dismissed, for failure to state a claim,

38. *Id.* at 506–07 ("[Expressive harm] is not concrete to particular individuals, singled out for distinct burdens. The harm instead lies in the disruption to constitutionally underwritten public understandings about the appropriate structure of values in some public arena.").

39. *Id.* at 513.

40. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion). *Croson* involved a plan created by the Richmond City Council to set aside a specific number of city-awarded construction contracts for minority-owned business enterprises. The plan involved a quota requiring "prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises." *Id.* at 477.

41. *See* Pildes & Niemi, *supra* note 6, at 506.

42. 430 U.S. 144 (1977). The state of New York, in response to Voting Rights Act

the plaintiff's challenge to a reapportionment plan on the grounds that the plaintiff had failed to adequately plead a harm.[43] Any plausible interpretation of *Shaw* must be reconcilable with *UJO*, since the *Shaw* Court expressly distinguished *Shaw* from *UJO*.[44] In *UJO*, a plurality of the Supreme Court approved the deliberate use of racial criteria in order to comply with section 5 of the Voting Rights Act.[45]

Under the irregular shape interpretation, *Shaw* and *UJO* are distinct in that they involved different kinds of injury. The *Shaw* Court characterized *UJO* as a vote dilution case.[46] In *Shaw*, according to the irregular shape interpretation, the issue was not vote dilution but the signal that highly irregular districts send. Under this reading, *Shaw* presented an injury because it involved a highly irregular district. *UJO*, on the other hand, did not present an injury, since under the facts of that case, there was no vote dilution.[47] The irregular shape interpretation is thus able to reconcile *Shaw* with *UJO* because the two cases turned on different theories of injury.

The irregular shape interpretation is a powerful explanation of the Court's rationale in *Shaw* because it is able to explain not only how the text and structure of the Court's opinion warrant its holding, but also how the rationale of *Shaw* is reconcilable with *UJO*. Despite the explanatory power of the irregular shape interpretation, however, there are enough difficulties with it to warrant a search for a better interpretation of the Court's rationale.

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violations, adopted a reapportionment plan that redesigned voting districts in Kings County. *Id.* at 149–51. The plan did not create any additional majority-minority districts, but did redistribute minority voters in a way likely to enhance overall minority voting effectiveness. One result was that a Hasidic community that had previously been located in one district was broken up into two districts. *Id.* at 148–52. The *UJO* Court upheld the plan on the grounds that New York's deliberate racial classification pursuant to the Voting Rights Act did not violate the Constitution. *Id.* at 167–68 (plurality opinion); *see also id.* at 179–80 (Stewart, J., concurring).

43. *Id.* at 164–65 (plurality opinion).

44. Shaw v. Reno, 113 S. Ct. 2816, 2829 (1993).

45. *UJO*, 430 U.S. at 164–65.

46. *Shaw*, 113 S. Ct. at 2829.

47. *UJO*, 430 U.S. at 163–64.

B. *Objections to the Irregular Shape Interpretation*

The irregular shape interpretation suffers from both internal and external deficiencies. The interpretation is internally deficient because it cannot explain important parts of the opinion itself; it is externally deficient because of the pressure it puts on other well-settled areas of law.[48]

The primary internal deficiency of the interpretation is that it cannot explain the abundant language in *Shaw* suggesting that all purposeful racial classifications are subject to strict scrutiny.[49] Under the irregular shape interpretation, only voting districts that have highly irregular shapes, explicable only in terms of race, are subject to strict scrutiny. Consequently, regularly shaped districts,[50] even if purposefully drawn in a race-conscious fashion, would not be subject to strict scrutiny under this interpretation.

This result does not square with the Court's language that "demands strict scrutiny of all racial classifications."[51] Strict scrutiny is required of such classifications because "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[52] Since every purposeful racial classification is subject to strict scrutiny, little room is left for the claim of the irregular shape interpretation that *Shaw* is an aberration, applying only to irregularly shaped voting districts. Under the traditional rationale interpretation of *Shaw*, a plaintiff living in a regularly shaped district could require her state legislature to demonstrate that its plan passed strict scrutiny. This result would be flatly inconsistent with the irregular shape interpretation of *Shaw*.

Aside from its inability to explain a critical part of the Court's opinion, the irregular shape interpretation is in significant

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48. At this point in the discussion, this Note considers only those critiques of the irregular shape interpretation that are not at the same time part of the argument for a different interpretation of *Shaw*. The purpose of this separation is to make clear that, on its own terms, the irregular shape interpretation is deficient. To be sure, however, the best objection to the irregular shape interpretation is the explanatory power of the traditional rationale. *See infra* Part III.

49. *See Shaw*, 113 S. Ct. at 2824–25.

50. Broadly, a district is regularly shaped if it accords with traditional districting principles: compactness, contiguity, respect for political subdivisions, and population equality. *Id.* at 2827; *UJO*, 430 U.S. at 168; Reynolds v. Sims, 377 U.S. 533, 578 (1964).

51. *Shaw*, 113 S. Ct. at 2830.

52. *Id.* at 2825 (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979)).

tension with other areas of the law. First, although the theory of expressive harm that underlies the irregular shape interpretation helps explain how the plaintiffs managed to state an equal protection claim, the theory itself is open to significant criticism. As the advocates of the irregular shape interpretation concede, granting expressive harms constitutional recognition would require judges to engage in extraordinarily difficult acts of interpretation.[53] To decide whether the shape of a district is sufficiently irregular as to warrant a finding that society has been harmed by its existence would not, indeed could not, involve the application of a legal test. Rather, courts would have to determine the expressive power or meaning that a government policy has in a particular social, historical, and political setting. Courts would be called on not to interpret the legislature's intent, but rather to determine the social message the policy sends. Even advocates of the irregular shape interpretation find the indeterminacy of the expressive theory of harm problematic: "Such exercises of judicial judgment are fraught with complexity and unlikely to yield determinate, single right answers."[54]

Second, and more seriously, the expressive view of harm is incompatible with the Court's ban on generalized grievances. For a party to have standing before a federal court, the party's claimed injury must be not general, but individuated. A plaintiff must be able to distinguish her claim from "a generally available grievance about government—claiming only harm to [her] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [her] than it does the public at large."[55] The fact that expressive harms are not tied to any discrete individualized harms makes the theory of harm underlying the irregular shape interpretation incompatible with the traditional requirement of individualized wrongs.[56] An

53. Pildes & Niemi, *supra* note 6, at 507–08.

54. *Id.* at 508.

55. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2143 (1992).

56. *See* Pildes & Niemi, *supra* note 6, at 513–14 ("Expressive harms focus on *social* perceptions, *public* understandings, and *messages*; they involve the government's symbolic endorsement of certain values in ways not obviously tied to any discrete, individualized harm. A significant tension, therefore, exists between recognition of expressive harms and traditional requirements of individualized wrongs."); *see also* Allen v. Wright, 468 U.S. 737, 754–55 (1984) (holding that abstract stigmatic injury unaccompanied by further individualized and unequal treatment is insufficient to give rise to standing).

interpretation of the *Shaw* Court's rationale that requires the creation of a new cause of action is seriously flawed if that cause of action is unable to invoke the jurisdiction of a federal court. The difficulties with the irregular shape interpretation warrant exploring an alternative interpretation of the Court's rationale.

III. THE TRADITIONAL RATIONALE INTERPRETATION

A. *The Arguments for the Traditional Rationale Interpretation*

Contrary to the claims of the irregular shape interpretation, the *Shaw* Court did not take discriminatory purpose for granted. The fact that the Twelfth District is of irregular shape was important not because it created a new kind of harm, but because it allowed the Court to presume that the legislature's purpose in drawing such a district was racially motivated. The injury needed to complete an equal protection claim was official race-conscious classification itself. The unique contribution of *Shaw* is that it makes racial classification in itself a personal, individualized injury.[57] Although this conception of harm makes its formal debut in *Shaw*, it has been germinating in the Court's jurisprudence for some time.[58] Thus, *Shaw* represents the next logical step in the Court's jurisprudence.

The traditional rationale, so conceived, avoids the internal and external deficiencies that plague the irregular shape interpretation. These factors combine to make the traditional rationale a better interpretation of the Court's reasoning than the irregular shape interpretation. Thus, lower federal courts confronted with a race-based equal protection claim must look to *Shaw* for guidance in a far greater range of cases than the irregular shape interpretation would suggest.

Under the irregular shape interpretation, discriminatory purpose is inferred from compliance with the Voting Rights Act. Thus, under this interpretation, a reason other than establishing discriminatory intent must be attributed to the Court's language regarding the irregular shape of the district.[59] To avoid making this language superfluous it is therefore necessary, under this interpretation, to use the language to explain the nature of the injury.

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57. Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993).
58. *See infra* notes 99–121 and accompanying text.
59. *Shaw*, 113 S. Ct. at 2820–21 (describing the shape of the district).

However, once it is seen that the Court was not taking discriminatory purpose for granted, the irregular shape language begins to make more sense as an attempt to attribute a racial motivation to the North Carolina legislature.

The *Shaw* Court began by noting that "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute."[60] However, the Court later explained that statutes not involving express racial classifications are substantively no different from those that do. Exacting judicial scrutiny must be applied "not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race-neutral, are, on their face, 'unexplainable on grounds other than race.' "[61] This exacting scrutiny must be "applie[d] . . . to a classification that is . . . an obvious pretext for racial discrimination."[62] If the element of discriminatory purpose is as clear-cut as the irregular shape interpretation suggests, it is hard to postulate a reason for the Court's lengthy analysis of statutes that are facially neutral.[63]

The Court expressly characterized the plaintiffs' claim as requiring the inference of racial classification from the shape of the district: "Appellants contend that redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race' demands the same close scrutiny that we give other state laws that classify citizens by race."[64] If the allegation of discriminatory purpose followed from North Carolina's intent to comply with the Voting Rights Act, as the irregular shape interpretation claims, there would be no need for the Court to characterize the appellants' claim as requiring the inference of discriminatory purpose from the shape of the district. If the district was expressly drawn with the purpose of racial discrimination, the fact that the district's appearance was unexplainable on grounds other than race would be entirely superfluous.

As the *Shaw* Court's subsequent discussion of *Wright v. Rockefeller*[65] illustrates, the irregular shape of the district is rele-

60. *Id.* at 2824.
61. *Id.* at 2825 (quoting Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).
62. *Id.* (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979)).
63. *Id.* at 2825–28.
64. *Id.* at 2825 (quoting *Arlington Heights*, 429 U.S. at 266).
65. 376 U.S. 52 (1964).

vant to the explanation of the legislature's purpose. *Wright* involved four districts created by a New York apportionment statute.[66] As the *Shaw* Court noted, the disagreement between the majority and the dissenters in *Wright* was whether the plaintiff had proved that the lines were drawn with a racially discriminatory purpose.[67] The *Wright* majority argued that although the lines were irregular, they were not so irregular as to permit no other conclusion than that they were drawn for the purpose of classifying voters by race.[68] The dissenters argued that the bizarre shape of the district lines could be "explained only in racial terms."[69]

According to the *Shaw* Court, *Wright* illustrates the difficulty of proving discriminatory purpose in the reapportionment context.[70] As the *Shaw* Court noted, however,

> The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race. Moreover, it seems clear to us that proof sometimes will not be difficult at all. In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to "segregat[e] . . . voters" on the basis of race.[71]

The Court further noted that compliance with traditional districting principles is not constitutionally required. Rather, such principles are important because they are "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines."[72] Moreover, the Court's summary of its holding shows that it understood North Carolina's statute to be race-neutral on its face.[73] Nevertheless, the Court held that the plaintiffs could state

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66. *Id.* at 53.
67. *Shaw*, 113 S. Ct. at 2826.
68. *Wright*, 376 U.S. at 56–58.
69. *Id.* at 59 (Douglas, J., dissenting).
70. *Shaw*, 113 S. Ct. at 2826.
71. *Id.* (quoting Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960)).
72. *Id.* at 2827.
73. The Court noted,

> [W]e conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race . . . .

Id. at 2828.

an equal protection claim by alleging that the shape of the district could be explained only as an attempt to classify voters on racial lines.[74] The Court remanded *Shaw* to the district court partly in order to determine if there had been a racial gerrymander.[75] If the intent to classify on racial grounds had been clear on the face of the record, the part of the remand order directing an inquiry into racial gerrymandering would have been redundant. The Court, it is important to remember, held only that the plaintiffs had stated a claim, i.e., that the plaintiffs' allegations regarding purpose were sufficient to go forward to a trial on the merits. Thus, the Court did not conclude that the question of discriminatory purpose was clear on the face of the record, for as it noted in *Shaw*, "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute."[76]

This language, coupled with the content of the remand order, is simply inconsistent with the supposition that discriminatory purpose appeared on the face of the record. Moreover, much of the Court's opinion seems to be aimed at fashioning criteria for lower courts to apply in determining whether there has been a racial gerrymander. Consequently, two propositions emerge from the Court's analysis. First, the Court was unwilling to treat North Carolina's reapportionment statute as an instance of express racial gerrymandering. Second, the Court relied on the irregular shape of the district to infer a racially discriminatory purpose. In strictly textual terms, then, the traditional rationale is able to provide a better account of the Court's focus on the odd shape of the district than is the irregular shape interpretation.

The reasons for preferring the traditional rationale's explanation of the prominence of the district's shape, however, go well beyond the text. The treatment of discriminatory purpose by the irregular shape interpretation depends necessarily on the assumption that intentional compliance with the Voting Rights Act, which may require race-consciousness, is equivalent to intentional race-consciousness per se. Validating this assumption would put serious pressure on the constitutionality of the Voting Rights Act itself. If

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74. *Id.*

75. *Id.* at 2832 ("If the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest.").

76. *Id.* at 2824.

the Court were to find that the mere intent to comply with the Voting Rights Act constitutes the discriminatory purpose necessary to state an equal protection claim, the Voting Rights Act would itself be subject to strict scrutiny since it would amount to a *de facto* racial classification.[77] Consequently, the *Shaw* Court expressly left open the question of whether the Voting Rights Act is itself unconstitutional,[78] because the Court's prior decisions counsel against reaching the constitutionality of an act of Congress when avoiding the issue is possible.[79] Specifically, the Court should invalidate an act of Congress, particularly one that addresses a "vexing national problem, only for the most compelling constitutional reasons."[80]

Consequently, there are doctrinal reasons for preferring an interpretation of the *Shaw* Court's decision that do not implicate the Voting Rights Act. Moreover, as argued above, the Court's discussion of facially neutral statutes lends strong support to the conclusion that the Court inferred discriminatory purpose from the highly irregular shape of the district, as the traditional rationale contends, rather than from the Voting Rights Act, as the irregular shape interpretation contends. Therefore, the best explanation of the Court's irregular shape language is that the irregular shape of the district allowed the Court to infer discriminatory purpose. Having located the element of discriminatory purpose in the shape of the district, the traditional rationale must set out a theory of injury compatible with the *Shaw* Court's reasoning.

Under the traditional rationale, the injury suffered by the plaintiffs in *Shaw* was the mere fact of racial classification. Al-

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77. *See, e.g.*, *id.* at 2830–31.

78. *Id.* at 2831.

79. *See, e.g.*, Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341, 345–48 (1936) (Brandeis, J., concurring) (arguing that the Court should neither pass on the constitutionality of an act of Congress if the question can be avoided, nor anticipate a question of constitutional law before an answer to the question is absolutely necessary, nor formulate a rule of constitutional law broader than required to resolve a case). The *Shaw* Court, in tying the element of purpose to the shape of the district, rather than to North Carolina's intent to comply with the Voting Rights Act, adhered to these prudential doctrines. The *Shaw* Court was able to characterize the issue in a way that avoided passing on an act of Congress; it did not anticipate the question of whether the Voting Rights Act is itself unconstitutional since it was able to resolve *Shaw* without addressing that issue. Since the shape of the district sufficed as an allegation of discriminatory purpose, to address the constitutionality of the Voting Rights Act would have been a broader resolution of the issue than the facts of *Shaw* required.

80. Mistretta v. United States, 488 U.S. 361, 384 (1989).

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though this theory of injury has been germinating in the Court's jurisprudence for some time, *Shaw* is the first case to rely on it for its central holding.[81]

The typical equal protection claim is bifurcated: it involves an allegation of discriminatory purpose coupled with an allegation that this purpose, or the attainment of this purpose, will have, or has had, certain injurious effects.[82] These two allegations amount to the requirement that to state a claim, a challenged official action must have been taken with invidious discriminatory intent.[83] In other words, in pre-*Shaw* equal protection jurisprudence, merely alleging a purposeful racial classification was insufficient. The complaining party also had to make the separate claim that the classification had denied the party some cognizable right. The consideration of pre-*Shaw* equal protection cases makes this bifurcation clear.

In the landmark case of *Brown v. Board of Education*,[84] the Court found unconstitutional the racial segregation of public schools. The plaintiffs suffered an injury, the Court held, because they had been denied their right to an equal education.[85] There was thus something tangible and material, namely, an equal education, that the plaintiffs had been denied. In *Loving v. Virginia*,[86] the Court held that a Virginia statute that proscribed interracial marriage violated the Equal Protection Clause.[87] The plaintiffs' injury was their conviction pursuant to the statute. In *Regents of the University of California v. Bakke*,[88] the Court held that the medical school admission policy of the University of California at Davis, which established a racial quota, was subject to strict scrutiny.[89] The plaintiff was able to state a claim because he had suf-

81. Though a true demonstration of this negative hypothesis would require an analysis of all equal protection cases, the proposition can be reasonably established by considering the landmark equal protection cases. *See, e.g.*, *infra* notes 84–93 and accompanying text.

82. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976).

83. *Id.*

84. 347 U.S. 483 (1954).

85. *Id.* at 492–95 (finding that segregation in education caused feelings of "inferiority," which in turn deprived plaintiffs of benefits they would have received from integrated schools).

86. 388 U.S. 1 (1967).

87. *Id.* at 2.

88. 438 U.S. 265 (1978).

89. *Id.* at 287–91.

fered the tangible injury of being denied equal access to a public institution.[90] In *City of Richmond v. J.A. Croson Co.*,[91] the Court held that Richmond's plan to award a fixed number of construction contracts to minority-owned business enterprises was subject to strict scrutiny.[92] The plaintiff stated a claim because it had suffered the tangible injury of being denied the opportunity to compete for a fixed percentage of public contracts due too its race.[93]

All these cases involved allegations of both a racial classification and a particular material harm. Under the traditional rationale interpretation of *Shaw*, this bifurcation is no longer necessary. *Shaw* merges these two claims: under *Shaw*, an allegation of racial classification analytically contains an allegation of harm. While this is a new theory of harm, its recognition is the next logical step in the Court's jurisprudence.

This theory of harm is not apparent on the face of the Court's opinion. The Court did, however, define the criteria by which a racial classification can be found benign.[94] The Court's theory of harm must be inferred from these criteria; a racial classification is invidious if it fails the test for benign classifications. Consequently, the criteria by which the *Shaw* Court tested for benign classifications is the essential link to the Court's understanding of injury in the racial context.

In one of the critical passages in *Shaw*, setting out the test for benign racial classifications, the Court noted that the reason

> the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is "benign." Thus, if appellants' allegations of a racial gerrymander are not contradicted on remand, the District Court must determine whether the General Assembly's reapportionment plan satisfies strict scrutiny.[95]

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90. *See id.* at 280–81 n.14.

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

92. *Id.* at 493–98.

93. *Id.* at 493. *But see* Aleinikoff & Issacharoff, *supra* note 7, at 599 (arguing that the Court in *Croson* did not identify any individual deprived of an interest or expectation).

94. *See, e.g.*, Shaw v. Reno, 113 S. Ct. 2816, 2830 (1993); *see infra* text accompanying notes 95–98.

95. *Shaw*, 113 S. Ct. at 2830 (citation omitted).

This passage has two important implications. First, the allegation of a racial gerrymander affecting the claimant,[96] and nothing more, is sufficient to state a claim: the Court made clear that the allegation of a racial gerrymander triggers strict scrutiny.[97] Therefore, unless the *Shaw* Court abandoned the traditional requirement of stating a claim (that there be discriminatory intent coupled with harmful effects), a presumption of injury must be built into the allegation of a racially discriminatory purpose. Second, to overcome this presumption of invidiousness, an official racial classification must pass strict scrutiny. Thus, any racial classification not narrowly tailored to pursue a compelling state interest is invidious.

The theory of harm in *Shaw*, therefore, envisions the following approach to equal protection claims in the racial context: to state a claim, it is sufficient to allege a racially discriminatory purpose, because racial classification is presumed invidious. This presumption can be overcome only by demonstrating that the classification passes strict scrutiny.

In essence, strict scrutiny defines invidiousness because it screens out all arbitrary classifications.[98] As Justice O'Connor, writing for the plurality in *Croson*, noted,

> [T]he purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.[99]

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96. One of the difficulties of this analysis is specifying exactly who is affected. For example, white voters in Hawaii are not affected by redistricting in North Carolina. *See* Allen v. Wright, 468 U.S. 737, 754–56 (1984) (holding that injury for standing purposes must be individuated). A harder question is whether white North Carolina voters living in districts not altered by the redistricting in question are affected for the purposes of determining standing. The *Allen v. Wright* requirement of individuated, unequal treatment, *id.*, suggests that the voters must belong to the districts that were drawn with discriminatory purpose in order to allege classification as an injury in the redistricting context.

97. Strict scrutiny analysis is not part of the determination of whether the plaintiff has stated a claim. *See Shaw*, 113 S. Ct. at 2832 (holding that plaintiff stated a claim and remanding to district court to determine if legislation passes strict scrutiny).

98. Statutes that fail rational basis review or intermediate scrutiny are similarly arbitrary and hence invidious. Strict scrutiny is used in the racial classification context because race is so strongly presumed to be irrelevant to public decisionmaking. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

99. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opin-

The logic of this passage implies that strict scrutiny prevents racial classification from arbitrarily allocating public goods in two ways. First, it requires that the interest pursued be compelling.[100] This component ensures that individuals are subject to racial classification only when powerful state interests are at stake. Second, strict scrutiny requires a narrowly tailored policy working to attain the compelling end.[101] This requirement ensures that the racial classification strictly correlates with the class of people that is the object of the state's compelling interest.[102] Thus, arbitrariness is avoided by ensuring that the racial classification does not benefit people who have no justified claim. When a race-conscious policy fails strict scrutiny, it is invidious because the racial group selected for the benefit is not congruent with the group that the state has a compelling interest in treating preferentially.

Two propositions follow from this analysis. First, discrimination is invidious only if it is arbitrary. Second, racial classification is presumptively arbitrary and thus presumptively invidious. These propositions not only are logically implied by the Court's conceptualization of the importance of strict scrutiny, but also are consistent with much of the Court's established equal protection jurisprudence.

As early as 1904, it was recognized that the touchstone of unconstitutional discrimination was arbitrary line-drawing. In *Missouri, Kansas, & Texas Railway v. Clay May*, Justice Brown argued that the key to unconstitutional discrimination was line-drawing without sufficient reason.[103] The connection between arbitrariness and unconstitutional discrimination has continued into the modern era. In *Hopper v. Bernalillo County Assessor*,[104] the Court held

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100. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

101. *Id.*

102. A policy that required an innocent party to pay compensation for a wrong would similarly fail the "narrowly tailored" prong of strict scrutiny. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) ("[T]here is a measure of inequity in forcing innocent persons . . . [to redress] grievances not of their making.").

103. 194 U.S. 267, 271 (1904) (Brown, J., dissenting) (stating that a statute that imposed liability on railroad for allowing Johnson grass to grow on right-of-way but imposed no similar liability on others should be found to violate the Fourteenth Amendment, because if Johnson grass is a nuisance when growing on railroad tracks, "it is equally so when growing upon the other side of the line fence, and . . . the law should be made general to avoid the charge of arbitrary discrimination").

104. 472 U.S. 612, 620–22 (1985).

that a New Mexico statute distinguishing between "established" and nonestablished resident veterans was invidious because the distinction was arbitrary. In its most clear statement of the connection between invidiousness and arbitrariness, the Court in *City of Dallas v. Stanglin*[105] noted that "it is only the invidious discrimination, the . . . arbitrary act, which cannot stand consistently with the Fourteenth Amendment."[106] Thus, classifications that are arbitrary are constitutionally invidious.

Just as firmly established is the proposition that racial distinctions are presumptively arbitrary. Nearly thirty years ago, Justice Douglas explained in *Wright v. Rockefeller* that "the individual is important, not his race, his creed, or his color. . . . [Racial differences between persons] are irrelevant in the constitutional sense."[107] Racial classification is presumed to be arbitrary because "laws grounded in such considerations are deemed to reflect prejudice and antipathy" and because racial factors "are so seldom relevant to the achievement of any legitimate state interest."[108]

The proposition that racial characteristics are arbitrary from a constitutional point of view is amplified by the Court's decision in *Palmore v. Sidoti*.[109] Linda Sidoti Palmore and Anthony Sidoti, both white, were divorced in May, 1980; Linda was awarded custody of their three-year-old daughter Melanie. In 1981, the father challenged custody on the grounds that conditions had changed: the mother was cohabiting with a black man, Clarence Palmore, Jr., whom she married two months later.[110] The district court awarded custody to the father because it felt

> that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that

105. 490 U.S. 19 (1989).

106. *Id.* at 27 (quoting New Orleans v. Dukes, 427 U.S. 297, 303–04 (1976)).

107. 376 U.S. 52, 66–67 (1964); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 518 (1989) (Kennedy, J., concurring) ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause."); *id.* at 527–28 (Scalia, J., concurring) (favoring a constitutional right to be considered in a race-neutral manner); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

108. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

109. 466 U.S. 429 (1984).

110. *Id.* at 430.

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SPECIAL INSTRUCTIONS:
Steve - I have a call into P. Igasaki (aka The Vice Chair) to see if he has any background material on the Calif. initiative. If he does, I'll pass it on to you.
Claire

Please telephone the appropriate office above if you do not receive all documents.

Effort to Outlaw Affirmative Action Promoted in California

W Post 12/27 1/2

By John Boudreau
Special to The Washington Post

BERKELEY, Calif.—The headquarters for the California Civil Rights Initiative, a measure that would outlaw affirmative action, is located on Martin Luther King Jr. Way.

"A lot of people see an irony," says Glynn Custred, one of two scholars leading the fight to overthrow the decades-old government attempt to redress discrimination. They want to end government programs that give minority and female preference for jobs, promotions, contracts and college admissions with a proposed state constitutional amendment.

And traditional civil rights groups are taking them very seriously. California voters gave the nation a jolt from the right last month when they passed Proposition 187, which would deny non-emergency medical care and education to illegal immigrants. Now the state could be on the verge of doing it again. Conservatives hope to place the anti-affirmative action measure on the 1996 presidential primary ballot.

"The tide has turned," says Thomas Wood, executive director of the conservative California Association of Scholars and the initiative's co-architect. "There is an anti-affirmative action issue coming down the pike in California that is going to make 187 look like kindergarten."

Noting that voters here are angry and worried about their economic future, Constance Rice of the NAACP Legal Defense and Educational Fund in Los Angeles said, "This state is already dangerously polarized."

The measure, which has been endorsed by the California Republican Party, needs 615,000 valid signatures to qualify for the ballot as a statewide proposition. If approved by voters, it would bar the use of ethnicity or gender "as a criterion for either discriminating against, or granting preferential treatment to, any individual or group." It also would require agencies to reimburse legal costs of successful plaintiffs.

"Affirmative action is like the Vietnam War," said Custred, a California State University anthropology professor. "We got into it with the best of intentions. It turned into a quagmire. Now it's time to get out.

"It's reversed Jim Crow," he added. "We will never have a color-blind society. But we need a color-blind legal code."

The authors of the anti-affirmative action measure argue that affirmative action contradicts the 1964 Civil Rights Act, which prohibited discrimination for reasons of color, race, religion or national origin. In addition, they said it penalizes qualified minorities by tainting them as so-called quota hires and rarely helps the economically disadvantaged.

"People are really livid about affirmative action," Wood said. "It compromises or distorts the American principle that people shouldn't be discriminated against on the basis of their race, sex, creed or national origin."

He said he believes California's political landscape, in an era of limited dreams and resources, is fertile ground for their populist ideas. Wood and Custred are confident that California voters, who approved Proposition 187 by a 2-to-1 ratio in November, are ready to send another powerful message to the state Capitol—and beyond.

> *"There is an anti-affirmative action issue coming down the pike ... that is going to make 187 look like kindergarten."*
>
> —co-drafter Thomas Wood

"If we get this on the ballot and raise the money and support we need, the race is ours to lose," Wood said. "I would not want to be the campaign manager for the opposition. Who wants to be opposed to equal rights?"

Civil rights advocates view the initiative as a cultural-political hand grenade.

"You can call it Willie Horton goes to college," said Eva Paterson, executive director of the Lawyers Committee for Civil Rights in San Francisco, referring to the television ad during the 1988 presidential campaign in which Massachusetts Gov. Michael S. Dukakis was attacked for allowing a convicted felon, who was black, out of prison. "It's the politics of polarization. It will re-segregate society.

"I believe affirmative action is flawed," she said. "But no one has come up with an answer for admitted racism."

Rice, the western regional counsel for the NAACP Legal Defense and Educational Fund, said that studies show that black males continue to lag behind white counterparts with equal education in terms of salaries. Affirmative action is the only way to bridge that gap and allow minorities to break into professional ranks, long the bastion of white males, she said.

"This is a door-closing measure," Rice said. "As long as the statistics are 100 percent white and male, no one ever raises the question, 'Is there anything wrong with this picture?' But as soon as you begin to level the playing field and make resources available [to minorities], all of a sudden we have a constitutional crisis. It's so hypocritical."

Custred and Wood call themselves neoconservatives. Their cramped, bare-light bulb office resembles a warren for university teaching assistants. The genial scholars emphatically rummage through piles of papers, refer to articles and books as required reading and speak with reasoned sincerity. They like to point out that their fiercest opponents have been unable to call them racists.

Wood, whose field is philosophy, said he has been denied academic appointments because he is white. "I was once told by a member of a search committee at a university, 'You'd walk into this job if you were the right gender,'" he said.

Custred said affirmative action threatens the state's educational system. He and colleagues became concerned with proposed legislation, which later failed, requiring proportional representation of minorities among public university graduates. The push for diversity, he maintained, overshadows academics. Minority students may be bumped up to a higher level of college than they are prepared for, he said.

"There are large numbers of under-prepared students coming in," Custred said. "Are we going to be a remedial institution or an institution of higher education?"

Furthermore, the two academics said they want to head off potential demagogues who could use affirmative action to fuel racism.

"Affirmative action was created

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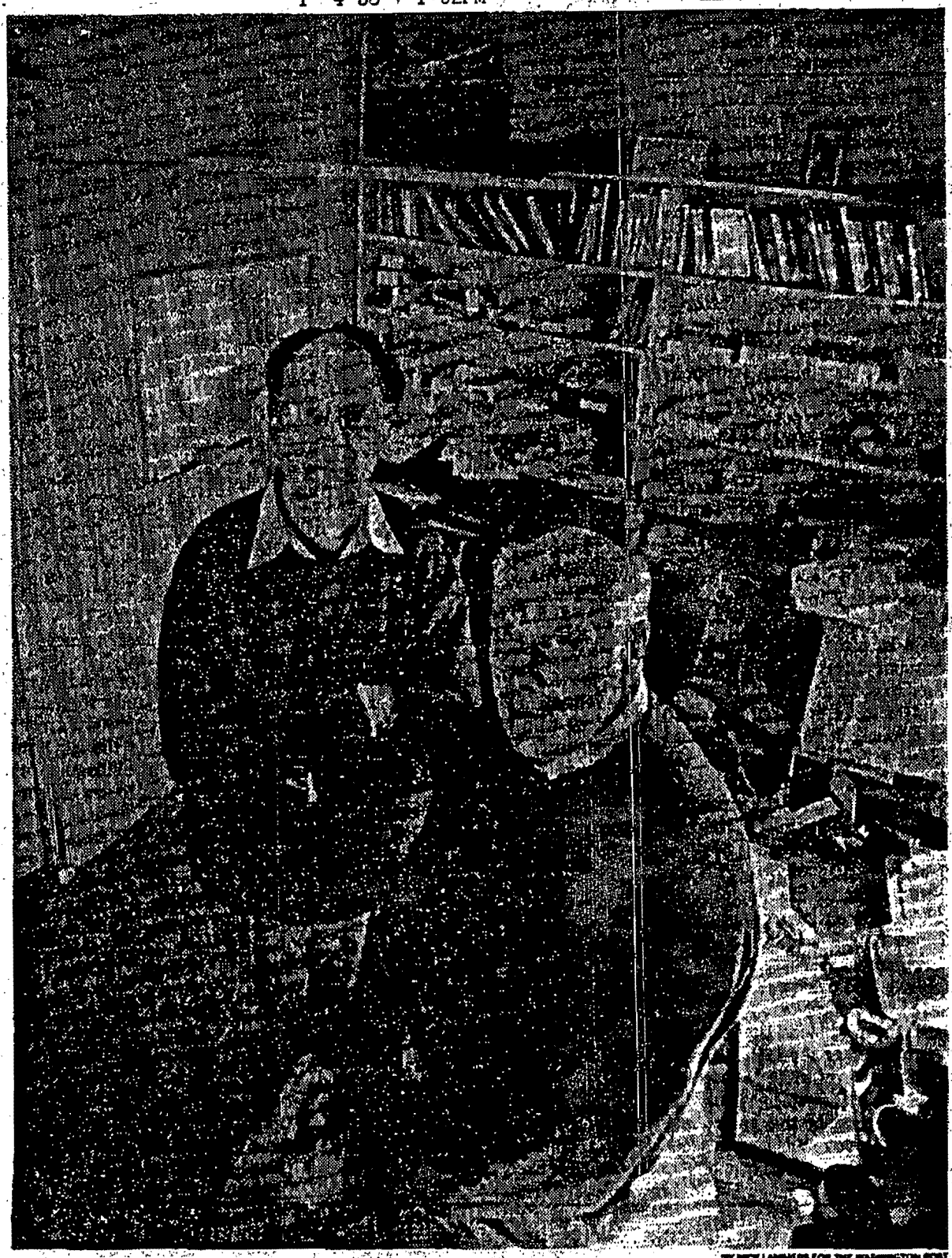

BY NICK LAMMERS FOR THE WASHINGTON POST

Thomas Wood and Glynn Custred are leading the ballot effort, which they call the California Civil Rights Initiative.

with the best of the American character: to right a wrong," Custred said. "But instead we've created an apparatus that has led us down the path of Balkanization where everything is decided by race, ethnicity and gender."

Civil rights advocates, though, said the measure will further inflame fears in a state strained by racial tensions and in economic shock.

"There's a very low flash point out here," Rice said. "When you pander to the lowest primal fears, it's a dangerous situation."

She added, "How the state reacts will depend on who has the most money to support or oppose [the initiative]. That's the sad fact."

Assemblyman Bernie Richter, a Republican from Chico, introduced a similar anti-affirmative action amendment in the state Assembly in early December. His legislation would support preferences only for economically disadvantaged people applying for entry-level positions.

"I would prefer that Democrats help put this on the ballot and join us," he said. "My message to my Democratic friends is: Either support it now or be run over by it later."

Affirmative Action

JUSTICE DEPARTMENT *ADARAND* MEMO RAISES QUESTIONS FROM OBSERVERS

The Justice Department may not have answered all the questions raised by a 1995 Supreme Court case on affirmative action in its recent memo telling federal agencies that race should be only one among several factors used in hiring and promoting.

Sources said it was premature to try to gauge reaction to the 19-page memo, as many observers on Capitol Hill and elsewhere in Washington had yet to see what the Justice Department described as "guidance" on the use of affirmative action in federal employment (42 DLR A-10, 3/4/96).

However, on Capitol Hill one Republican staffer dismissed the Justice memo as an effort to make the Clinton administration look like it was doing something on the affirmative action front when in fact it was maintaining the status quo.

From labor, Comer Cash, an official with the National Alliance of Postal and Federal Employees, said that, although his organization has not yet examined the new guidelines, the Alliance is "opposed to changing affirmative action to weaken the system because affirmative action is the vehicle for minorities and women to eliminate past discrimination."

The unaffiliated Alliance, which was organized in 1913 to advance the interests of African American postal employees, has a predominantly minority membership.

In *Adarand Constructors Inc. v. Pena*, the high court ruled 5-4 that federal affirmative action programs are subject to the same "strict scrutiny" that is applied to state and local programs (57 FEP Cases 1828).

In the memo, the department said, at this time, the strict scrutiny test does not apply to gender-based affirmative action measures in employment, but rather "intermediate" scrutiny. However, Justice said that using the same sort of analysis that the department was laying out in this memo "should ensure that those programs meet applicable legal standards."

In an earlier memorandum, the Justice Department provided a list of questions for federal agencies for federal attorneys to use in assessing the legality of their programs under the new standards laid out in *Adarand* (125 DLR AA-1, 6/29/95).

(The memo appears in Section E).

THE WALL STREET JOURNAL TUESDAY, MARCH 5, 1996

Work Week

A Special News Report About Life On the Job — and Trends Taking Shape There

PRIME PROFESSORS name their terms despite tight university budgets.

Universities can receive hundreds of applications for a single tenure professorship, but competition for superstars, particularly minorities and women, is fierce in the move to diversify faculty. With tight budgets, colleges increasingly offer nonsalary perks.

On the CAMPUS

Cornell University College of Arts and Sciences in Ithaca, N.Y., which hired 30 professors last year, finds spouses of coveted candidates jobs at Cornell, nearby colleges or businesses. It also schedules long weekends for star professors who commute and offers child care and a nationwide referral network for professors who care for aging parents, says Joycelyn Hart, human-resource manager.

Hamilton College, in upstate New York, trying to attract dual teaching couples, allows spouses a chance to share one job, one salary and one set of benefits, allowing the couple to split research and teaching obligations on their own.

JUSTICE DEPARTMENT MEMO ON POST-ADARAND AFFIRMATIVE ACTION GUIDANCE

U.S. Department of Justice
Office of the Associate Attorney General

MEMORANDUM TO GENERAL COUNSELS

February 29, 1996

From: John R. Schmidt
Re: Post-*Adarand* Guidance on Affirmative Action in Federal Employment

I. Introduction.

In *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), the Supreme Court held that federal affirmative action programs that use racial and ethnic criteria as a basis for decisionmaking are subject to strict judicial scrutiny. Under strict scrutiny, such programs must serve a compelling governmental interest and must be narrowly tailored to serve that interest.

On June 28, the Justice Department's Office of Legal Counsel (OLC) issued preliminary legal guidance on the implementation of *Adarand*. As indicated in the OLC memorandum, although *Adarand* was a challenge to a Department of Transportation contracting program, its holding applies to race-based decisionmaking in all areas of federal activity, including employment.

The purpose of this memorandum is to provide guidance on the use of affirmative action in federal employment. In order to assure that race is used in a manner consistent with *Adarand* principles, each agency will be expected to utilize this guidance, and communicate it as necessary throughout the agency.

A number of overarching points merit attention at the outset. First, the federal government is firmly committed to fair employment practices that open opportunities to all Americans. It is also committed to ensuring that its workforce draws on the full range of the nation's talent. Affirmative action efforts can advance those vital objectives. Thus, to the extent that they comport with *Adarand*, such efforts should be continued.

Second, the Supreme Court in *Adarand* did not establish a constitutional bar on the use of race-based affirmative action measures by the federal government, but rather held that such action requires strict scrutiny. Moreover, a majority of the Court rejected the proposition that "strict scrutiny" of affirmative action measures means "strict in theory, fatal in fact," and agreed that such measures may be permissible even under strict scrutiny. The Court in *Adarand* did not decide the constitutionality of the program at issue in the case, but rather remanded the case to the lower courts so they could determine, in the first instance, whether the program satisfied strict scrutiny. No program was held unconstitutional in *Adarand*.

Third, *Adarand* itself does not provide specific guidance on application of the strict scrutiny standard. Some principles can be gleaned from the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), in which a majority of the Court held for the first time that race-based affirmative action by state and local governments is subject to strict scrutiny. In large measure, the standards by which federal affirmative action in employment will be judged generally will track the standards used in *Croson*. Post-*Croson* lower court cases, including some in the employment setting, also help to flesh out what strict scrutiny means in practice.

Fourth, *Adarand* left open the question whether, even under strict scrutiny, Congressionally authorized affirmative action measures undertaken by federal agencies are entitled to particular deference from the courts, given Congress' broad powers to remedy discrimination. In our view, that deference should remain, and so affirmative action programs directed by Congress may have more force than those created solely by agencies.

Fifth, at this time, strict scrutiny does not apply to gender-based affirmative action measures of the federal government. Under current Supreme Court authority, such action is subject to intermediate scrutiny. Therefore, the guidance set forth in this memorandum does not apply in all respects to gender-based affirmative action programs in federal employment. However, applying this guidance to gender-based programs should ensure that those programs meet applicable legal standards.

Sixth, *Adarand*'s application of strict scrutiny is premised on the limitations equal protection principles place on governmental action. *Adarand*, therefore, does not apply directly to employment actions of private employers. Both public and private employers are subject to Title VII of the 1964 Civil Rights Act. The Supreme Court has held that the Title VII standards governing affirmative action in the workplace are less stringent than the constitutional standards, and so in some circumstances, measures taken by governmental entities that would satisfy Title VII might not meet the *Adarand* requirements. See *Johnson v. Transportation Agency*, 480 U.S. 616, 627 (1987).

Finally, agencies should be aware that when legal challenges to the use of affirmative action plans are made, they will arise in cases filed under Title VII. Although *Adarand* is premised on constitutional standards, under *Brown v. GSA*, 425 U.S. 820 (1976), most lawsuits alleging race discrimination in federal employment must be brought pursuant to Section 717 of Title VII, 42 U.S.C. §2000e-16.[1] The federal government, nevertheless, is obligated to act in accordance with the Constitution, and, therefore, use of race-based decisionmaking in federal employment must comport with the *Adarand* standards.

II. Scope of Adarand.

Adarand established that any governmental action that uses race or ethnicity as a basis for decisionmaking will be subject to strict scrutiny. In the employment setting, such action encompasses race-based measures that the federal government adopts on its own initiative, through legislation, regulations, internal agency procedures, or even individual employment decisions. This is to be contrasted with race-based employment decisions that agencies undertake pursuant to court-ordered remedial directives in race discrimination lawsuits against the government, or pursuant to court-approved consent decrees settling such suits. The Supreme Court has not definitively resolved the standard of review for court-ordered or court-approved affirmative action. See *United States v. Paradise*, 480 U.S. 149 (1987) (court order); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (consent decree). It is unclear to what extent *Adarand* applies to such actions. Accordingly, this memorandum does not address race-based employment decisions that agencies make under court orders or consent decrees.[2]

The scope of race-based employment decisions that are subject to *Adarand* is quite broad. *Adarand* applies to both the final judgment as to a particular decision, as well as to the various steps leading to that judgment. Race-based decisionmaking includes situations where race is one of several factors as well as those in which race is the only factor.

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The kinds of employment decisions covered by *Adarand* also are very broad. *Adarand* applies both to the agency's decisions creating and implementing formal and informal affirmative action programs, as well as to the decisions of individual supervisors. It applies to the use of race in decisions regarding hiring, promotion, training, and scholarships, just as it applies to race-based decisions regarding reductions in force and reassignments.

Adarand does not apply, however, to actions in which race is not used as a basis for making employment decisions about individuals. For example, action to increase minority applications for employment is not subject to *Adarand*. Outreach and recruitment efforts — such as attending job fairs and minority professional association meetings, and making vacancies known at schools with substantial minority enrollment — which merely seek to expand the pool of qualified applicants generally would not be subject to strict scrutiny under *Adarand*. As long as non-minorities are well represented in the applicant pool, the courts of appeals have held that efforts to expand the number of qualified minorities in the applicant pool do not involve race-based decisionmaking and hence do not raise constitutional issues. See, *e.g.*, *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-1558 (11th Cir. 1994) (presentations at job fairs and career days designed specifically to apprise minorities of career opportunities deemed to be race-neutral); *Billish v. City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992), vacated on other grounds, 989 F.2d 890 (7th Cir.) (en banc), cert. denied, 114 S. Ct. 290 (1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992). To the extent that efforts designated as "outreach and recruitment" might also involve providing temporary or summer employment to interns, however, the use of race in deciding who will receive these internship positions is subject to *Adarand*.

Other race-neutral action not subject to *Adarand* would include reviewing qualification standards to ensure that unnecessary criteria that have a disproportionate impact on minorities are eliminated. Agencies should review their current practices to determine whether any are unnecessarily excluding minorities. Agencies may also define selection criteria in ways that give an applicant credit for overcoming social and economic disadvantage, which may include barriers posed by discrimination based on race or ethnicity. As long as race or ethnicity is not used to define social and economic disadvantage, *Adarand* will not apply. Indeed, agencies should regularly examine their recruitment practices to ensure that they are effective and productive. Agencies should also determine whether minority applicants have been deterred as a result of past discriminatory practices or the agency's reputation for discrimination, whether deserved or not. *Adarand* also does not preclude tracking minority participation in the agency's workforce through the collection and maintenance of statistics or the filing of reports with the Equal Employment Opportunity Commission.

At this time, strict scrutiny does not apply to gender-based affirmative action measures in employment. Under current Supreme Court authority, such action is subject to intermediate scrutiny.[3] Nevertheless, the same sort of analysis described below, when applied to gender-based programs, should ensure that those programs meet applicable legal standards. In addition, *Adarand*'s strict scrutiny neither applies to employment programs based on age or disability, nor to measures that use membership in a Native American tribe or residence in an Alaskan Native village as a basis for decisionmaking. Such action is subject to the more lenient "rational basis" standard of scrutiny. See *Morton v. Mancari*, 417 U.S. 535 (1974), in which the Supreme Court held that strict scrutiny did not apply to hiring preferences for tribal members at the federal Bureau of Indian Affairs.

Finally, the establishment of numerical goals for minority participation should not raise concerns under *Adarand* where race-based decisionmaking is not used to achieve the goal and the goal is commensurate with availability of minorities in the qualified and appropriate labor pool. This use of goals is consistent with Executive Order 11246, 30 Fed. Reg. 12319, (Sept. 24, 1965), as amended, under which the federal government requires federal contractors in the private sector to set goals where minorities are underutilized in the contractor's workforce. Regulations that the Department of Labor has promulgated to enforce the Executive Order, which are published at 41 C.F.R. Part 60, provide guidance as to the manner in which federal contractors may properly use such goals. See further discussions at pp. 16-17.

III. Elements of Strict Scrutiny.

Under *Adarand*, federal programs that use race or ethnicity as a basis for decisionmaking must be strictly scrutinized to ensure that they promote "compelling" governmental interests, and that they are "narrowly tailored" to serve those interests. The "compelling interest" prong of the strict scrutiny standard focuses on the purpose of the classification; the "narrow tailoring" prong focuses on the method by which the government seeks to meet the objective of the racial or ethnic classification.

A. Compelling Governmental Interests

1. Remedial Predicate.

a. *Historical evidence*. Standing alone, the fact and history of racial discrimination in society at large is not sufficient predicate for race-based affirmative action. Under *Adarand*, however, the government does have a compelling interest in acting to remedy the identified effects of its own discrimination, or of its own practices that unintentionally extend the effects of discrimination by others. See *Croson*, 488 U.S. at 486 (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion).[4] Race-based remedial action may be aimed at ongoing patterns and practices of exclusion, or at the lingering effects of prior discriminatory conduct that has ceased. See *Adarand*, 115 S. Ct. at 2133 (Souter, J., dissenting) ("The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination.").

The federal government today is quite proud of its record of fair employment for persons of all races. However, its record has not always been one of fair practices. Beginning in the 1940s, a series of Executive Orders and statutes was adopted to address a long history of employment discrimination by the federal government. Although progress was made after those actions, it was insufficient; Congress in 1972 determined that discrimination against federal employees continued, and that it was necessary to provide federal employees the protection against employment discrimination that Congress previously afforded to other employees. Congress stated that extending Title VII to federal employees was necessary to "correct this entrenched discrimination in the Federal Service." H.R. Rep. No. 238, 92d Cong., 1st Sess. 84 (1971).

While discrimination in federal employment may not now be the pervasive problem it once was, instances of discrimination still persist in federal employment, as elsewhere. The Presi-

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dent's July, 1995 Affirmative Action Review noted that one of the lingering effects of historical practices has been that minorities and women are still underrepresented at higher grade levels. Eliminating this disparity is made more difficult by the time lag necessary for new hires to reach senior ranks. In addition, according to the Equal Employment Opportunity Commission (EEOC) and the Merit Systems Protection Board, the federal sector equal employment process still produces a significant number of decisions in which agencies are found to have discriminated against minorities and women. Where agencies identify current discriminatory practices, or the lingering effects of past practices, affirmative action is an effective remedial measure.

A prior judicial, administrative, or legislative determination of discrimination by the government is not required before the government may voluntarily choose to use affirmative action efforts. *Croson*, 488 U.S. at 500. An agency must have a "strong basis in evidence," however, for its determination that its practices have resulted in a significant exclusion or underutilization of minorities or have perpetuated exclusion perpetrated by others and that a race-based remedial effort is appropriate. *Id.* (quoting *Wygant*, 476 U.S. at 277). See also *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1553 (11th Cir. 1994); *Concrete Works v. City and County of Denver*, 36 F.3d 1513, 1521 (10th Cir. 1994), cert. denied, 115 S. Ct. 1315 (1995); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1458 (8th Cir.), cert. denied, 502 U.S. 1059 (1991); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 424 (D.C. Cir. 1992); *Stuart v. Roache*, 951 F.2d 446, 450 (1st Cir. 1991) (Breyer, J.); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir.), cert. denied, 498 U.S. 983 (1990).

This does not mean that an agency must admit that it has discriminated, either intentionally or inadvertently, before adopting affirmative action measures. See *Johnson v. Transportation Agency*, 480 U.S. at 652-653 (O'Connor, J., concurring); *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring). Furthermore, the fact that an agency has adopted some affirmative action measures does not imply that the agency has discriminated against minorities. In certain circumstances, agencies may voluntarily use race in employment actions if there is a "gross statistical disparit[y]" between the level of minority participation in a particular job category and the percentage of qualified minorities in the applicable labor pool for the relevant geographic market. *Croson*, 488 U.S. at 501, 509. While the Supreme Court has never established a bright line test by which to judge the significance of a statistical disparity, the Court has stressed that statistical disparities must be substantial enough to suggest that minorities are being excluded from consideration because of factors related to race. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 (1988).

b. *Statistical evidence.* Establishing the prerequisite for affirmative action does not have to be complicated. Statistics alone may form a sufficient predicate for race-conscious measures. Cf. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). In *Hazelwood v. United States*, 433 U.S. 299 (1977), the Supreme Court stated that the "standard deviation analysis" can be used to demonstrate that a significant underrepresentation of minorities in a particular job category could be the result of a factor in the selection process that was eliminating minority candidates. The Court stated that "a fluctuation of more than two or three standard deviations would undercut the presumption that decisions were being made randomly with regard to race." *Hazelwood*, 433 U.S. at 311 n.17. See also *Casteneda v. Partida*, 430 U.S. 482, 496-497 n.17 (1977), for a further discussion of "standard statistical deviations" and an explanation of how they are calculated.

Standard deviation analysis is less probative with respect to smaller sample sizes. In those situations, other means of statistical analysis may be necessary to determine whether the disparity between the percentage of qualified minorities in the available labor pool and the jobs at issue is sufficiently large to permit the adoption of race-conscious efforts. There are statistical analyses available for small sample sizes,[5] but it is preferable to use the largest justifiable sample size.

Anecdotal and documentary evidence is always relevant. In determining whether race-based remedial measures are warranted, an agency may use other types of evidence to supplement the statistical comparisons between current minority availability and current minority representation. For example, anecdotal or documentary evidence showing historical underrepresentation (on the virtual absence) of minorities at an agency over a long period of time may put a gloss on an existing statistical disparity, and thus provide further support for race-based remedial action.

Indeed, there may be some occasions where the number of jobs at issue is so small that no reliable statistical analysis is possible. In those circumstances, agencies may rely on anecdotal evidence that there has been discrimination, or that there has simply been no, or exceedingly few, minority personnel despite the fact that hiring has occurred over a sustained period. This sort of evidence could indicate that the absence of minority hiring is unlikely to be due solely to lack of qualified candidates, justifying race-conscious remedial action.

Whenever an agency establishes an affirmative action plan, based on statistical comparisons or anecdotal information, it is important that agencies carefully match the job qualifications in the jobs at issue with those in the relevant applicant pool as closely as possible. It would not be sufficient for an agency to have only a general sense that its EEO profile indicated minority underrepresentation. The agency must go through the process of comparing minority representation in the job category at issue to the relevant pool in the civilian labor force to determine whether there is a sufficiently substantial disparity and, therefore, a predicate for affirmative action.

Depending on the circumstances, the relevant labor pool is measured either by applicant flow data or the civilian labor force. An underrepresentation of minorities when compared to the general population or the general civilian labor force, however, would not be a sufficient predicate for the use of racial criteria in employment decisions when special skills or qualifications are required to perform the job. *Croson*, 488 U.S. at 501 (internal quotations omitted). See also *Johnson v. Transportation Agency*, 480 U.S. at 632; *Hazelwood Sch. Dist. v. United States*, 433 U.S. at 308. There are many entry-level jobs, however, for which comparisons to the general labor market are appropriate.

For example, if an agency or office sought to determine whether it has an underrepresentation of African-American engineers, it would not compare the percentage of African-American engineers that it employed with the percentage of African-Americans in the civilian labor force generally, or with the percentage of African-Americans in a "professionals" category of which engineers may be only a part. Since engineers possess unique qualifications not shared by the population or professionals at large, the comparison should be between the percentage of African-American engineers employed by the agency or office and the percentage of African-American engineers in the civilian labor force. Where the fit cannot be so precise, the agency should use the qualified labor force that most closely matches the agency's qualifications for the jobs at issue.[6] If an agency were going to fill SES positions and wanted to know if it had an underrepresentation of Hispanics in its SES ranks, the agency would compare the number of its Hispanic GS-15s, and others of similar qualifications eligible

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for placement into an SES positions, to the number of Hispanic SESers it employs.

This analysis should be performed at whatever level within the agency that the employment decisions are made. The fact that there are sufficient disparities to justify race-based action by one component of an agency does not mean that other components may take such action, when employment decision are made by individual components.

Similarly, evidence that particular employment practices at the agency have dissuaded minorities from applying for jobs or accepting offers can serve to buttress statistical disparities on which the use of racial criteria in employment decisions is predicated. By contrast, if it is clear that minority underrepresentation stems from the agency's inability to compete for minority candidates with other agencies and private corporations that simply can make more attractive job offers, the statistical disparity alone may not justify the use of race-based remedial measures (although, in such circumstances, the agency still may be able to show that it has a non-remedial operational need to increase minority representation, a concept that is discussed below).

It is important that the statistical evidence on which the decisions to use racial and ethnic criteria is made be thorough and accurate. The use of sound statistics will enable an agency to establish a justification for the use of race if challenged. The use of race in the affirmative action context will be upheld where there is a sound basis for its use; absent such sound support, a non-minority disadvantaged by the use of race could successfully challenge the use of an affirmative action plan.

2. Operational Needs Of The Agency

While both *Adarand* and *Croson* make clear that remedial interests can be sufficiently compelling to justify race-based measures, they did not explore the full range of interests that might be found compelling. Efforts to advance an agency's operational objectives may also supply a predicate sufficient to permit race-conscious employment actions, apart from any remedial objective the agency may have. There has never been a majority opinion for the Supreme Court that addresses the question whether and in what circumstances such objectives can constitute a compelling interest. Some members of the Court and several lower courts, however, have suggested that, under appropriate circumstances, an agency's operational need for a diverse workforce could justify the use of racial considerations. This operational need my reflect an agency's interest in seeking internal diversity in order to bring a wider variety of perspectives to beat on the range of issues with which the agency deals. It also may reflect an interest in promoting community trust and confidence in the agency.

The courts will require a convincing basis for the conclusion that the use of race and ethnicity are necessary to promote an operational need. The Supreme Court requires that the articulated need be based on a "legitimate factual predicate." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 n.5 (1986). Thus, even prior to *Adarand*, public employers could not rely solely on broad assertions of operational need to justify the use of race and ethnicity as criteria in decisionmaking. See, *e.g.*, *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207 (4th Cir. 1993) (opinion of police chief that effective law enforcement required racial diversity was insufficient alone to create a compelling state interest; city was required to support its contention with objective evidence as well). Thus, any agency relying upon non-remedial justifications for race-based action should have a well-reasoned basis — be it statistical, anecdotal, expert opinion, or other — for concluding that there is a compelling operational need for increased minority representation in its workforce.

In the controlling opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell stated that a university could take the race of applicants into account in its admission process to foster the diversity of its student body. This greater diversity, he reasoned, would bring a wider range of perspectives to the university and would contribute to a more robust exchange of ideas, which is the central mission of higher education. In short, Justice Powell recognized that diversity among the student body serves the operational needs of a university. Along the same lines, in a concurring opinion in *Wygant v. Jackson Bd. of Educ*, 476 U.S. 267, 286, 288 (1986), Justice O'Connor also suggested that fostering racial and ethnic diversity among faculty in public schools may be a compelling interest. See also discussion in *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992), in which now-Justice Ginsburg, in a concurring opinion, stated her agreement with Justice Stevens' position "that remedy for past wrong is not the exclusive basis upon which racial classifications may be justified."

Individual federal agencies may have operational objectives that can be served by a diverse workforce that brings an array of backgrounds and perspectives to the issues that these agencies confront and the choices that they must make. The same robust exchange of ideas that was deemed essential by Justice Powell in *Bakke* to further the educational objectives of a university may also be vital to sound decisionmaking at certain agencies. For example, under Justice Powell's reasoning regarding the value of diversity at college campuses, federal agencies that have educational missions may themselves have a legitimate interest in fostering diversity in their own workforces. Similarly, a racially diverse range of views and perspectives among its workers may substantially enhance the performance of an agency that is charged with handling matters that particularly affect minorities and minority communities (*e.g.*, public housing and urban policy; economic dislocation in minority communities; immigration; health care in underserved, predominantly minority communities; conditions in tribal reservations or villages).

It would, therefore, not necessarily be inconsistent with *Adarand* for race and ethnicity to be taken into account in employment decisions in order to assure that decisionmakers will be exposed to the greatest possible diversity of perspectives. However, the goal of affirmative action in the federal workplace cannot be diversity for diversity's sake. It must be rooted in an identifiable and articulated operational need for diversity of opinion in the agency's workforce. The agency, moreover, cannot rely on racial or ethnic stereotypes to obtain a diversity of opinion. Rather, the agency must have some basis to believe that, in the aggregate, diversification of its workforce will make a difference in the array of perspectives communicated at the agency, and that this greater diversity will significantly enhance the performance of the agency's functions. Furthermore, if an agency's articulated reason for the use of affirmative action is the need for diversity of opinion, the use of racial and ethnic criteria should not be the only means by which the agency obtains a diversity of opinion. In addition, other factors that bear on diversity — such as geography, education, work and life experience — should also be considered.

There are also areas of governmental activity where, in order to be effective and have the cooperation and confidence of the community, an agency must be representative of the community. This form of operational need has been recognized in the law enforcement context by members of the Supreme Court, and by lower courts, and focuses on an agency's ability effectively to address the needs of the communities it serves. See *Wygant*, 476 U.S. at 314 (Stevens, J. dissenting) ("[I]n law

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enforcement * * * in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of whites."); *United States v. Paradise*, 480 U.S. 149, 167 n.18 (1987) (plurality opinion) (noting, but not reaching, argument that race-conscious hiring can "restore[ ] community trust in fairness of law enforcement and facilitate[ ] effective police service by encouraging citizen cooperation"); *Detroit Police Officers' Assoc. v. Young*, 608 F.2d 671, 696 (4th Cir. 1979) (argument "is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police"); *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1981).

In the federal employment context, the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco, and Firearms and other federal law enforcement organizations are dependent on this kind of community support to function effectively. Law enforcement organizations also may have particular diversity needs quite apart from their need for community support. For example, undercover operations are likely to require the availability of agents of diverse racial and ethnic backgrounds.

The military is another segment of the government that clearly has a compelling and widely-recognized need for diversity. In order to maintain combat readiness, the armed forces have an unusually strong need to maintain morale and cohesiveness. Its cohesiveness could be threatened if personnel did not have visible evidence that advancement within the military is possible for members of all racial and ethnic groups. Federal policies with regard to military affairs have traditionally received significant deference from the judiciary, see, *e.g.*, *Weiss v. United States*, 114 S. Ct. 752, 769 (1994), and we do not anticipate *Adarand* affecting that deference.

Other examples of organizations that might have a compelling interest in using race-based employment measures to help ensure trust would include EEO offices that must gain the confidence of current or former employees who already feel that they have been subject to discrimination, and community relations offices that are called upon to quiet racial tensions in troubled neighborhoods, This list is by no means exhaustive. Depending on its mission, an agency may have a compelling interest in fostering community trust, unique to the agency, or to an office within the agency, that would justify the consideration of racial and ethnic factors.

B. Narrow Tailoring Inquiry.

Once an agency identifies a compelling interest for using race or ethnicity in its decisionmaking, the inquiry shifts to whether the manner in which these criteria are used is narrowly tailored to achieve that interest. The narrow tailoring analysis ensures that the use of the racial or ethnic criteria is the result of careful deliberation and is the least intrusive means to obtain the desired result.

In determining whether race-based employment action is narrowly tailored to serve a compelling interest, the courts have usually considered the following factors: 1) whether the government considered race-neutral alternatives before using the racial or ethnic criteria, 2) the manner in which race or ethnicity is used in making decision — *e.g.*, is it one of many factors to be considered, or is it the sole or dominant factor, 3) the comparison of any numerical target to the number of qualified minorities in the labor pool, 4) the scope of the program, 5) the duration of the program, and 6) the impact of the program on nonminorities. *United States v. Paradise*, 480 U.S. 149, 171 (1987); *Hayes*, 10 F.3d at 216.[7]

All of these factors will not be relevant in every case. However, examining an agency's use of race and ethnicity in light of these factors will ensure that any race-based employment activity is narrowly tailored to meet the agency's legitimate objective.

1. Race-Neutral Alternatives.

In *Croson*, the Supreme Court held that a Richmond, Virginia ordinance that required prime contractors who received city contracts to subcontract at least 30 percent of the dollar amount of those contracts to minority businesses was not "narrowly tailored," in part, because the city had not considered race-neutral means to increase minority participation in municipal contracting. While the Court made clear that race-neutral measures had to be considered, it did not specify the extent to which such measures had to be considered — or actually used — before the government may resort to race-conscious action.

The most common race-neutral method of increasing minority participation in federal employment is recruiting and outreach.[8] Other race-neutral methods would include training programs open to all employees, diversity seminars, and eliminating unnecessary selection criteria that have a disproportionate impact on minorities. In some instances, race-neutral measures might be sufficient to serve the agency's objectives. In other cases, they may not. If an agency documents a compelling interest in remedying discrimination, it will not have to rely solely on race-neutral action to meet its objective. Cases suggest that although an agency will be required to give the race-neutral options serious consideration and use them to the extent feasible, use of race-neutral action need not be exhausted before race may be used more directly in decisionmaking. As the Ninth Circuit said in *Coral Constr. Co. v. King County*, 941 F.2d at 923, "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every such possible alternative." *See also Peightal*, 26 F.3d at 1557. This approach gives the agency a measure of discretion in responding to its articulated need and allows the agency to draw on its prior experience as to the efficacy of race-neutral options.

It is also essential that agencies review both existing and contemplated selection practices and devices to ensure that they are job-related and minimize disparate impact to the extent practicable.[9] Traditional standardized tests can result in severe disparate impact, and often can be shown to be only marginally job-related at best. These examinations are very susceptible to challenge under Title VII and should be carefully scrutinized and reformed as part of any serious effort in affirmative action.[10]

2. The Manner In Which Race And Ethnicity Is Used.

Of critical importance in the narrow tailoring analysis is the manner in which race and ethnicity are used in decisionmaking. Once a compelling interest has been identified and documented, and race-neutral options considered, race can be used along with other factors when evaluating the qualification, and breath of experience that an applicant brings to a job. However, race should not become the sole or dominant factor.

In *Bakke*, Justice Powell rejected a system in which the university reserved a set number of places for minority applicants. He contrasted that program, which based decisions solely on race and ethnicity, with other programs in which race

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or ethnic background is simply one factor among many in the admissions decision. Justice Powell noted that in the latter type of program "race or ethnic background may be deemed a 'plus' " but does not "insulate the individual from comparison with all other candidates * * *" 438 U.S. at 317. Such programs, he suggested, would be deemed sufficiently flexible to meet the narrow tailoring requirement.

Similarly, in *Johnson*, the Supreme Court upheld an affirmative action plan under which a state agency considered the gender of applicants in making promotion decisions. The Court noted that the plan did not set aside positions for women but only established goals for their representation "which were not 'construed' by the agency as 'quotas.' " The Court stressed that in the promotion decisions at issue "sex * * * was but one of numerous factors [that were] taken into account." 480 U.S. at 638.

As these cases suggest, there are two kinds of race-based employment actions that, because of their rigidity, would be particularly vulnerable to constitutional challenge under strict scrutiny. The first is the use of quotas. Unlike goals, which establish only a numerical objective to be attained through an agency's best efforts, quotas require the selection of specified numbers of minorities without regard to relative qualifications, availability, or application rates. The second is a program in which race or ethnicity is the sole or dominant requirement for eligibility for a particular employment opportunity. Under the standard established by the Court, race can be an appropriate consideration in employment decisions only as long as it is not the exclusive or dominant factor. Flexibility is the key.

In his July 19, 1995, Directive to the Executive Departments and Agencies, the President stated that any program that creates a quota must be reformed or eliminated. Consistent with this guidance, agencies should ensure that the use of numerical goals are not converted into rigid requirements.

In sum, where an agency uses race in employment decisions, race should be only one factor of the many that go into both the assessment of a candidate's accomplishments and potential as well as the assessment of what the candidate may bring to the agency. Under *Adarand*, such measures must be flexible and fair — race can be used as one of a number of factors in evaluating an applicant's credentials, but it cannot be the sole factor, or so outweigh all other considerations that it effectively defines who will receive consideration.

3. Comparison Of Numerical Target To Relevant Labor Market.

Any numerical objectives for minority representation must be reasonable. In those cases where an affirmative action program is justified on remedial grounds, any numerical goal must have a reasonable relation to the extent of the demonstrated disparity, the number of vacancies, and the availability of candidates. Both the disparity and the availability of candidates will be judge in relation to the relevant labor market. Where a targeted position requires special skills or training, the comparison must be to the *qualified* labor market; that is, the real market of persons with qualification that match those of the agency. Broad comparisons to general population statistics will not suffice where agency qualifications require specific educational qualifications or levels of specific experience. See *Croson*, 488 U.S. at 507 (30% minority subcontracting requirement not narrowly tailored because it was tied to the minority population of Richmond and not the pool of qualified subcontractors); *Edwards v. City of Houston*, 37 F.3d 1097, 1114 (5th Cir. 1994) (race-based promotion goals narrowly tailored because tied to number of minorities with required skills).

As stated before (see, *infra* page 5), when taking race-based remedial action, an agency may establish as it's ultimate goal the achievement of minority representation in a particular type of job similar to the percentage of minorities in the available, qualified applicant pool. The selection of that goal is based on the legitimate assumption that fair employment practices, over time, would result in a selection rate for minorities that essentially tracks the availability of minorities in the qualified labor market. It also establishes a benchmark by which the employer can measure whether its practices are somehow foreclosing opportunities for minorities. The use of this goal also helps to demonstrate that opportunities for non-minorities will not be unfairly diminished.

An agency may, under certain circumstances, the short-term goals that are somewhat higher than that percentage in order to eliminate significant underrepresentation of minorities. However, the use of such higher short-term goals should probably be limited to circumstances of extraordinarily severe underrepresentation that may justify a more concerted effort to remedy that level of underutilization. See, *e.g.*, *United States v. Paradise*, 480 U.S. 149 (1987). Use of higher short-term goals may be appropriate, for example, where an agency has engaged in actions that have discouraged minorities from seeking employment with the agency. Agencies contemplating the use of such goals should consult with the Justice Department.

While the use of goals for minority participation that match the level of minority representation in the relevant labor pool is required when an agency is pursuing a remedial effort, that is not necessarily the case when an agency sets a goal for non-remedial operational interests. In those circumstances, the goal may be tied to a level of minority representation that the agency considers necessary to achieve those interests.

4. Burden On Nonminorities.

Affirmative action efforts will necessarily affect nonminority employees and applicants who were not themselves responsible for the problem that those efforts seek to address. The Supreme Court has indicated that while some degree of impact on these individuals is constitutionally permissible, that burden cannot be too onerous. See *Wygant*, 476 U.S. at 280-81. The nature and extent of the burden is an integral part of the narrow tailoring analysis.

Racial or ethnic classifications that "unsettle * * * legitimate, firmly rooted expectation[s]," *Johnson*, 480 U.S. at 638, are likely to be viewed as more burdensome than those that do not. For example, in *Wygant*, the Court recognized that race-based layoffs may impose a more substantial burden than race-based hiring, because "denial of a future employment opportunity is not as intrusive as loss of an existing job," and because where affirmative action is achieved through hiring, "the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." 476 U.S. at 282-283.[11]

Agencies therefore should give careful consideration to the way in which non-minorities are affected by employment practices when determining whether specific practices are constitutional. As affirmative action advances beyond hiring, the effect on third parties may shift onto those specific individuals competing for a limited promotion. The same kind of consideration of race might satisfy constitutional standards when used in the hiring context but be somewhat more vulnerable when used for promotions.

The time within which an agency will be able to eliminate a significant underrepresentation of minorities in its workforce will depend not only on the rate at which minorities are selected, but also on the overall number of hires or promotions an agency makes each year. As the number of hires decreases,

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as is likely during this era of government downsizing, the speed at which underutilization can be eliminated may be reduced. When using race-based affirmative action to remedy underrepresentation of minorities, agencies must be very careful to do so at a rate that does not unfairly trammel the interests of nonminority applicants.

5. The Scope Of The Program.

In *Croson*, the Supreme Court criticized the Richmond minority subcontracting program on the ground that it extended the benefit of a racial classification to minority groups as to whom there was no evidence of discrimination. The Court concluded that the plan was not narrowly tailored because although the program was intended to remedy discrimination against African-American contractors, it included among its beneficiaries Hispanic, Asian-Americans, Native-Americans, Eskimos and Aleuts — groups for which Richmond had proffered "absolutely no evidence of discrimination." 488 U.S. at 506. Apart from operational needs, if an agency's statistics were to reveal underutilization only in its hiring and promotion of African Americans, the agency would be justified in focusing remedial action on African-Americans, but not on Hispanic-Americans, Native-Americans, or Asian-Americans. Treating "minorities" as a single group raises concerns, remedial action in federal employment usually can be targeted only at specific groups determined to have a need for a special focus. Similarly, where an agency can only demonstrate an operational need for diversity in some offices, racial and ethnic criteria cannot be considered in employment decisions throughout the agency; narrow tailoring will require limiting the use of such criteria to the offices and positions determined to have an operational need for diversity.

Croson also imposed a geographic limitation on the scope of remedial action. Although the program at issue in that case was intended to remedy discrimination against African American subcontractors in Richmond, it was also open to minorities elsewhere in the country. The Court held that it was not narrowly tailored because it conferred the benefit on persons from outside the relevant geographic market. This geographic limitation does not apply to affirmative action in employment by the federal government with respect to jobs for which agencies advertise or hire nationally.

6. Duration Of The Program.

A race-based measure should last only as long as it is needed. See *Fullilove*, 448 U.S. 448, 513 (1980) (Powell, J. concurring). The use of rase should either be of limited duration or subject to periodic review. See *Hayes*, 10 F.3d at 11. In employment, this periodic review would normally be performed when the agency submits its yearly affirmative action reports to the Equal Employment Opportunity Commission. At that time, it can be determined whether the objectives of race-based actions have been met. If race-based measures that were justified when adopted are no longer needed, they should be discontinued.

In addition, there may be instances in which agencies are continuing to use non-job-related selection criteria, such as a test, that have a disparate impact on minorities while developing new selection criteria that do not have such a disparate impact. In those situations, an agency can continue to use race-conscious selection methods to overcome the effects of the exclusionary criteria until new selection procedures are in place that no longer exclude disparate numbers of minorities or that are job-related.

Racial and ethnic criteria cannot be used after remedial objectives have been satisfied merely to maintain a statistical balance. See *Johnson v. Transportation Agency*, 480 U.S. at 640; *Sheet Metal Workers v. EEOC*, 478 U.S. at 477-478; *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207 (4th Cir. 1993). But that does not necessarily mean that the use of such criteria must be abandoned the moment that minority representation in a particular job category at an agency equals minority representation in the qualified labor market. The agency may be able to use the criteria for a reasonable period thereafter to ensure that its remedial objectives have been fully satisfied. And if the use of the criteria is suspended for some period of time because disparities appear to have been corrected, an agency may re-institute them if it subsequently finds that its policies, or its unrepaired selection devices, are again leading to a significant disparity.

IV. Conclusion.

As the President emphasized in his July 19, 1995, statement, the Administration is committed to the vigorous enforcement of the laws prohibiting discrimination as well as to the elimination of barriers to opportunity. The Administration thus supports affirmative action measures that promote employment opportunities for Americans subject to discrimination or its continuing effects. Nothing in *Adarand* requires a retreat from this effort. Moreover, because federal agencies have long been subject to Title VII standards in their employment practices, the application of strict scrutiny should not require major modifications in the way federal agencies have been properly implementing affirmative action policies.

In sum, what *Adarand* requires is that in order for race or ethnicity to be used as a basis for decisionmaking, an agency must have a demonstrable factual predicate for its actions. That predicate could be the agency's interest in remedying the effects of its past discriminatory practices or the effects of employment practices that unintentionally have excluded minorities, or it could be based on the agency's operational needs. Once this predicate is identified, the agency should consider all reasonable means of increasing minority participation in its workforce without specific reliance on racial criteria. However, if such methods are inadequate to meet the agency's legitimate objectives, consideration can be given to racial and ethnic factors. Under *Adarand*, such measures must be flexible and fair — race can be used as one of a number of factors in evaluating an applicant's credentials, but it cannot be the sole factor, or so outweigh all other considerations that it effectively defines who will receive consideration. The use of race-conscious measures also must be limited in duration, lasting no longer than necessary to accomplish the agency's objectives. If the use of the classification is intended to be remedial, it can be targeted only at those groups against whom discrimination has been shown. Finally, consideration must be given to the kind of employment decision that is at issue and the impact the use of the criteria will have on nonminorities to assure that the burden will not fall too heavily on innocent parties.

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[1] One notable exception to this rule is for claims of discrimination asserted by uniformed members of the armed forces, who are excluded from the coverage of Title VII. See, *e.g.*, *Doe v. Garrett*, 903 F.2d 1455, 1461 (11th Cir. 1990), cert. denied, 499 U.S. 904 (1991). Such claims may be brought directly under the Constitution.

[2] We are available to provide specific guidance to any agency in that situation.

[3] The appropriate standard of scrutiny for gender-based programs may be considered by the Supreme Court in *United States v. Commonwealth of Virginia*, No. 94-1941, which address the male-only admission policies of the Virginia Military Institute.

[4] In *Croson*, which involved affirmative action in public contracting, the Court said that the government may act on the basis of race or

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ethnicity to remedy the effects of discrimination committed by private contractors, where the government becomes a "passive participant" in that conduct, and thus helps to perpetuate a system exclusion. *Croson*, 488 U.S. at 492 (plurality opinion); *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment).

[7] See, *e.g.*, Fisher's Exact Test, discussed at *Jurgens v. Thomas*, 29 FEP Cases 1561, 1568 n.15 (N.D. Tex. 1982); *Sims v. Montgomery County Comm'rs*, 766 F.Supp. 1052, 1100-1101 & n.136 (M.D. Ala. 1990).

[8] The 1990 Civilian Labor Force (CLF) census data would provide a source for these comparisons. It reflects the racial and ethnic distribution of the civilian labor force by major occupations. The Office of Personnel Management also maintains a Central Personnel Data File that provides work force information by occupational code. EEOC uses a Cross Classification Table that can assist agencies in matching OPM and CLF classifications. EEOC can make this table available to agencies. Finally, OPM and the Census Bureau have agreed to conduct preliminary statistical studies to help agencies match job requirements and appropriate applicant pools.

[9] Some of the factors that make up the narrow tailoring requirement have essentially been applied in challenges to affirmative action plans filed under Title VII. See *Johnson*, 480 U.S. at 637-638 and *Steelworkers v. Weber*, 443 U.S. 191, 197, 208 (1979), in which the Court stated affirmative action measures must not "unnecessarily trammel" the interests of nonminorities.

[9] As indicated above, (at pages 3-4), such action is considered race-neutral because it does not involve the use of racial criteria in employment decisionmaking.

[9] Title VII prohibits the use of an employment practice or devices, such as a written examination, physical agility test or minimum height/weight requirement, that is neutral on its face but causes a disparate impact on the basis of race, color, religion, sex or national origin, unless the employer can demonstrate that such practice or device is job related for the position for which it is used and is consistent with business necessity. Title VII also prohibits the use of an employment practice or device that causes a disparate impact but is job related, if there exists an alternative selection practice or device that will cause less of a disparate impact and will equally serve the employer's legitimate business needs.

[10] In fact, over the past several years, an increasing number of employers have begun to use testing mechanisms that have less of a disparate impact than traditional cognitive-only examinations. Agencies that need information about such tests should contact the Employment Litigation Section of the Civil Rights Division of the Department of Justice.

[11] *Wygant* addressed race-based layoffs by a local public school system that resulted in the displacement of more senior and more qualified nonminority teachers in favor of junior, less qualified minorities. It is our understanding that federal agencies historically have not used race in making layoff decisions. Any agency contemplating a change from the current practice should discuss the circumstances specifically with the Justice Department.

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WAKE

Safety call: A Raleigh safety committee urges the city to spend $4,000 on emergency park phones.

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Death knell? No, say Garner merchants who are trying to bring downtown to life during the week.

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DURHAM

Tall tales: Club Boulevard fifth-graders, including Lauren Ettson, build a monument to literature.

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Schools: Chapel Hill-Carrboro's mandatory service requirement gets its day in court Tuesday.

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Crew: Two churches and several student groups will come together to build a Habitat house.

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EEOC accuses Johnston company of discrimination

BY BOB WILLIAMS
STAFF WRITER

RALEIGH — The EEOC filed a disability discrimination suit against a tobacco company Friday, calling it a warning shot to the growing number of U.S. employers engaged in downsizing.

The government's message: Downsizing to become lean and mean doesn't allow employers a free hand to jettison employees with disabilities.

The company named in the Equal Employment Opportunity Commission's lawsuit is J.R. Tobacco of North Carolina, which is based in Statesville and operates a large factory outlet store and tobacco shop at the Interstate 95-U.S. 70 interchange in Selma. J.R. denies that it discriminated, saying it refused an earlier offer to settle the case.

EEOC Commissioner Paul Steven Miller was in Raleigh on Friday to announce the filing of the lawsuit in U.S. District Court. Miller said the agency has been searching for a case to make a statement about the reach of the Americans with Disabilities Act with regard to disabled workers who are laid off.

ADA is a wide-ranging federal law that prohibits discrimination against disabled workers. It went into effect in 1992.

Miller said the lawsuit is part of a new national enforcement plan adopted by EEOC a few weeks ago. The plan says the agency's limited legal resources will be directed toward selected cases that will have a significant impact on various types of workplace discrimination.

The lawsuit alleges that J.R. violated the law when it laid off Johnny Narron of Selma three years ago. Narron was born with spina bifida and uses a wheelchair.

The lawsuit says Narron, who bundled and labeled cigars for J.R. at a distribution center in Selma, was the only one of 25 employees to lose his job when the company decided to relocate that operation to Statesville.

Narron was told that his job was being eliminated and that he would

SEE EEOC, PAGE 7B

Johnny Narron says J.R. Tobacco discriminated against him when he was laid off from the company two years ago.

STAFF PHOTO BY SCOTT SHARPE

Los Angeles Times

DATE: 03-18-96

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Some Regents Seek UCLA Admissions Priority

■ Education: Those who sought help included several who pushed to end affirmative action, records show.

By RALPH FRAMMOLINO, MARK GLADSTONE and AMY WALLACE
TIMES STAFF WRITERS

Several University of California regents who voted publicly to roll back affirmative action admissions for minorities and women have privately used their influence to try to get their relatives, friends and children of business partners into UCLA, in some cases ahead of better qualified applicants who were turned away, a months-long Times investigation shows.

Confidential documents reviewed by The Times also show that Gov. Pete Wilson—the political force behind the anti-affirmative action movement who used the university's controversial board vote last year to boost his presidential aspirations—made two casual requests as well.

Other top state officials, including state Sen. Ken Maddy (R-Fresno) and former Lt. Gov. Leo T. McCarthy, a Democrat, sought favors at UCLA through what has long been a back channel into the university for the state's well-known and powerful.

In all, The Times' investigation documented hundreds of requests made to the Westwood campus through the back door during the last 15 years by more than 80 former and current public officials. These requests were either made directly to top UCLA officials or relayed by UC's Sacramento lobbyist, Stephen A. Arditti, records show.

"Anyone in prominence who has made a recommendation—a school principal, a legislator—those carry weight," said Regent Ralph Carmona, contrasting the way the VIP requests were handled with the university's recent decision to shelve affirmative action.

"People who come from disadvantaged backgrounds, who are blacks and Latinos, don't have that kind of weight to carry," said Carmona, who is a supporter of affirmative action. "And we've got to recognize that."

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The cases examined by The Times show that not all back channel requests were successful and, in many cases, the applicants recommended by regents and others were academically competitive even without help.

In one instance, a regent tried to influence a student's admission on behalf of a legislator who had just helped the university defeat a bill, records show. The regent tied the legislative action to his admission request in a remarkably candid letter addressed to UCLA Chancellor Charles E. Young.

Chancellor Denies Favoritism

Regents involved in the requests said in interviews this week that they were merely passing on letters of recommendation to the highly competitive Westwood campus, where thousands of UC-qualified students are turned away each year, including those with perfect grade-point averages.

But some of them acknowledged Friday that their behind-the-scenes actions may appear to be unfair.

"I agree, no, it isn't always fair," said Regent Meredith Khachigian, who, records show, intervened on behalf of her daughter and another Orange County student in 1989.

"But at the same time, I think that it's anyone's responsibility, if you think that something should have happened that didn't happen . . . [to] call and find out why. I didn't insist she be accepted. I inquired. As any parent could or should."

University officials concede that they give requests from the regents and other top officials "personal" service. UCLA's Young said his administration responds to special requests for housing and campus parking but not for admissions.

"Am I aware of any instances where people have tried to pull strings? Yes," Young said Friday. "Am I aware of times when people tried to pull strings and got somebody in? No.

"Am I aware of times when regents said, 'Oh, my nephew is applying for next year. Would you please see to it that people are aware of that? And give it special attention? Yes.

"I don't think that means admit them," the chancellor said. "I know the admissions office would not interpret it that way. It would mean that they would make sure the people involved would take a look at it."

But in other cases records show that the students whose names were forwarded by officials had academic records below the school's rigorous cutoff standard, were headed for rejection or had already been turned down. In some of these cases, the political inquiries had dramatic effects.

The regents involved in some of these requests were among the majority who voted last July to strip race and gender considerations from undergraduate admissions—criteria designed to give a boost particularly to blacks and Latinos, who are underrepresented in the university population.

The controversial vote drew national attention—President Clinton called on the regents to change their minds—and struck at the heart of the question of how to fairly allocate limited slots for undergraduates. The problem is particularly acute at Berkeley and UCLA, the most popular of the nine UC campuses, where the law of supply and demand means thousands of qualified students are turned away each year by officials who have the luxury of picking the best.

"I voted that way because I believe in equal rights," Regent Leo S. Kolligian, a Fresno attorney, said earlier this week about his vote to repeal affirmative action in admissions. "To me, when you give preferential treatment, you're not exercising equal rights. . . . That's not the way I understand the Constitution to be."

"Neither the Republican fears nor the Democratic hopes were realized by the reality here," said state elections director David Rancourt.

Another well-publicized concern—excessive cost—has yet to materialize.

In Washington, where a state version of motor voter took effect in 1992, elections director Gary McIntosh said costs have been "fairly minimal." The per-voter registration cost has dropped to as little as a quarter of that under the former system, he said. Officials in other states agree.

Fraud still looms as a potential worry, however.

Elections officials of all stripes believe that the reform does not allow them to deeply probe whether an individual is registered more than once.

But the officials say indications so far are that new registrants who erroneously sign up do so by mistake or as a sidelight to another pursuit—for example, an underage teen seeking a fake driver's license. And interviews with officials in several states, including those who oppose the law, turned up no incidents of intentional fraud.

Proponents of motor voter argue that it has far less potential for fraud than other registration systems.

Ultimately, the new law is likely to be judged not on its explicit goal—registering voters—but on whether it has a lasting impact on voter turnout.

In Washington state, turnout has grown. In its 1992 general election, which occurred nine months into the state's new program, turnout was 82.6% of registered voters, the highest since 1944.

Election officials cautioned that voting rates for motor voter registrants were expected to be low, since this is a group either too busy, disinterested or dissatisfied to have registered when the system was more difficult.

"It's going to be a protracted three-step process," said Brown of Kentucky. "First, we register the voters; secondly we need to educate and interest the voters in government and thirdly we need to motivate them and try to get them out to vote."

Times researcher Edith Stanley in Atlanta contributed to this story.

Yet four months before his vote, confidential records show, Kolligian leaned heavily on UCLA officials to admit the daughter of a Fresno-area builder who had been rejected with a 3.47 grade-point average, a 790 SAT score and no high school honors classes—by the school's standard, an anemic academic record.

Internal correspondence sent to Young's chief of staff indicated that UCLA officials tried to dissuade Kolligian, pointing out that the student's academic record was "poor."

"He wanted me to forward this for consideration anyway and asks for the chancellor's intervention," a UCLA official wrote in internal correspondence. "He says that the father is a prominent citizen in the Fresno Valley (developer) and that this student should be considered on the basis of coming from an underrepresented area.

"Generally Regent K. is very realistic on these matters," the correspondence noted, "so this one must be very important to him."

The student was admitted and is currently enrolled at UCLA, records show. Meanwhile, the school turned thumbs down on more than 500 other students who on their own appealed rejections and had better grades, SAT scores and honor classes than the Fresno applicant, records also show.

Kolligian's intervention is all the more noteworthy considering that under current admissions policies, students from rural areas already receive special consideration.

A Record of Requests

In all, The Times' investigation found that Kolligian had made 32 such requests to UCLA since he was appointed to the Board of Regents in 1985 by former Gov. George Deukmejian. As the first regent from Fresno in decades, he said his position has helped him advance the applications of strangers and friends from the Central Valley.

"If preferential treatment is going to be given to those with hardships during their lifetime, I consider this a hardship insofar as somebody living in Central California," he said, adding that the UC admission rate for Central Valley graduates is below that for the rest of the state.

Khachigian's case struck closer to home, documents show. Her daughter was rejected for the fall 1989 class although she had a 4.0 grade-point average.

On March 24, 1989, records show, the regent called UCLA to ask why and the request was given to John R. Sandbrook, the chancellor's assistant at the time.

Five days later, the rejection was reversed and the girl was offered admission with the fall class, records show. She opted instead to attend George Washington University.

Three months later, Khachigian inquired again, this time writing a letter on behalf of a San Clemente applicant who was denied housing because she missed the deadline for submitting her deposit, records show.

The student had appealed but was turned down again. Chancellor Young overruled that decision because he believed "the overall institutional interest" would be better served, Sandbrook wrote in a memo at the time.

Khachigian said Friday she couldn't recall the housing request but did not deny making it.

Regent William Bagley said he, too, helped with admissions requests. Records show that one of them at UCLA last year was for a student related to a San Francisco banker whom he called his "brethren."

After Bagley requested a "special look if this is a borderline case," records show that the student was admitted although her rankings for academic and supplemental factors were low and she had been coded for rejection by the admissions office.

In yet another case, politics, not friendship, prompted Bagley to seek a 1993 graduate school admission. In a letter to Young in September 1993, Bagley cited how Assembly Republican leader Jim Brulte had "held his whole caucus and thus killed" a proposed constitutional amendment that would have overhauled the way regents are selected.

"This one is important, not for me but for Good Government," Bagley wrote, asking for help with the admission of a sister of a top GOP legislative aide.

"As you would know, the 'leader' has to keep 'his' members happy. Thus Jim asked for my help.

"I stopped by and thanked Jim for his work—thus he called me re the request for admission. Please do everything you can on this one and please let me and Steve Arditti [the university's Sacramento liaison] know the positive results."

The student was not admitted to a graduate program in social work, where she was fourth on the waiting list.

Brulte said he was asked to speak against the legislation by several regents and it was not unusual for him to get his caucus to vote as a bloc. He dismissed as "ridiculous" any attempt to link his admissions request to his actions.

Bagley said that when he buttonholed Brulte after the vote he "was saying thank you. That's different than trading" a vote.

Other Appeals

Bagley, a former Republican assemblyman, said he writes as many as 10 letters a year. Asked if it was fair for him to give a leg up to some students, Bagley said: "Tell me where in the rule book of life that says you've got to be fair. I mean that facetiously."

Other officials who made requests of UCLA included Gov. Wilson, who made two casual—and unsuccessful—requests on behalf of 1993 applicants. One was for a gubernatorial campaign worker who was denied admission as an undergraduate, and the other for a former staff member who failed to get into graduate school for political science.

Wilson spokesman Sean Walsh said the governor writes many letters of recommendation but only for people he knows personally—either the children of friends or members of his gubernatorial staff.

He said the governor did not screen the requests to determine if the individuals were eligible for UC admission.

"The governor's general rule is that he provides letters of recommendation for individuals that he may know or for individuals who may have worked with him where he can testify that this individual's character, their energy, their intellectual ability and their work drive would be a benefit and an asset to the University of California," said Walsh. "This is not the governor saying, 'Admit this individual to the university.' "

Walsh said that Wilson also has made "several dozen" recommendations over the years to graduate schools, both public and private.

Former Gov. Deukmejian made eight requests to UCLA. Records show that his inquiries through UC

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lobbyist Arditti in the mid-1980s helped two students get into UCLA who initially had been rejected.

Even after becoming a private citizen, Deukmejian continued to lobby UCLA. According to a memo, he took the case of one 1993 applicant "very personally" and contacted Arditti twice. The student had been rejected, but UCLA reconsidered and gave him an opportunity to start classes as a sophomore.

Deukmejian was traveling and could not be reached for comment Friday, his secretary said.

Records show that among the Democrats who made successful requests were former Lt. Gov. Leo T. McCarthy, former state Sen. Gary K. Hart of Santa Barbara, former Assembly Speaker Willie Brown, now San Francisco mayor, and former state Sen. Art Torres, now acting California Democratic Party chairman.

Hart, who made one request to UCLA, said he believes he sent a general letter of recommendation for a prospective student who had served as an intern in his office. Hart said he may have written one or two other letters asking UC officials to review a file where a student seemed to have a credible case in which "an injustice was done."

Brown could not be reached for comment. But McCarthy said he would only help people if their records looked reasonable. If he thought it was a close call, he would send a letter on their behalf, sometimes through Arditti's office.

Torres said he never got the impression that his recommendation letters were given special treatment.

Maddy, who until recently was the state Senate Republican leader, intervened in 1986 on behalf of the son of a local businessman and friend who helped him in his first political campaign and was an occasional donor. The student was turned down, but UCLA changed its mind after Arditti told the campus that the case was "very important to Maddy."

"Anybody who's my age has had their kids and their contemporaries who are college age. I wouldn't even begin to count the number of requests that I have received from my friends and so on asking that I try to write a letter or do something to encourage the UC," he said.

Regent Clair Burgener, now chairman of the regents, who voted against affirmative action, wrote letters to UCLA's admissions director that helped change the course for applicants in 1993 and last year. The former San Diego congressman said he couldn't recall the older case but remembered that the 1995 letter was written for a relative of a friend. Internal documents show the applicant was apparently headed for rejection but was given the chance to enroll as a sophomore the next year.

"It's a courtesy and it's very difficult to say no," Burgener said. "You know people want to get an education. They [UC campuses] should not admit anybody based on the recommendation of a regent."

Regent Frank Clark, a Democrat who also voted against affirmative action, contacted a top UCLA official in 1985 after the son of a bank vice president was told to go to another campus.

Paperwork on Clark's request noted: "Would like him admitted. Very important." The student was admitted.

Asked about the case, Clark said he had "no recollection."

The most prolific of the regents, however, has been Kolligian.

Not Always Successful

Not all Kolligian requests were honored, especially for applicants to graduate schools, where the process is carefully controlled by the faculty. Although he pushed hard, Kolligian failed to get his nephew into UCLA's medical school, records show.

But his track record is much better for undergraduate admissions, which are handled by the campus administration, and records show that Kolligian hasn't been shy about weighing in for people with whom he has personal and business ties.

One beneficiary has been Kolligian's longtime friend and business partner in a commercial real estate development on the outskirts of Fresno. Records show that Kolligian contacted UCLA for admissions and housing help for three of his partner's children.

The latest was in 1990, when Kolligian went to bat for a son of his associate, an applicant with a 3.29 grade-point average and a 940 SAT score—far below UCLA's academic average for that year. Records show that the youth was admitted for the fall semester. At least 6,000 others with better marks, including some with perfect grades, were turned away.

The son said Kolligian's intervention "definitely" helped him get into the school, from which he earned a bachelor's degree in history in 1994.

"I needed any help I could get, because I knew I was competing on a higher level," he said. "We know this is the United States. It tends to be more and more who you know, not what you do, these days, for some reason."

Meanwhile, the case prompted an exchange between UCLA officials about how they could benefit by granting the favor. Young's assistant at the time, Sandbrook, boasted via electronic mail about the "markers" the chancellor earned by performing the favors for Kolligian's partner and another Fresno student.

"We admitted [the partner's son] earlier this year upon specific request from Leo and Leo knows he owes us one," Sandbrook wrote to another high-ranking official. "Leo then calls and asks if we can get a dorm space for [the youth] since he got a low lottery number. I understand that you are taking care of this, thank you."

After recounting a third favor—switching the start date for another student from winter to fall—Sandbrook summed up: "CEY [Young's initials] you I have three (3) markers from Leo K in our pocket."

Sandbrook, now a senior associate dean for the Anderson business school at UCLA, said his note was a manifestation of his "wry" sense of humor and Kolligian adamantly denies that the school asked for something in return.

"If I'm indebted to them, don't you think they would collect the markers or say, 'Hey, give me more money for athletics, or give me more money for the playhouse or something?" Kolligian said. "Not once, nobody but nobody ever has."

Times staff writer Virginia Ellis in Sacramento and Times researchers Janet Lundblad and Michele Butteiman contributed to this story.

Los Angeles Times

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UCLA Chief Admits Possible Favoritism

■ Education: Chancellor Charles Young acknowledges applicants sponsored by regents and other officials may have been given admission preferences. Lawmakers seek investigation.

By RALPH FRAMMOLINO
and MARK GLADSTONE
TIMES STAFF WRITERS

While state lawmakers called for investigations into charges of favoritism in UCLA admissions, Chancellor Charles E. Young on Saturday acknowledged that his staff may have "acted improperly" by showing preferences to applicants sponsored by UC regents and other public office holders.

Young's admission followed a Times investigation that revealed several state politicians and regents prevailed on his administration to obtain admissions and housing favors for relatives, friends and the children of their business associates, sometimes ahead of better qualified

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students who were turned away from the highly competitive Westwood campus.

On Friday, Young downplayed the significance of such private political pressure, saying that his administration responded to requests for housing and parking but not for admissions. "Am I aware of times when people tried to pull strings and got somebody in? No," he said.

But on Saturday, Young issued a clarification: "I believe that most of UCLA's responses to requests for special attention from regents, elected officials and other prominent individuals have been proper.

"However, the L.A. Times has brought to light some isolated instances over the past 15 years where UCLA staff may have acted improperly," his statement said. "I have directed those responsible for the processes involved to ensure that this does not happen in the future."

The Times reported Saturday that several of the regents who obtained the favors had voted last July to roll back affirmative action preferences for women and minorities.

Confidential records showed that Regent Leo Kolligian of Fresno sought admissions and housing favors for the children of his partner in a commercial development. And four months before he voted to end race-based preferences last July, Kolligian leaned heavily on UCLA officials to overturn the rejection of a white daughter of a Fresno developer, although school administrators assessed her academic record as "poor." His reason: The student came from an "underrepresented area" of the state.

Records also show that Regent Meredith Khachigian of San Clemente contacted the UCLA chancellor's office after her daughter had been rejected for fall 1989, a decision that was subsequently reversed. And Regent Bill Bagley of San Francisco once tried to get a woman admitted to the UCLA graduate program in social work on behalf of a lawmaker who helped the university defeat a measure in the Legislature.

Reacting to those disclosures, two state lawmakers and a member of the UC Board of Regents called for separate probes of backdoor admission requests made to UCLA and other campuses of the university system.

Sen. Tom Hayden (D-Santa Monica) said he will convene a hearing next month of his Select Committee on Higher Education to investigate whether "this corrupting practice of favoritism is a widespread pattern in admissions policy in general.

"I think there's a hypocrisy problem that needs to be looked at," said Hayden, whose district includes UCLA.

"This whole claim of [Gov. Pete] Wilson to seek a policy based absolutely on merit and nothing else has opened a door to a world of favoritism," he said. "And it starts with whether the system of backslapping and favors that's characteristic of politics has influenced the university admissions process. And I think it has."

Assemblywoman Marguerite Archie-Hudson (D-Los Angeles) said that she, too, plans to seek an investigation by the Assembly Higher Education Committee of the private preference admissions.

"I'm very happy to see the cover pulled off. . . . It shows a terrible level of hypocrisy and questions the integrity of the entire Board of Regents," said Archie-Hudson, former chair of the higher education panel. She also suggested that the backdoor system for admissions extends beyond the Westwood campus to the entire UC system.

But Assemblyman Brooks Firestone (R-Los Olivos), the chairman of the Higher Education Committee, said the disclosures were "no big deal."

"If someone feels they have been treated unfairly or overlooked and that their application has merit that the admissions department has not seen, I would certainly review that. That's my job," Firestone said, adding he would discuss the request for a hearing with Archie-Hudson.

Angered by the revelations, Regent Ralph Carmona called for a special inquiry by the university board, either at its next regularly scheduled session in May or at a special meeting.

He equated the private preferences granted at UCLA to affirmative action "for the rich and famous."

"There clearly seems to be a double standard," he said. "It's downright hypocritical for those who oppose an affirmative action program that seeks to enhance the university's diversity and then push for preferences based on power and privileges."

But Regent Ward Connerly of Sacramento, who spearheaded the rollback of affirmative action admissions last year, said it is "totally wrong and inappropriate" to tie the revelations of back-room politics in admission to the controversial decision to end race- and gender-based preferences.

"This whole idea of giving some extra consideration to those recommended by prominent people is not a race-based issue, and I think we ought to discontinue it regardless of the ethnic and racial characteristics," he said.

"In a public university, every citizen should have credibility in the admissions process, every citizen should have an assurance that when they submit an application, it is not going to be judged on the basis of their race . . . their gender, their national origin or who they

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happen to know," Connerly said.

Sean Walsh, spokesman for Gov. Pete Wilson, said the state's chief executive would not comment on specific cases.

Walsh said Wilson, who sits on the Board of Regents, "believes that the review process by the University of California should be conducted on the basis of merit. Recommendations are appropriate and welcomed by the university, but that should be the extent of an individual's activities with regards to the admissions process."

The Times investigation found that the governor made two casual requests, but neither of the applicants was admitted to UCLA.

Confidential records show that Hayden's office made one request in 1986 for a student who was attempting to transfer to the UCLA medical school. It was undetermined whether the request was successful, and Hayden said on Saturday that he couldn't recall anything about the case.

Times staff writer Virginia Ellis in Sacramento contributed to this story.

The Washington Times

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Inside Politics

Compiled by Greg Pierce

Affirmative action

With affirmative action likely to be a major issue in the presidential election this fall, it is worth noting that racial and sexual preferences are also being fought out in the courts and in the press.

The administration recently announced that a $1-billion-a-year Pentagon set-aside program was being junked, which the New York Times, in a front-page story, presented as a major change in policy.

But, according to the Wall Street Journal's Paul M. Barrett, the administration "couldn't plausibly defend the program" under new Supreme Court guidelines. The program would have been eliminated anyway by the courts, Associate Attorney General John Schmidt told the Journal.

But the administration is going all out to defend the largest affirmative-action scheme of them all: the $4.6 billion-a-year Small Business Administration 8(a) program.

Today, a Minneapolis-based builder goes to U.S. District Court in Las Cruces, N.M., to challenge a $3-million-a-year set-aside at the White Sands Missile Range. A federal court here will take up a similar case next month.

"These two far-flung proceedings provide the first opportunity to see the Justice Department's strategy for protecting not just 8(a), but a whole range of affirmative-action efforts in the uncertain legal environment created by the top court's 1995 ruling," the Journal said.

Los Angeles Times

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PERSPECTIVE ON AFFIRMATIVE ACTION

Quota Myths Keep Discrimination Alive

Opponents rely on an inflated number of beneficiaries harming phantom victims.

By REGINALD ALLEYNE

The word "quota" provides affirmative action opponents a huge public relations advantage. Quota imagery includes inflated numbers of affirmative action beneficiaries, an exaggerated scope of harm to a largely phantom class of victims and a false picture of legal remedies for unlawful discrimination.

"Quota" conjures up an image of unemployed and underemployed white males, unable to find work or advance because employers are by law or practice committed to hiring and promoting inflexible percentages of women and minorities. The underqualifications of affirmative action hires and the corresponding qualifications of unhired and unpromoted white males complete this misperception.

Never mind that inflexible quotas have been struck down by courts and that employers almost never lose government contracts over lack of affirmative action.

The quota card deflects attention from some important statistical realities, including an acceptable single-digit unemployment rate for the general work force; a double-digit unemployment rate for blacks—at twice the general rate—and data showing women's wages still lagging behind those of men performing comparable work.

University and college admissions policies provide a graphic measure of how the public image of affirmative action—though decidedly false—flows smoothly in favor of its opponents. Take the case of a prestigious university with 10,000 applications for 2,000 freshman seats. It offers admission to 3,000 applicants, of whom 300 are black and other minorities with at least good grades and test scores, if not in the excellent range of most other admitted applicants. Assume that of the 7,000 rejected applicants, 6,000 are white. Each of them would be positioned to tell their families and friends that the university denied their admission because of affirmative action.

Even assuming the virtual impossibility that every admitted minority applicant was less academically qualified than every one of the 6,000 rejected white applicants, no more than 300 of the rejectees would be right; at least 5,700 would be wrong. If each of the rejectees acquired the sympathetic ear of five family members and friends, close to 30,000 potential opponents of affirmative action would be created. Re-create this scenario across the country, and the numbers of affirmative action opponents become swelled by millions.

Opponents of affirmative action also benefit from the widely held belief that victims of unlawful discrimination can gain legal redress. Filled with stern thou-shalt-not commands, antidiscrimination laws appear, on paper, to be effective. But they fall far short of their intended objectives. A labyrinth of time-consuming and complex procedural hurdles, sometimes generating years of delay, wears down and defeats most employment discrimination plaintiffs.

Also, except for sexual harassment, the Supreme Court has made it difficult to win a discrimination case with anything short of smoking-gun evidence. And in a 1991 ruling, the Supreme Court took a long step toward closing the courts to all kinds of discrimination cases. It permitted employers to channel all statutory discrimination claims to arbitrators—mainly white males, many of whom are hired and compensated by the employer.

The court did this by letting employers force job applicants to sign agreements to arbitrate their statutory claims of discrimination and not take them to court for jury trial. The applicant who refuses to sign the agreement would not be hired.

Even a terminated employee, whose good chance of winning a large jury award make judicial delay tolerable, will have his or her case dismissed on the basis of the agreement to arbitrate.

In arbitration, the employee is less likely to win or will win less money if he or she prevails, because juries are composed mainly of employees or former employees, and jurors are not, as are the arbitrators in many of these disputes, chosen and compensated by the employer.

A United States without affirmative action is not so easy to envision. Opponents see colorblind, neutral policies applied by employers and university and college admissions officers: Those qualified would be hired or admitted, including women and minorities who met the standards; those not qualified would not be hired or admitted, including white males who did not meet the standards. But it very likely won't work that way.

The end of affirmative action as provided, for example, by the "California civil rights initiative," would probably launch a regime in which some employers had, at best, a good faith but erroneous belief that the choice of a qualified minority or female applicant over a qualified white male would draw swift legal retribution. The motivation might differ from that which drove employers to discriminate openly and with impunity against nonwhites and women before modern civil rights laws became effective in the 1960s. But the consequences would scarcely differ.

Reginald Alleyne is a professor of law at the UCLA School of Law.

AP Associated Press

Faulty-Products Bill Finally Moving To House, Senate Votes
By MARCY GORDON
Associated Press Writer

WASHINGTON (AP) - Senate moderates prevailed Wednesday in limiting a bill aimed at reducing the incentive for Americans to sue. Ceilings on damages would be imposed only in faulty product cases under the compromise drafted by Senate and House negotiators.

The much broader Republican "Contract With America" package passed by the House last year would have limited punitive damage awards in all civil lawsuits, including medical malpractice cases.

The compromise closely tracks the narrower Senate measure, which passed by a 61-37 vote last May. Judges could override the statutory limits on punitive damages designed to punish wrongdoing in many cases. But defendants in those cases also would get automatic rights to a new trial.

Sen. Jay Rockefeller, D-W.Va., an author of the Senate bill, said House Republicans dropped their demand for a sweeping rewrite of the nation's civil litigation laws when they realized the Senate would not pass it, nor would President Clinton sign it.

"It took all this time for them to finally come round and understand," Rockefeller said.

Clinton had threatened to veto the broader version, which had been pushed by Senate Majority Leader and now GOP presidential front-runner Bob Dole.

House Judiciary Committee Chairman Henry, one of the House negotiators, called the compromise "a solid down payment on long-needed reform of our current out-of-control legal system."

"The give and take of democracy means that sometimes you have to settle for a sandwich instead of the full meal," said Hyde, R-Ill.

It wasn't immediately clear whether Clinton would sign the compromise, which the Senate could vote on early next week. White House officials have said Clinton would support a bill covering damages from defective products, although he has criticized some features included in the new measure.

"It's taken more than a decade to get this legislation this far and I hope the president, as an attorney himself, will see how desperately we need it signed into law," said Sen. Slade Gorton, R-Wash.

The legislation represents a milestone in a 13-year bitter battle pitting business interests against consumer groups and trial lawyers.

Businesses have contended for years that such a measure was needed to create uniformity out of divergent state laws on product liability and stem a tide of frivolous lawsuits.

Consumer groups and trial lawyers counter that such a change would deprive people of legal redress against manufacturers of unsafe products.

THE WALL STREET JOURNAL

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Measure to Reform Product Liability Cleared by Conferees

By a WALL STREET JOURNAL Staff Reporter

WASHINGTON – House-Senate conferees said they reached agreement on landmark product-liability legislation, but the outlook for final passage was murky.

The agreement sets the stage for a showdown in the Senate, probably next week. Approval in the House is virtually assured, though Senate passage is considered too close to call. The White House has also expressed concerns, but without openly threatening a presidential veto.

The legislation, which business has sought for years, would establish uniform federal standards in cases over products ranging from faulty toasters to machine tools. The conference agreement tracks a Senate version that was narrowly cleared last May, and rejects a sweeping overhaul of the civil justice system previously approved by the House.

Proponents called the measure a modest and needed effort that would spur the development of new technologies while preserving rights of consumers to sue.

For House Republicans, the legislation is a downpayment on fulfilling a key provision in the Contract with America. House Judiciary Committee Chairman Henry Hyde said the bill would "unleash an American job-creation boom."

The bill would give new protection to manufacturers and distributors of products, including caps on punitive-damage awards, which are intended to punish or deter wrongdoers. It would exempt retailers and wholesalers from getting dragged into suits in most cases, and give a break to deep-pocketed defendants in cases involving large awards for "pain and suffering" damages.

At the same time, the final version doesn't include a proposal by conferees to protect charitable groups from large punitive awards. Congressional staff said the conferees weren't able to agree on final language, and that members intended to seek separate legislation.

The New York Times

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'94 Ruling Ended Race-Based Districts as Remedy

By NEIL A. LEWIS

WASHINGTON, Feb. 26 — Drawing districts dominated by black or Hispanic voters to insure that they have a chance to elect candidates of their choice was a main remedy used to broaden minority participation in electoral politics under the Voting Rights Act of 1965.

But in 1994, a narrowly divided Supreme Court began questioning that method when the justices were confronted with a bizarrely shaped district in North Carolina, drawn explicitly to elect a black candidate to the House of Representatives. The Court majority seemed especially offended by the serpentine shape of the district, which wound for 160 miles through parts of 10 counties, connecting black population centers from Durham to Gastonia.

Justice Sandra Day O'Connor said the practice of creating such districts on the belief that people of the same race or ethnic background think alike bore "an uncomfortable resemblance to political apartheid." Such districts, she said, violated the equal protection rights of white voters.

Since then, the Supreme Court has struck down other districts, offering the ambiguous guideline that they are unconstitutional if they were drawn "predominantly" or "principally" for racial or ethnic reasons.

"The Court's rulings don't lead to any obvious answer as to whether any individual district meets the constitutional standards," said Jacqueline Berrien, an associate counsel for the NAACP Legal Defense Fund Inc., which has been involved in many of the Voting Rights Act cases. Ms. Berrien said, "The practical upshot is that there has to be a case-by-case determination by the courts on each district."

Representative Nydia M. Velazquez, whose mostly Hispanic 12th Congressional District of New York was deemed unconstitutional today, became the 10th member of Congress to suffer such a fate since 1994.

There are at least two other challenges by white voters to Congressional districts pending in South Carolina and Illinois. Suits have also been filed challenging state legislative districts in Georgia, Louisiana and North Carolina.

In a sense, the issue of racial or ethnic redistricting is a new version of the affirmative action debate that gripped the judiciary for more than two decades and provoked heated debate. The majority and dissenting opinions in the Supreme Court cases demonstrate how race remains the greatest unresolved issue at the intersection of law and policy for the justices.

Justice O'Connor, who has proved to be a crucial swing vote, has argued in essence that the country should get beyond race. The classic liberal answer, embodied in the court's minority opinions, is that race has to be one remedy used to get beyond race.

The Supreme Court's intolerance toward districts drawn exclusively to help minority groups elect one of their own spawned another debate: whether white voters would ever elect a nonwhite to Congress.

Last November provided an answer of sorts. The five black members of Congress whose districts were redrawn to eliminate black voting majorities were re-elected easily. Lee Parks Jr., the lawyer who successfully challenged two black-majority districts in Georgia, said that the results demonstrated that black voters do not have to be in the majority of a district to have black representation.

The New York Times

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U.S. Court Outlaws a New York District Drawn for Hispanic Voters

By CLIFFORD J. LEVY

A Federal court declared yesterday that the mostly Hispanic 12th Congressional District in New York City was unconstitutional because race and ethnicity were the dominant factors used to draw it. The ruling is expected to lead to new boundaries for many of the city's 14 Congressional districts, forcing some incumbents to defend their seats in the next election in unfamiliar neighborhoods.

The three-judge Federal panel in Brooklyn said it was abiding by recent decisions handed down by the United States Supreme Court, which found that legislative districts shaped mostly or solely to increase the representation of racial and ethnic groups violated the 14th Amendment's guarantee that all people be treated equally.

"The 12th C.D., as a majority Latino district, would never have been created" if not for explicit racial and ethnic criteria, the panel wrote.

It said the number of Hispanic residents had been so important in drawing the district that a sophisticated computer program was used to find people with Hispanic surnames on voter registration lists.

The panel ordered the New York State Legislature to reconfigure the district, now represented by Nydia M. Velazquez, a Democrat, setting the stage for what is likely to be a tumultuous battle in Albany, where conflicts over legislative borders have often proved so intractable that the courts have had to resolve them.

In fact, the effort to give the 12th District a Hispanic majority succeeded only after a lengthy political skirmish. In 1992, after months of bickering, the Legislature agreed on a Congressional redistricting plan aimed at increasing the chances of more Hispanic representation.

The Legislature acted reluctantly, under pressure from a Federal court that had threatened to impose its own plan. But the Supreme Court later ruled that districts drawn predominantly for racial or ethnic reasons are unconstitutional.

The 12th District stretches from Brooklyn to Queens to the Lower East Side of Manhattan, a conglomeration of mostly Hispanic neighborhoods that looks something like ink splotches from a Rorschach test.

The district's boundary changes direction 813 times, according to testimony described in the panel's decision.

The odd shape recalls districts with black majorities in Texas, Georgia and North Carolina that the Supreme Court has ruled unconstitutional in recent years. Those decisions represented a new drive by the court to scrutinize whether states were engaging in unconstitutional racial and ethnic gerrymandering.

After some of those earlier rulings, new district boundaries were drawn and special elections were held. The Federal panel in Brooklyn did not call for a new election yesterday, apparently deciding that any changes in the city's Congressional Districts should be in place for the 1998 election.

Ms. Velazquez was elected to the seat in 1992 after a bitter primary victory over Representative Stephen J. Solarz, a powerful nine-term incumbent who had to run in the district after his own district was lost in the reapportionment process.

The 1990 census showed that New York had gained fewer people than other states, so its delegation in the House of Representatives was shaved, from 34 seats to 31.

Ms. Velazquez said yesterday that she would appeal the decision to the Supreme Court. "I am deeply disappointed," she said. "It is a sad day for equal justice for communities of color."

Officials in Albany and in Washington said the Legislature's move to redraw Ms. Velazquez's district would most strongly affect two adjacent districts, the Seventh, represented by Thomas J. Manton, and the 14th, represented by Carolyn B. Maloney. Both are also Democrats.

Under one scenario, the Legislature could shift some non-Hispanic residents to Ms. Velazquez's district while moving some Hispanic ones to the other two districts.

But the 12th District borders on several other districts as well, so the resulting makeover could affect as many as six other representatives.

The Legislature has until July 30 to approve a plan, which Gov. George E. Pataki must sign. If the deadline is not met, the court could appoint its own experts to redraw the districts.

Mr. Pataki said he had not yet read the ruling, but he said he supported the gist of the Supreme Court's earlier decisions.

"It is far better," he said, "to have districts that make geographic and sense in other ways — that don't stretch miles and miles through unrelated neighborhoods and across geographic boundaries."

The three judges on the panel that issued the ruling yesterday were Joseph M. McLaughlin, Sterling Johnson Jr. and David G. Trager. The lead plaintiff in the lawsuit was Angel Diaz, a hospital administrator who ran as a Republican against Ms. Velazquez in 1992.

The decision came in response to a motion by the plaintiffs for summary judgment, meaning that the panel believed that the evidence was so overwhelming that there was no need for a trial.

Mr. Diaz's lawyer, Robert D. Popper, said Mr. Diaz believed the majority Hispanic district marginalized and segregated Hispanic people.

THE NEW YORK
DAILY NEWS

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Race haste makes waste

THE RACIAL BEAN counters at the Justice Department surely have taken leave of their senses. There can be no other explanation for their hell-bent determination to play the race card, even when it means a stacked deck against black and Hispanic New York students.

In a bizarre racial analysis, the department reinstated the school board in Bronx District 12 — which Chancellor Rudy Crew had suspended and replaced with three trustees. Justice officials said the suspension violated the Voting Rights Act, a law set up to protect minority voters.

"The minority community literally had no input into the chancellor's selection of the three temporary trustees," wrote Deval Patrick, who is stepping down as the department's top civil rights official. Good riddance.

The facts in this case undercut the theory, as facts usually do with rigid ideology. Starting with the fact that Crew is black. Oops. Doesn't that mean "the minority community" actually had quite a bit of input?

The Justice Department noted that there are 46,918 registered and parent voters in District 12 — 90% black and Hispanic. It neglected to mention another number: Only 1,233 actually turned out for May's elections in District 12 — 2.6% of the eligible voters.

But locked in a time warp, Justice has proposed a 1960s solution for a 1990s problem. Racism was not the issue in District 12. Home-grown incompetence and corruption were. To use the civil rights law to protect inept officials merely on the basis of their race is obscene. And stupid.

Other numbers Washington ignored: District 12 has been perenially under investigation for its poor performance. Only 23.2% of its kids read at grade level; only 42.3% are on par in math (city averages are 41.6% and 58.5%, respectively).

Albany had a chance to fix this mess when Crew wanted to postpone the May elections. Instead, the Legislature agreed to a new law that led to this snarl.

Local officials have rightfully rallied behind Crew. Mayor Giuliani even called the decision a case of "some federal bureaucrat pretending" that he knows more than a chancellor . . . about what's in the best interest of children." Indeed.

The ruling must be overturned on appeal, lest its cancerous thinking infect other districts. But it dramatically illustrates the need to take power out of the hands of the local boards.

That means Albany can delay no more. The leaders must call a special session to strip the local boards of hiring power. That will put an end to the nonsense of federal bureaucrats protecting the people who are robbing children of a decent education.

The Washington Times

DATE: 11-19-96

PAGE: A-16

Exit Deval Patrick

Given the positions he had taken since his installation as head of the Justice Department's Civil Rights Division, it becomes clear that Deval Patrick's most salient qualification for the job he is now leaving was that he didn't have much of a paper trail. The Clinton administration's first choice for the job, Lani Guinier, got hung out to dry by Mr. Clinton himself when her left-wing racialist academic writings were widely disseminated. Yet it is painfully apparent that Mr. Patrick shared Ms. Guinier's views on matters of race. As an advocate for racial preferences in employment, education and even elected political offices, he made an excellent king to Ms. Guinier's "quota queen."

Mr. Patrick was always careful to couch his ambitious left-liberal agenda in the unobjectionable language of "equality, opportunity and fair play." But in practice, "equality" was not what Mr. Patrick had in mind (at least not equality before the law, as opposed to equality of outcome). Mr. Patrick has been a powerful force in the Clinton administration pushing the view that the color of one's skin is a compelling characteristic in the eyes of the law. It was Mr. Patrick's shop at Justice that fought so hard to maintain racially gerrymandered congressional districts. Fortunately, Mr. Patrick lost each of the four race-based districting cases that he argued before the Supreme Court.

Mr. Patrick was also on hand to support one of the most egregious recent examples of affirmative action run amok. In the midst of a budget crunch, the school board in Piscataway, N.J. fired Sharon Taxman — who happens to white — so that Debra Williams, a black teacher, would not have to be let go. Their qualifications were comparable (they were even hired on the same day), so much so that the Piscataway Board of Education made no bones about the fact that it laid off Mrs. Taxman because she was white — the board wanted to promote "diversity."

The Bush administration had entered the fray on the side of Mrs. Taxman, who sued the school district under Title VII of the 1964 Civil Rights Act. And interestingly, the Justice Department during the first year of the Clinton administration also worked with Mrs. Taxman helping her case. But in 1994 Mr. Patrick took his post as the Civil Rights guru at Justice. One of his first acts in that office was to pull the rug out from Mrs. Taxman. Not only did Justice stop helping her; Mr. Patrick filed briefs in support of the school board's system of race preferences. In 1996 the Third U.S. Circuit Court of Appeals rebuffed Mr. Patrick by striking down the Piscataway quotas.

Mr. Patrick was also a prominent critic of the California Civil Rights Initiative, the ballot measure calling for an end to the state's affirmative action policies. He denounced CCRI and its goal of "colorblindness" as "just a high-sounding concept intended to block society's progress toward equal opportunity." The voters of California disagreed, and voted to end the quotas and preferences that have done so much to poison race relations in the United States.

We can be thankful that Mr. Patrick met with so little success in these high profile conflicts. But it would be naive to think that his passion for race-based solutions to social problems has not inflicted unfairness on untold numbers of people. Who knows how many lost jobs or didn't get them in the first place because they didn't enjoy membership in one of Mr. Patrick's preferred classes? In any case, senators would be wise to scrutinize whomever Mr. Clinton ultimately chooses to fill Mr. Patrick's shoes. The left-liberal establishment — in which the advocates of affirmative action loom large — has put the brakes on the repopulation of the Clinton team, the better to vet new appointees for liberal purity. The civil rights desk at Justice is one of the positions the left will try hardest to fill with one of its own. Keeping the racially divisive tenure of Mr. Patrick in mind, the Senate should not allow it.

Church and State Revisited

Religious freedom case raises important underlying federalism questions

BY RICHARD C. REUBEN

Religion and politics always are a delicate mix. But put them in the context of a power struggle between two branches of the federal government, add subthemes of national policies on race and states' rights, and you have all the makings of a potential landmark ruling by the U.S. Supreme Court.

Such is the mix in *City of Boerne v. Flores*, No. 95-2075, argued before the Court in February. The case centers on a dispute between the Roman Catholic archdiocese in San Antonio, Texas, and municipal officials of the nearby community of Boerne who refused to grant a permit to expand a church adjacent to a historic district covered by a landmarks preservation ordinance.

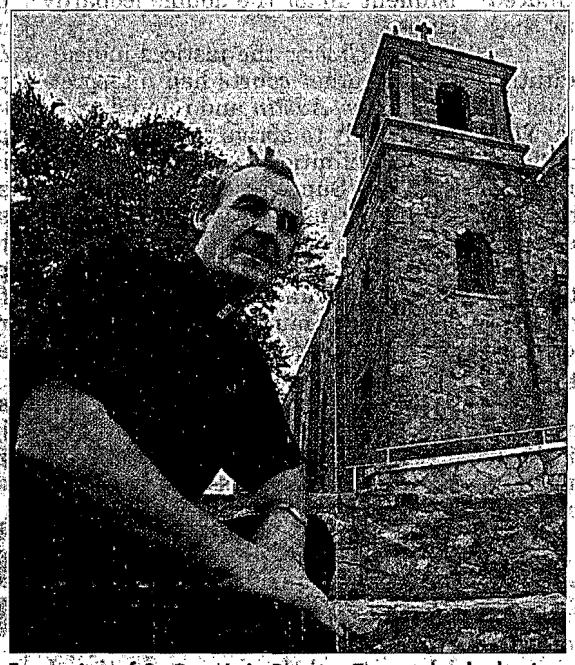
Archbishop P.F. Flores sued in U.S. District Court, claiming the permit denial interfered with the church's rights under the Religious Freedom Restoration Act of 1993 because the city did not have a "compelling" reason required by the act, and the permit denial was not a suitably "narrowly tailored" response.

The city contends that the act is unconstitutional because it exceeds congressional power, an argument rejected by the 5th U.S. Circuit Court of Appeals based in New Orleans, which reversed and remanded the District Court's ruling for the city, 73 F.3d 1352 (1996).

In the Supreme Court, the case has taken on a larger significance as the latest chapter in a growing power struggle between the Court and Congress over the scope of federal legislative power. For much of this century, that power was seen as essentially unbridled. But, responding to states' rights concerns, the Rehnquist Court recently has been chipping away at that citadel with increasing intensity.

The Court itself initiated the religious spin on the federalism matter in 1990, when it issued a controversial decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, that claims under the free exercise clause of the First Amendment based on facially neutral laws of general applicability would be subject only to deferential rational basis review, rather than traditional "strict scrutiny."

After heavy lobbying by religious groups, Congress passed the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*, to reinstate the strict scrutiny standard.



Expansion of St. Peter's in Boerne, Texas, sparked suit.

Constitutional Can of Worms

Now the issue has boomeranged back to the justices on the question of Congress' power to override the Court on a matter of constitutional interpretation.

Archbishop Flores, along with the Clinton administration, liberal and conservative members of Congress, and an army of religious organizations, contends the law is well within Congress' "power to enforce, by appropriate legislation," constitutional guarantees under Section 5 of the 14th Amendment.

But Boerne officials, property rights proponents and other critics of the statute contend it is unconstitutional because the power of Section 5 is limited to enforcement of the 14th Amendment guarantee of due process and equal protection, and it may not be extended to other constitutional domains.

Professor A.E. Dick Howard of the University of Virginia School of Law in Charlottesville says the substantive scope of Section 5 has been an open question since the Court's 1966 decision in *Katzenbach v. Morgan*, 384 U.S. 641, suggested that it could be a source for broad congressional expansion of constitutional guarantees. But the issue has remained dormant as congressional power has expanded largely without question until recent years.

"Reopening the Section 5 issue would be even more unsettling than the *Lopez* decision, and surely the Court knows that," says Howard, questioning whether the justices really want to open such a can of constitutional worms.

The implications are hardly academic. Much of the nation's patchwork of civil rights legislation and other anti-discrimination laws is built in part on a sweeping understanding of Section 5—a point underscored in powerful amicus briefs filed in *Flores* by the American Bar Association and the National Association for the Advancement of Colored People, which urged the justices to uphold the Religious Freedom Restoration Act and a robust interpretation of Section 5.

John E. Nowak, a professor at the University of Illinois College of Law in Champaign, suggests the Court may choose to let the Section 5 issue simmer and decide *Flores* on other grounds.

But he sees the debate as just beginning, leading either to a continuing, powerful congressional role in addressing racial discrimination and other social problems or "back to where we were 100 years ago," when judicial hostility rendered such efforts all but futile. ■

Richard C. Reuben is a lawyer and journalist in Culver City, Calif.

ABAJ/TOMMY HULTGREN

PRESERVATION PHOTOCOPY

Other courts had given short shrift to sex offenders' claims of harassment, Chin indicated, citing torrents of public ire that rained down on offenders after notification. In New Jersey, one man was driven out of town after reporters and the Guardian Angels staked out his house around the clock.

In Washington state, a released offender's home was burned to the ground. And in another New Jersey incident, two men broke into a house where police had disclosed that a sex offender lived. However, they beat up and seriously injured a visitor in the house whom they mistook as the sex offender.

Chin's analysis of the statute's legislative history left no doubt in his mind that, although the New York General Assembly carefully crafted the statute's language to show a regulatory intent, the floor speeches revealed that the law's real purpose was to punish.

" '[R]epeat sexual predators, especially those that prey on children, are the human equivalent of toxic waste,' " Chin quoted one legislator as saying.

"Public notification is the modern-day equivalent of branding and shaming," Chin wrote in enjoining the state from enforcing the notification provision.

Kansas also enacted its version of Megan's Law on a wave of emotion, this time spurred by the 1993 murder of Stephanie Schmidt by a co-worker with previous convictions for rape and aggravated sodomy. But unlike the New Jersey and New York provisions that provided for the "controlled" notification to the public of the presence of sex offenders in their communities, the Kansas statute allowed anyone to walk into the local sheriff's office and obtain the names and addresses of sex offenders.

"For it to be available to the public is an invasion of the criminals' rights to privacy," Schmidt's sister, Jeni, told legislators during hearings. "But isn't it an invasion of rights when those criminals turn around and rape or murder innocent individuals?"

The Kansas Supreme Court did not view it that way in striking down the statute's notification provision in the case of Kym E. Myers, a disbarred lawyer and twice unsuccessful congressional candidate who pled no contest to sexually assaulting a 17-year-old girl in his office.

"Unrestricted public access to the registered information leaves open the possibility that the registered offender will be subjected to public stigma and ostracism," the court concluded in *State v. Myers*, 923 P.2d 1024 (1996).

Supreme Court's Turn May Be Next

Meanwhile, back in Washington, the U.S. Supreme Court tilted the analytical applecart in June 1996 when it ruled in *United States v. Ursery*, 116 S. Ct. 2135, that civil drug-asset forfeitures are not punishment under the double jeopardy clause.

In *Ursery*, the justices indicated that other courts had interpreted *Halper*, *Austin* and related cases incorrectly to arrive at a rigid, universal definition of punishment.

The Supreme Court's decision in *Ursery* may leave lower courts with a more flexible analytical framework in future cases involving dual sanctions, but it also means they must search harder for precedent closely resembling the factual and constitutional scenarios of the cases before them.

But while *Ursery* may change the analysis, it has not changed the results or led to consistency in cases involving sex offender notification.

Since *Ursery* was decided, at least six courts have considered ex post facto challenges to notification provisions. The score: Three courts have held that notification is punishment and thus unconstitutional, but three others have ruled that notification is not punishment and upheld the provisions.

In November, Kansas asked the U.S. Supreme Court to hear its appeal of *Myers*. The state also asked the justices how to define punishment for ex post facto purposes in light of *Ursery* and related cases.

Given the importance of the issues and the deep rift among the lower courts, it is a safe bet that the Supreme Court will take up the ex post facto question.

And, considering the Court's usual practice of ruling as narrowly as possible, all that probably remains to be seen is just how small a pigeonhole the justices will create for notification.

Eventually, of course, the ex post facto issue will go away as sex offenders convicted before passage of the registration statutes die off. The only problem is that waiting may entail a terribly high cost. ■

Judicial Conduct

Judge Must Forgo TV Commentary Gigs

The New Jersey Supreme Court has ruled, in *In re Inquiry of Broadbelt*, 683 A.2d 543 (1996), that a municipal judge violated the state code of judicial conduct when he appeared regularly on television to comment on pending cases in other jurisdictions, including the O.J. Simpson criminal trial.

Judge Evan W. Broadbelt's appearances on the Court TV network and on the CNBC program *Geraldo Live* violated the judicial conduct provision that directs judges to "abstain from public comment about a pending or impending proceeding in any court." Through this ban, stated the court, "we avoid the possibility of undue influence on the judicial process and the threat to public confidence posed by a judge from one jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction."

Broadbelt's TV appearances also violated the prohibition against judges "lend[ing] the prestige of office to advance the private interests of others," the court ruled.

Civil Rights

Refusing Patients May Discriminate

New York's highest court ruled in *Cahill v. Rosa*, 89 N.Y.2d 14 (1996), that dentists who deny treatment to patients known or suspected to be HIV-positive are committing unlawful discrimination.

The Court of Appeals based its decision on a holding that dental offices are "places of public accommodation" under the state human rights law. Although dental services "may be conducted on private premises and by appointment, such places are generally open to all comers," stated the court.

The court held that the human rights statute must be liberally construed to accomplish its purposes.

While recognizing concerns of health care providers over potentially contagious conditions, the court pointed out that "the very essence of the Human Rights Law is that persons within the reach of the statute may not pick and choose those against whom they discriminate."

—*Joseph Wharton*

PRESERVATION PHOTOCOPY

LEGAL TIMES
LAW AND LOBBYING IN THE NATION'S CAPITAL
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What's Ahead For Affirmative Action

BY LINDA CHAVEZ

For the first time in the 30-year history of affirmative action programs, voters finally got the chance to voice their opinion on the controversial policy. By 54 percent to 46 percent, Californians voted on Nov. 5 to ban racial, ethnic, and gender-based preferences in state education, employment, and contracting. The measure is likely to affect policy not only in California but also nationally. Even President Bill Clinton may be forced by the courts, Congress, and the voters to simply end the divisive practice of counting by race and sex.

Some two dozen states allow ballot initiatives, and several are potential targets for Proposition 209-type measures. Arizona, Colorado, Florida, and Michigan are good prospects for ballot initiatives in the next couple of election cycles. The success of such efforts will rest in large part on what happens not only in California but also in Washington, D.C.

PRESSURE POINTS

Despite his promise to "mend" affirmative action after a thorough review of all federal programs, President Clinton has done virtually nothing to change the status quo. Passage of Proposition 209, however, will increase the pressure on him from both sides in the affirmative action debate.

Proponents of racial preference will likely pressure the administration to attempt to block or at least slow the effects of Proposition 209, especially in higher education. The administration could attempt to use its authority under Title VI of the Civil Rights Act, which bars discrimination in federally assisted programs, to pressure schools to come up with new ways of increasing minority enrollment, for example. Some colleges already have changed their affirmative action programs to target low-income students and those who are the first in their families to attend college, and the administration could constructively aim its resources at encouraging more of these programs. Most civil rights advocacy groups reject such programs, however, because so many current affirmative action recipients would be ineligible to participate under those criteria, since they come from middle class families and are frequently second-generation beneficiaries. But the president could decide that such programs represent the only feasible chance to salvage any remnants of affirmative action. If so, he might find willing allies among the Republicans in Congress.

The courts, too, will play an important role in deciding the ultimate fate of affirmative action. Although it is almost inconceivable that Proposition 209 opponents will succeed in their effort to declare the initiative unconstitutional—the American Civil Liberties Union and the Lawyers Committee for Civil Rights, among others, have already filed suit to block its implementation in California, charging that prohibiting preferences on the basis of race or sex violates the equal protection clause—it is possible that the federal courts will once again shift position on racial preferences. The majorities in both *Adarand Constructors Inc. v. Peña*, 115 S. Ct. 2097 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which struck down the most egregious government-mandated preference programs, were slim. Change is especially likely with respect to higher education, where Supreme Court rulings have traditionally been less than definitive. After all, it was the muddled decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that encouraged schools (and by extension, employers) to come up with the racial and ethnic diversity argument that now undergirds most affirmative action programs.

Here, too, President Clinton could hold the key. If he has the opportunity to appoint even one or two new justices, the balance could tip away from colorblind justice toward racial preferences once again.

Proposition 209, the measure adopted in California, was straightforward enough: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Despite the initiative's innocuous language, opponents ran one of the dirtiest campaigns in recent memory to defeat it. In the closing two weeks of the campaign, anti-209 forces ran television ads featuring David Duke, images of burning Ku Klux Klan crosses, and women being stripped of their clothes to try to scare voters into rejecting the measure. While ultimately unsuccessful, these efforts no doubt depressed the margin of victory from what might otherwise have been a complete blowout. Why the hysteria? The scurrilous tactics of some proponents of affirmative action suggest just how bankrupt the policy itself has become.

Affirmative action began as a modest effort by the federal government to encourage employers to recruit and train minority workers (and, later, women) in jobs from which they had long been excluded by discrimination and social practice. From the time of President Franklin Roosevelt, successive administrations issued orders making racial discrimination illegal in firms doing business with the federal government. In 1965, President Lyndon Johnson issued Executive Order No. 11,246, which not only forbade discrimination but mandated "affirmative action" on the part of federal contractors "to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." (Prohibitions on the basis of sex were added in 1967.)

Nothing in the original meaning of affirmative action hinted that the program would ever require racial or gender preferences, quotas, or set-asides. Nonetheless, within a few years of its issuance, Executive Order No. 11,246 became the justification for a wide range of practices

Cont'd

designed to ensure hiring and promotion by race and sex in both the public and private sector. When the Congressional Research Service reviewed federal programs in 1995 to determine how many incorporated race and gender preferences, it found more than 160 such programs, ranging from mandating hiring and promotion "goals" for federal contractors to awarding "preference points" to minority- or women-owned banks for capital assistance programs. For 30 years, affirmative action has been used to justify lowering job standards, eliminating or radically altering employment tests, and race- and gender-"norming" test scores to boost those of minorities and women, all in an effort to increase the proportion of minorities and women hired and promoted.

PUBLIC OPINION

The public's reaction to these practices has been consistently negative. Although the vast majority of Americans favor equal opportunity in hiring and promotion, nearly two-thirds oppose racial preferences, according to most polls taken over a 30-year period. Sensing that there was no broad-based support for racial preferences in California, opponents early on settled on a strategy to paint Proposition 209 supporters either as out-and-out racists or as sexists whose real goal was to drive women from the workplace.

None of the opponents' tactics succeeded in defeating Proposition 209 at the polls. But no one should be surprised that affirmative action advocates will use any means necessary to protect preferences. On the other hand, the newly re-elected chairman of the House Subcommittee on the Constitution, Charles Canady (R-Fla.), has announced he will again pursue a federal law to ban preferences. Most important, the majority of the American people consistently reject race and gender preferences and, as the California vote shows, they can now demonstrate their opposition at the polls.

Linda Chavez is president of the Washington, D.C.-based Center for Equal Opportunity, and was director of the U.S. Commission on Civil Rights during the Reagan administration.

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Equality in Law Schools Elusive

Discrimination and harassment persist, Women's Commission reports

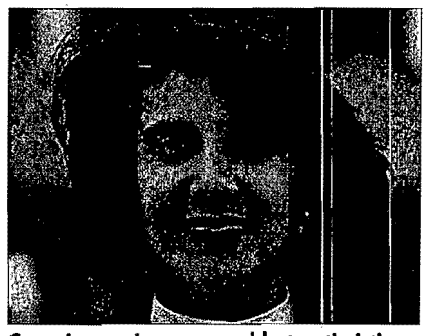
A report produced by the ABA Commission on Women in the Profession and introduced to the public at the midyear meeting finds both subtle and overt biases against women continue to be problems in American law schools.

ABA President Roberta Cooper Ramo presented the report at a press conference, saying, "If we don't consistently look to see if we have problems, it becomes too easy to assume that the number of women in the profession and the passage of time alone will take care of the problems."

Ramo said the report, *Elusive Equality: The Experience of Women in Legal Education*, is important for a number of reasons. She laid out four:

• The report shows incidents of discrimination are not isolated occurrences. Rather, they happen throughout the country and at every level of legal education.

• It establishes that key administrative positions within law school faculties are too infrequently chaired by women.



Cory Amron is concerned but optimistic.

• It documents continuing reports of harassment and disrespect by male law students toward female students and faculty. "It's surprising to us that we have male law students who fail to understand that it is part of their ethical obligation to treat women faculty and their colleagues with respect," Ramo pointed out.

• It suggests what will make things better: "The person at the top—the dean—must indicate by every means possible that law schools will not tolerate discrimination against women," Ramo said.

Cory Amron, immediate-past chair of the Women's Commission, joined Ramo and told reporters she does not see the report's conclusions as particularly bleak.

"It's a picture that we are very concerned about," Amron said. "There are consistent and persistent obstacles to women receiving the best education they can in law school because of gender issues, and there are persistent glass-ceiling obstacles within the faculties of law schools."

But, Amron added, "There are lessons to learn globally without pointing fingers at particular schools."

Amron expressed her optimism after a meeting on the report with law school deans. "I'm very pleased to tell you the deans had a spectacular response. They talked about their own experiences and how they handled some of these problems successfully."

—*Steven Keeva*

Curbing Hate Crimes

State laws are inadequate, according to experts

While hate crimes appear to be on the rise, experts say they have no way of knowing for sure because many such incidents are believed to go unreported.

Even when a hate crime is reported, experts say, the laws under which such cases are prosecuted, if they exist at all, are often inadequate or poorly enforced.

That dismal assessment comes from a panel of experts who appeared at an ABA Midyear Meeting program on the subject of hate violence and what lawyers can do to help bring it to an end.

The program, sponsored by the ABA Commission on Opportunities for Minorities in the Profession, offered an overview of some of the problems involved in hate crimes legislation and some tips on how to get around those problems.

One of the biggest difficulties, according to Brian Levin, associate director for legal affairs at the Southern Poverty Law Center's Klanwatch Project, is a lack of reliable information.

One study shows 75 percent of hate crimes do not get reported, and another shows 90 percent of those that do are misclassified by police, Levin said.

Another big problem is the variety of laws under which hate crimes are prosecuted, Levin said. Eight states have no laws whatsoever. And the rest have laws that vary considerably in terms of the severity of the penalties, the status of the groups that are protected, and the activities for which a hate crime can be charged, he said.

Moreover, some states have stand-alone laws, which allow hate crimes to be prosecuted as a separate offense, Levin pointed out, while other states have penalty enhancement statutes, which permit the prosecution of a hate crime only in connection with another offense.

Elizabeth Shuman-Moore, director of the Project to Combat Bias Violence for the Chicago Lawyers' Committee for Civil Rights, said civil litigation can sometimes be more effective at combating hate violence than a criminal prosecution.

She cited several examples of cases her organization has handled in which the victims of hate crimes have been awarded upwards of $1 million in judgments against the perpetrators.

But former Illinois Attorney General Roland Burris said no amount of legislation can change what essentially is a learned behavior. What is needed, he said, is a wholesale change in attitudes, which can only be achieved through education.

"No one is born to hate," said. "It has to be taught."

—*Mark Hansen*

Hansen 2 (Hansen)

ABA

The Washington Times

DATE: 9-8-95

PAGE: A-17

SAMUEL FRANCIS

Privilege loophole

Most people think of affirmative action as a set of legally established privileges for racial minorities and women, and in fact the original purpose of the affirmative action system was supposedly to redress past wrongs endured by those groups. But there's more to the saga of the policy, and now it develops that even those indigenous Americans who are supposed to benefit from affirmative action aren't getting what they're supposed to get.

That's because, as a new study shows, non-white immigrants are increasingly eligible for the privileges in hiring that affirmative action institutionalizes. Sponsored by The Social Contract, a journal that keeps track of immigration and population issues, the study was conducted by the journal's senior analyst, James Robb, who finds the results distinctly distasteful. "Since affirmative action is a fixed pie," he says, "the slices that go to newcomers are slices taken away from Americans."

How has this happened? For one thing, it happened because lawmakers didn't pay attention to the very laws they passed. Not only has Congress ignored or tried to whitewash the breakdown of immigration control in the last 20 years, but it's even enacted laws that let immigrants claim the same benefits that affirmative action was supposed to grant native-born groups.

In the Immigration Reform and Control Act of 1986, Congress adopted a provision that barred discrimination in hiring on the basis of "citizenship" status. As a result, immigrants of the qualified racial-ethnic groups can now expect to be hired by firms seeking to satisfy their affirmative action quotas. To meet those goals, firms need only hire employees of a particular racial-ethnic background, regardless of what country they come from.

As Mr. Robb writes, "If most firms give no preference to Americans over non-citizens [due to barring discrimination because of citizenship], and an immigrant's racial/ethnic background places him in a hiring pool highly sought after to meet affirmative action hiring goals, the immigrant may suddenly find himself at the front of the line for job placement. An advantage meant for American minorities goes instead to a non-citizen."

How much this loophole forks over to non-Americans is suggested by the racial composition of recent immigration into this country. In 1993, for example, nearly 75 percent of legal immigrants came from countries whose citizens are generally considered members of the non-white racial-ethnic groups eligible for affirmative action privileges. Every job these non-Americans fill is a job denied to native Americans, white or black.

In D.C., for example, Mr. Robb reports that 60 percent of the minority set-aside contracts awarded by the city in the late 1980s went, not to the black American firms that were supposed to get them, but to firms owned by a family of Portuguese immigrants. The Small Business Administration awards about half its set-aside contracts to firms owned by immigrants or the children of immigrants.

It's not just American businessmen who get the short end of the affirmative action stick, but academics as well. Universities are not too particular about asking where their professors come from, but when Stanford University inquired about its own faculty, it found that more than half its ethnic faculty were foreign-born. In the hard sciences, foreign-born Asians now receive 10 doctorates for every one earned by a native-born Asian, and 46 percent of all science doctorates go to non-citizens, who are mostly ethnic minorities.

As a result, since universities have affirmative action quotas imposed on them too, they tend to satisfy those quotas simply by hiring foreign-born scientists. Again, neither white nor black nor yellow benefits if they were born in the United States.

The long march of immigrants through an affirmative action system that was never intended to benefit them ought to be one more reason to abolish affirmative action entirely, but the Republican majority in Congress seems to be getting some frosty footsies on that matter. OK, if they don't want to touch affirmative action, they could at least start controlling immigration, so Americans could get what the system promised them.

Yes, but the Republicans seem to be stalling on that too. After a while, if Republicans won't touch affirmative action and won't control immigration, you have to ask, what are Republicans good for at all?

Samuel Francis is a nationally syndicated columnist.

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The Washington Times
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CORD MEYER

Immigration, security . . .and affirmative impact

Reform moves overdue

In a recent speech to the National War College, Dan Stein, the executive director of the Federation for American Immigration Reform (FAIR), made some essential points in the growing debate over immigration policy. While President Clinton reminded us this week that we are a "nation of immigrants," Mr. Stein, in a sober recital of the facts, informed his audience that nearly one-fifth of our foreign-born residents came here since 1990, while the Immigration and Naturalization Service has just launched a new program to try to reduce the huge backlog of immigrant applications for citizenship.

The vast majority of these new entrants have settled in six states: California, Florida, New York, Texas, Illinois, and New Jersey. A quarter of the 4.5 million most recent immgrants came from Mexico and are twice as likely as native-born citizens not to have graduated from high school. Behind this mounting population pressure is the fact of explosive worldwide population growth. The United Nations estimates that 90 million people are added each year to the human population of the planet, which now totals an estimated 5.6 billion — and is expected to reach 10 billion before leveling off.

One of the predictable consequences of this surging population growth in the undeveloped world is spreading environmental degradation and ethnic conflict, exacerbated by a desperate flight from rural to urban areas in search of jobs. Mexico City, for example, has grown from a town of 3.5 million in 1950 to 18 million today. The United Nations estimates that between 1987 and 2025, the urban population of the Third World will have grown by 2.75 billion.

A Gallup International Poll found this year that, among the many millions wanting to leave the overcrowded Third World, the United States is the first or second choice as a destination. As Mr. Stein warns, "Any loophole in our immigration process will produce uncontrolled waves of immigrants." Already, the U.N. High Commissioner for Refugees estimates at 16 million the number of refugees residing outside their home countries, while another 26 million are displaced within their own borders.

With its structure of entitlements, free education and comparatively low population density, the United States is still an attractive magnet for Third World refugees — although high tax rates and declining quality of life make it less attractive to the most successful and talented. Mr. Stein warns that unless we develop more effective border controls and reduce immigration, we will simply be overwhelmed, as parts of California appear to have been already. Schools, hospitals and housing will continue to deteriorate under the rising tide of uncontrolled immigration.

It is not enough for Mr. Clinton to remind us that we are a "nation of immgrants." It is time for him to demand of Congress the changes in immigration law that are required — and to push for the reforms that the U.S. Commission on Immigration Reform under Barbara Jordan has proposed.

At a time when our economy needs a highly skilled and educated workforce, Mr. Stein points out that we are admitting "an ever-growing number of unskilled, partly educated people." Of the more than 1 million permanent immigrants who come to the United States each year, only 40,000 — or 3 percent — are selected on the basis of some unique skill or qualification the United States needs. Mr. Stein is stating the obvious when he comments that "an immigration policy that admits around a million people a year without regard to skills is a luxury we can no longer afford."

A demographer from the University of Michigan, Dr. William Frey, has detected another unfortunate result of our current policy. As poor immigrants move into an area, whites and blacks move out — and low-skilled immigrant workers have fewer chances to work their way up to middle-class jobs. Balkanization and alienation are the result. In Southern California, for instance, there exists a radical wing of young Mexican-Americans who claim that the United States has "stolen Mexico" and that is has to be returned.

Since 1970, an estimated 10 million illegal immigrants have come to the United States, and the decisive passage of Proposition 187 in 1994 in California is evidence of the depths of the public reaction. In Mr. Stein's view, "Eliminating the expectation that those who make the attempt to come will be permitted to stay is the single most important component of effective immigration control." Obviously, this requires the prompt closing of existing loopholes and procedural reforms ensuring the quick removal of any person not entitled to be here.

Mr. Stein makes a strong case for the development in the United States of a system that will enable officials and employers to ascertain a person's U.S. citizenship or immigration status with a machine-readable device. Most industrialized countries have such identification systems, and our technology is certainly capable of developing a quick, reliable method of checking a person's status. The first step will have to be a national birth-death registry as a data base to verify citizenship. It is late — but not too late — to regain control of our borders.

Cord Meyer, a specialist in foreign affairs, is a columnist for The Washington Times.

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The Issue Is Classified

EEOC Sees Age Discrimination In Those Lawyer Help-Wanted Ads

BY CARRIE JOHNSON

Law firms, beware: Those help-wanted ads may land you in hot water with the Equal Employment Opportunity Commission.

Firms routinely take out classified advertisements seeking to hire associates who are a set number of years out of school. The problem, according to the Washington field office director of the EEOC, is that such language may constitute unlawful discrimination against older job applicants.

The EEOC is currently pondering whether to file suit against the D.C. office of New York's Epstein Becker & Green over a charge filed by a disgruntled 52-year-old antitrust and labor litigator. The lawyer, Stephen Koslow of Rockville, Md., claims that the firm discriminated against him by not granting him an interview for jobs advertised for associates "between two and six years out of school for its antitrust/litigation practice," and "between four and seven years out of school" for its Medicare/Medicaid practice. (The ads were placed in the July 25, 1994, issue of *Legal Times*).

The commission is also suing a New York recruiting business for accepting job postings from law firms and companies that allegedly discriminated on the basis of age and national origin.

EEOC officials decline comment on these cases, but say such complaints should teach law firms and recruiters that they need to watch carefully the way they seek attorneys.

"Our view is that the ads give out a signal," says Susan Reilly, director of the EEOC's Washington field office. "I've got a problem with the ads, and I've also got a problem with the practices that underlie them."

The EEOC's scrutiny comes at a time when firms are stepping up their recruitment of attorneys via classified ads, capitalizing on the trend toward more lateral movement of associates among firms.

The number of age-discrimination complaints in the legal profession has actually declined over the last five years, according to Michael Widomski, spokesman for the EEOC. Last year, 45 people employed nationally in "legal services" filed age-discrimination complaints with the agency. That figure was higher in each of the preceding four years.

It's also true that many of the complaints in this sector of the economy come not from lawyers but from support staff—paralegals, secretaries, and the like. Still, Reilly suggests that other professions have been actively grappling with age-discrimination problems—and warns that it's time law firms caught up.

"My point is that everybody is changing in terms of the way they do business, so why don't law firms?" she asks.

FORBIDDEN WORDS

The basis for complaints about such ads is sections of the Age Discrimination in Employment Act that prohibit the use of phrases like "recent graduate" in help-wanted ads.

Such descriptions as "two to four years' experience," while not facial violations of the age act, can shut the door on older applicants who want to shift careers or practice areas, according to Reilly.

"That's a common form of advertising . . . that would have a disparate impact on people who are older," says Sally Dunaway, an attorney in the litigation unit of the American Association of Retired Persons. "We consider it age discriminatory."

Joseph Cleary, assistant legal counsel at the EEOC national headquarters in the District, says that the commission is aware of the issue and "would certainly encourage firms to move away from ads that place maximum limits on years of experience."

Despite conflicts in rulings among federal courts around the country, Cleary says the commission believes that the Age Discrimination in Employment Act bars not only intentional discrimination against people 40 years of age and over but also neutral words or phrases that tend to have a disparate impact on the protected group. (The U.S. Court of Appeals for the D.C. Circuit has assumed that the theory applies under the ADEA without actually holding that it does.)

Some employment law specialists note, however, that ads alone are not sufficient to bring a claim. People who allege age discrimination also need to provide comparative hiring data, or show that companies exclude older candidates on the basis of age.

"[Those ads] are age-neutral," says Deborah Kelly, a principal who represents defendants to employment actions at D.C.'s Dickstein, Shapiro, Morin & Oshinsky. "The net they take in is anyone who graduates from law school from those years. If a law firm looked into that net and said, 'I don't want any of those 45- or 50-year-olds,' that's discrimination."

Not everyone in the legal community is bothered by classified ads that request specific amounts of experience from lawyers.

Both managing partners and local recruiters say that law firms often have good business reasons for targeting attorneys with certain experience levels.

"When an employer needs a lawyer with one to three years' experience, they're not saying they need someone who is 21 to 24 years old," says a D.C.-based headhunter, who himself went to law school later in life. "The reality of it is, there are some duties that junior lawyers, regardless of their age, need to do in order to get trained. It's function control."

The headhunter says that he has never been instructed by firms or companies to seek out candidates of a certain age, but rather to find people with appropriate experience for a job so that lawyers are challenged by their work, can put their skills to use, and can develop new expertise.

Paul Mickey Jr., managing partner at D.C.'s Shaw, Pittman, Potts & Trowbridge and himself a labor and employment specialist, points to economic reasons for advertising for a range of experience.

"I know we don't—and most firms would not—interpret a zone [a set range of years] as embracing a cap on experience," Mickey says. "Attorneys with different levels of experience are billed at different levels, and it can become a question of economics."

But Mickey says he would not count out more experienced lawyers who apply for lower-level attorney posts.

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EEOC News Clips

for

March 11, 1997

Compiled by

The Office of Communications and Legislative Affairs

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EEOC Official Warns of Age Bias in Ads

"The additional years of experience are never going to be a problem," he says.

At Dickstein, Shapiro, deputy managing partner Michael Nannes says that law firms can comply with age-discrimination law and meet the needs of older or more experienced lawyers by allowing attorneys to "negotiate down" in terms of their experience.

"If you've got an attorney who's coming from another city or from government where they were being paid a lesser salary, he or she might be willing to come in at a less-senior class," he says. "Lateral attorneys often don't want to have to come in as partners or very senior associates and feel they have to prove themselves instantly."

Still, hiring partners know that one factor in picking the right person is how well the new hire will fit in; older attorneys working alongside junior associates can sometimes make both groups uncomfortable.

'REASONABLE CAUSE'

The case of Koslow, a former lawyer at the National Labor Relations Board and the Justice Department, now sits with the Baltimore field office of the EEOC, which is deciding whether to bring the matter to federal court.

Koslow, who filed his charge in October of 1994, has already cleared one key hurdle: The commission has determined there is "reasonable cause" to believe his allegations. While formal attempts at conciliation between Koslow and Epstein, Becker have failed, the parties still could settle the matter before the EEOC decides to sue.

Possible penalities for a violation of the age-discrimination act include compensatory and punitive damages (capped at $300,000 for companies with more than 500 employees), back pay (including interest) for the aggrieved party, and an injunction to stop the discriminatory behavior.

Neither George Sape, the firmwide managing partner of Epstein Becker, nor Alan Banov, the solo practitioner who represents Koslow, would comment on the matter. Koslow referred calls to Banov.

The New York case, *EEOC* v. *Barrister Referrals Ltd.*, is in the discovery stage in the U.S. District Court for the Southern District of New York. Barrister is a New York recruiting company charged by the commission with accepting "discriminatory job orders from employers which specified age less than forty, placed a limit on years of experience, or specified a low number such as 5 years of experience."

The complaint also cites Barrister's alleged "referral of candidates based on age . . . and the failure to retain required employment records, including résumés."

The Barrister case is the result of a sweep of recruiting companies carried out by the New York office of the EEOC in the early 1990s.

Some who work with older law students worry that such cases are just the tip of the iceberg. Many more lawyers are affected by age discrimination in the workplace than actually file complaints with the EEOC, according to these observers, who have seen older members of their school's graduating class struggle to find work.

"I had a student who was well-qualified, a man with a gray beard, and there was no doubt it affected his job opportunities," says Charles Craver, a professor and employment law specialist at D.C.'s George Washington University Law School. "Some people get nervous having to supervise someone who's 10 years older than they are."

Craver says there is "no question law firms are hesitant to hire entry-level people over 30—and certainly over 40. And if you're in your thirties, you don't have the protection of federal age-discrimination law. They just have to grin and bear it and look for another job."

Anna Davis, director of career services at George Mason University School of Law, says that law school advisers are sensitive to age discrimination, but that most law firms deny the problem exists.

"I do think among firms that some consideration is given to how old [candidates] would be when they are going to be considered for partner," Davis says. "Given the equity that would be put into that person, in all honesty I can't say that's irrelevant."

The real tragedy with age-discriminatory ads is that they are easily avoidable, some recruiters say. By merely inserting an "at least" in front of the "two to six years' experience required," firms can immunize themselves against ad-based age-bias complaints.

For example, Flo Frye, an attorney search consultant at Arlington, Va.'s Frye & Sher Associates, Inc., says she places ads seeking a level of experience, such as junior-, mid-, or senior-levels, rather than using a range of years.

And the federal government often gets around this problem by merely indicating a minimum range of experience. The government also frequently lists a job title and salary range in its help-wanted notices—something private firms rarely do.

Age is not always a liability in the job marketplace, of course.

"When you're put in the door at a law firm, age can be a huge advantage," says Kelly, the Dickstein, Shapiro principal. "Sitting at a conference table, a client wouldn't say, 'What is this, my kid?' when you're running a meeting," she says.

Still, in a highly competitive legal market, candidates need all the help they can get.

"Some of these folks are in a tough enough spot to begin with," says Raymond Fay, a partner in the D.C. office of Chicago's Bell, Boyd & Lloyd. "A grandmother who's gone back to law school will typically get a government job, and even then she may be considered weird."

George Mason's Davis says that older women may even have an advantage over older men in looking for their first job as a lawyer.

"It's one of those areas where women may get the benefit of the doubt," she says. "Some interviewers have praised women on raising families or changing careers, whereas with a male counterpart the assumption is they had a midlife crisis. There may be more sinister assumptions made concerning their decision to pursue a second career." ■

USA TODAY • TUESDAY, MARCH 11, 1997 •

Army wants more than a few good women

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Women are 13.7% of the Army, a service that is battling sexual harassment vigorously, hoping to attract enough new recruits to make that percentage even higher.

By Steven Komarow
USA TODAY

The Army is struggling to end sexual harassment not just on grounds of equality, but because the service needs all the women it can get.

"If a secret blast went off right now, killing all the women, the Army would cease to function," says Lt. Col. James Sullivan, spokesman for the Army's personnel branch.

Sullivan's words are an overstatement, but only slightly so.

Women make up 13.7% of the 495,000-soldier Army, and the percentage is rising. In the year ending last Sept. 30, 20% of recruits were women. Despite a sexual-harassment scandal, the figure rose to 22% from October through January.

The Army says there are just not enough smart men enlisting. Last week, it lowered recruiting standards below that of the other services. The Army now allows 10% high school dropouts, up from 5%. Women, who score higher on Department of Defense intelligence tests, keep the standard from slipping further.

Women also are less likely to get in trouble with police. In the Navy, they are less likely to miss a ship's departure. They enlist for a longer period, saving training time and money.

But critics have seized on the sex harassment scandal at the Aberdeen, Md., training camp to launch a broad review of the wisdom of so thoroughly mixing the sexes in uniform.

The House National Security Committee plans hearings later this month. Conservatives on the panel suggest that the Army has been naive in training women and men in the same boot camps, and in widening the jobs open to women to include flying combat jets and serving on warships.

Defense Secretary William Cohen, a former Republican senator, says he won't order the Army, Navy and Air Force to return to single-sex training without compelling evidence it would solve problems.

"It seems to be working quite well," Cohen said during a visit to the Army's Fort Jackson, S.C., boot camp last month.

After 20 years of liberalization, only the Marines have separate training, and that is only at entry level. The Marines, who have by far the fewest women and smallest percentage, say separate boot camps with female drill instructors give women a better chance to get used to Marine culture.

Women in the service say the cure for harassment of women is to have more women, so they are not seen as tokens and inferior. Women who fought their way up the command ladder chafe at any hint that the integration of the past two decades will be reversed.

Air Force Lt. Col. Denise Travers, commander of a Los Angeles-based recruiting squadron, says the Air Force has few men-only jobs. If you don't pull in women, "you're basically separating out 50% of the population. Then you have to dig deeper into the rest of the population and pull out some not as well-qualified."

"We really want to recruit smart people, motivated people, and we really don't want to look at gender, color ... things that just don't make a difference," says Navy Lt. Cmdr. Michelle Howard, executive officer of the USS Tortuga. Howard is a 1982 graduate of the Naval Academy. When she was a freshman, the senior class was still all-male. Until 1994, she was banned from combat ships like the one she now helps command.

Now, women serve across the fleet except on submarines. When President Clinton ordered a missile strike on Iraq last fall after President Saddam Hussein attacked separatist Kurds, on one ship it was a woman who ordered "fire."

The Navy approached sexual integration aggressively. Instead of gradually adding women, it assigned large numbers. When the USS Eisenhower became the first aircraft carrier with women, the Navy assigned 500 in a crew of 6,000.

But critics say the services have given women extra breaks in examinations for coveted jobs, such as pilots.

And sometimes, those women turn out to be bad investments. The Army is fighting a lawsuit filed last week by a female helicopter pilot, a West Point graduate. Lt. Emma Cuevas wants to quit the Army so she can breast feed her 9-month-old daughter. For her $500,000 in education and training at taxpayers' expense, she made a commitment to serve until May 2000.

Lt. Col. Denise Vowell, chief Army lawyer in Bosnia, says sexual harassment there has been under control.

"I can't say that it doesn't go on in any particular unit, but the indicators I would see of it in my job show that it's fairly low," she says in an interview at the U.S. base in Tuzla.

Staff Sgt. Sharon Simmons, who manages a dining hall at Patch Barracks in Stuttgart, Germany, says she's endured unwelcomed sexual remarks in her five years there. Now, she says, she can see in the men's behavior that the Army has made the no-harassment policy clear.

"A lot of guys, they're afraid to say things to females, correct them in any way," Simmons says. "They say, 'I don't want to get brought up on charges.'"

To keep women from turning away, Army commanders say they must reassure recruits of their seriousness.

Maj. Gen. Al Lenhardt, chief of Army recruiting, says the scandal caused 25 female recruits to back out before their reporting date. That's out of 6,000 in a delayed-entry program. To keep that number down, he says the Army "is getting the word out to everyone else that the Army is sincere" about ending harassment.

Young women are "leery in many cases to look at Army service," he says.

The scandal has stunned an Army that prided itself for successful racial integration, and it assumed sexual integration was going equally well. Maybe it shouldn't have been so surprised. A Pentagon survey released last May said that 55% of women reported harassment during their careers, ranging from lewd comments to sexual assaults. In the Army, 45% of the women felt confident they'd get an "honest and reasonable" response if they reported harassment.

Now, Army leaders have launched prosecutions and new procedures. Young female recruits follow a "buddy rule." They stay in pairs so they're never alone with drill instructors or other superiors who could coerce them into sex.

Army leaders say they'll make it work — because they have little choice.

USA TODAY 3-11-97

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Army hot line gets 7,500 calls in four months

In the four months since drill instructors were accused of raping recruits at its Aberdeen, Md., training school, the Army has had a flood of sexual harassment complaints.

A hot line has logged 7,500 calls, of which 1,183 were deemed serious enough for follow-up.

At Aberdeen, 13 men were charged, seven with criminal offenses that could result in prison terms. Six cases involve lesser charges that could mean discharge or a fine.

Four of the criminal defendants await courts-martial. Two have been discharged under circumstances the Army won't discuss, citing privacy rules. The seventh is on trial.

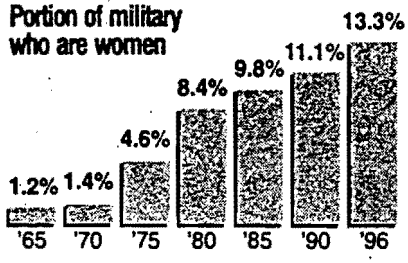
Of the six other cases, three resulted in guilty findings, two not guilty, and one was dismissed because the complaint was about an offense for which the soldier already had been punished.

The highest-profile case is that of Sergeant Major of the Army Gene McKinney, the Army's top noncommissioned officer. He's being investigated; no formal charges have been made.

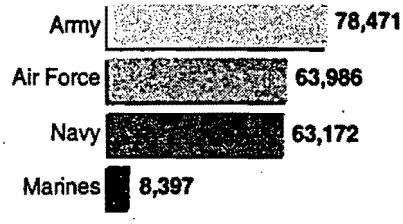
More fighters in the force are women

More than 13% of active-duty U.S. military personnel are women, the Pentagon says. The Army, rocked by allegations of sexual harassment and rape of female soldiers by superiors, has the largest number of women. Women in the military:

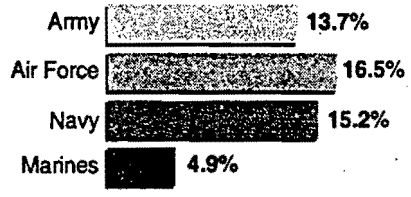
Portion of military who are women



Number of women, by branch



Portion of each branch who are women

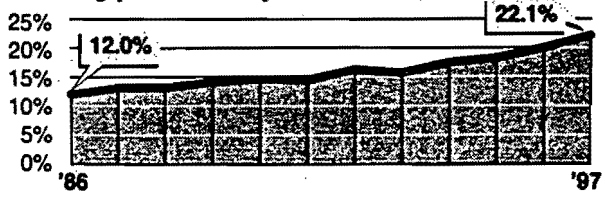


Female officers, enlisted personnel

Overall, 13.3% of the officers and 13.3% of the enlisted personnel in the military are women. Percentage of officers and enlisted personnel, by service branch:

	Female officers	Female enlisted personnel
Air Force	15.6%	16.7%
Navy	13.5%	13.0%
Army	13.2%	14.1%
Marines	4.0%	5.0%

Increasing portion of Army enlistees are women



Rank of women in the Army

Percentage of various Army ranks that are women, as of June 30, 1996, the most recent figures available:

Officers	
General	0.0%
Lieutenant general	0.0%
Major general	0.0%
Brigadier general	3.3%
Colonel	6.0%
Lieutenant colonel	10.4%
Major	14.2%
Captain	15.0%
1st lieutenant	19.0%
2nd lieutenant	17.3%
Chief warrant officer	4.4%
Warrant officer	11.1%

Enlisted personnel	
Sergeant major	3.9%
First/master sergeant	7.9%
Platoon sergeant/ sergeant first class	11.0%
Staff sergeant	11.4%
Sergeant	13.2%
Corporal/specialist	15.8%
Private first class	16.2%
Private	17.0%

'Together' only way to win, commander tells her men

By Andrea Stone
USA TODAY

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COVER STORY

FORT STEWART, Ga. — As first days go, it was a good one. Lt. Col. Susan Lawrence's 123rd Signal Battalion took just 4½ hours to put up radio and phone lines for a 10-day infantry field exercise last month. At a late-night briefing, she led 30 officers and noncommissioned officers in a rousing rendition of the 3rd Infantry Division's *Dogface Soldier*: "I eat raw meat for breakfast . . . "

As midnight approached, the Army commander retired to her camouflage-covered tent. Climbing inside her sleeping bag, Lawrence tucked her unloaded 9mm pistol beneath the pink flowered pillowcase.

Lawrence has come a long way since she left Ida Grove, Iowa, in 1972 to enlist as a private in what was then the Women's Army Corps. Back then, she had to wear skirts, no slacks, and wasn't allowed to fire weapons. Today, Lawrence commands 630 soldiers, one in five of them women. The signal battalion's mission seems to contradict guidelines devised to keep women out of combat: reach the battlefield first, ahead of the infantry and armor, which ban women.

For two decades, the U.S. military has been integrating women into the services. There has been friction along the way, but for the most part the Pentagon says having women serve alongside men in all but combat arms has improved the caliber of a force that now depends as much on brains as brawn.

But now Congress is rethinking gender integration. A sexual harassment scandal has brought a torrent of complaints, most from young female recruits who say their instructors treated them worse than the men, subjected them to coarse language or, in some cases, forced them to have sex.

The questions before a congressional committee later this month: Has the grand plan to make women in the service equal to men failed? Does training men and women together create a combustible situation that guarantees trouble? Should all service branches train men and women separately, as only the Marines do now?

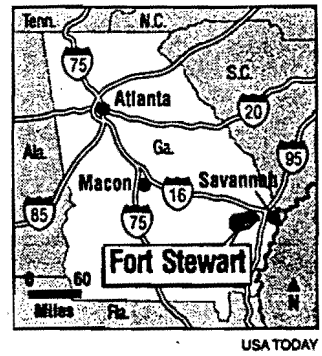
And then there is the ban on women in combat jobs, a situation that some say breeds contempt for female soldiers and feeds into the problem of sexual harassment.

While policymakers wrestle with those issues at the Pentagon and on Capitol Hill, soldiers in the field offer their answers. Many want to train as they will fight: together.

"Women aren't going to go away from the armed forces," Lawrence tells men. "We're going to go to war with you."

But female soldiers still battle sexual harassment — unwanted sexual attention or worse — as well as sex discrimination. Months before the sexual misconduct scandals at Maryland's Aberdeen Proving Ground, this base was rocked by charges of sexual harassment against the officer Lawrence replaced. The incident prompted an investigation that uncovered widespread misconduct, mostly of the "Hey, baby" verbal variety, at Stewart and nearby Hunter Army Airfield in Savannah.

Everyone is on guard, especially men. "You've got to watch what you say, watch what you do," says Sgt. Melvin Tripp, 31, in an all-male field artillery unit.



USA TODAY

Some women complain that exclusion from combat presents a "brass ceiling" to advancement, but most interviewed here recently are happy with the range of opportunities open to them. They are, as they say in the Army, *hoo-ah* — an all-purpose cry combining gung-ho, can-do and right-on.

"We can do anything a man could do," says Sgt. Marie Bridgers, 42, hammering a stake holding camouflage netting over a radio truck. "We can't all be secretaries."

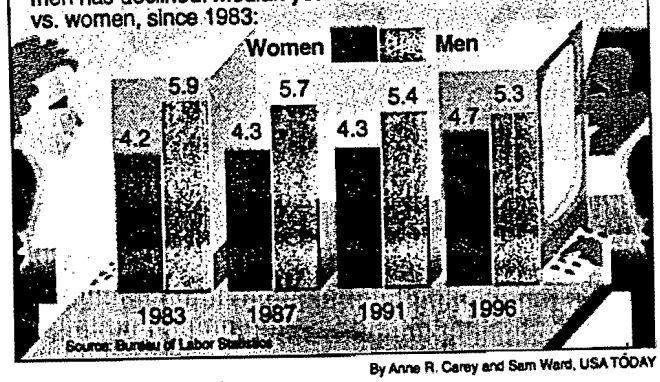
FRONT PAGE 1/2

USA SNAPSHOTS®

A look at statistics that shape your finances

Job tenure for men vs. women

The median time female workers over age 25 have been with their current employer has risen since 1983, while tenure for men has declined. Median years with current employer, men vs. women, since 1983:



By Anne R. Carey and Sam Ward, USA TODAY

COVER STORY

Female soldiers have few mentors

Spec. Julie Carrigan, 20, of Palm Bay, Fla., a Black Hawk helicopter crew chief who teaches preschool in her off-hours, loves soldiering. "There's nothing like shooting live ammunition out of a moving helicopter ... flipping and curving and you're hanging out the window with the wind whipping through your hair — that's amazing," she says. "So is picking up a crying baby and making her stop."

Women here are helicopter pilots, military police, tank mechanics, intelligence officers, chaplains, ammunition handlers, parachute riggers and radio operators. And while the Pentagon doesn't like to publicize it, men and women routinely share tents. "There is an art to getting dressed and undressed in your sleeping bag," says Maj. Susan Oliver, a public affairs officer.

That's not necessarily the view from all-male units. Six Bradley Fighting Vehicle crew members took time out from morning exercise to list reasons women shouldn't fight in combat. Lack of physical strength and endurance. Concerns about hygiene. Salty infantry language.

But after they jogged off, their platoon leader, 1st Lt. Stephen Grenier, predicted women would fill combat jobs within a decade. "It's fear," he said of his men. "If it doesn't work out, they fear they may pay dearly" with their lives.

"A lot of guys think we're second-class citizens," says Command Sgt. Maj. Becky Bruce, 44, the top NCO in a 568-member quartermaster battalion at Hunter. That view is common in integrated units where women hold traditionally male jobs.

After seven years in the Army, Sgt. Lula Grundy, 29, commands a motor pool with 10 male mechanics. She says that as a young recruit she worked for a tough sergeant who loaded her and another female mechanic with more work than their male counterparts. The treatment contributed to the other woman's decision to leave the Army. But Grundy stayed.

"You just have to be strong," she says.

And good. Female soldiers say they must be better than men to advance as far.

Going in for a job interview, "I'd be in a hole 10 feet deep while a man would be on the floor," says Maj. Peggy Combs, 33. "You've got to be willing to work twice as hard. But when you get that respect, it's a real accomplishment."

Female soldiers here talk a lot about respect: how proud they are to earn it and how sometimes they are denied it.

Lawrence commands it from her company leaders, most of them male. At the evening briefing, each stands to report his unit's progress. Lawrence nods her head when she's pleased. She asks tough questions when she's not. When it becomes clear that Capt. Norm Weeks' Alpha Company is the only unit that still hasn't installed one of 50 electronic connections in the battalion network, Lawrence turns to give him a hard time.

"What's the bet here, Norm?" she asks.

"I'll be there tonight, ma'am," barks Weeks, squirming visibly. Within hours, he reports the line up.

Lawrence is seen as tough but fair, a fairness that has earned her a level of respect that was lacking before she arrived last June. Then, performance marks lagged and morale matched this region's nickname: Low Country.

Five women went to Lawrence to file sexual harassment charges against her predecessor, Lt. Col. Robert Sinclair. They told of unwelcome embraces, touches and kisses. Sinclair, six months shy of 20 years of service, resigned rather than face a court-martial. He received an other-than-honorable discharge and lost his pension. He couldn't be reached for comment.

The new 3rd Division commander, Maj. Gen. John Hendrix, warned in his first address to his soldiers, "If you can't walk the talk, you're going to be gone."

Sexual harassment doesn't appear epidemic in the 20,000-member division. Since October 1995, there have been 28 reported complaints, 19 of them substantiated and one still under investigation.

But when Hendrix sent a team of female officers and NCOs to canvass 500 female soldiers, one of every two said she had received unwanted gestures or comments or knew a female soldier who had. Officers and senior NCOs who had problems were most likely to tell superiors or resolve them on their own. Younger soldiers rarely said anything, believing their complaints wouldn't be taken seriously or would lead to reprisals.

Lt. Col. Pat Mulcahy, a support battalion commander, understands. She will long remember 1985 as a "tough year" spent fending off constant verbal sexual harassment from a supervisor. "Not enough privates know that the system will work for them," says Mulcahy, 38, who joined her troops for a field ration lunch on the hood of a Humvee. "When I experienced it, I didn't think there was anyone who would do anything about it."

Women here say the Army has tried hard to end harassment. But although it's hard to distinguish a man from a woman in a Kevlar helmet and flak jacket, female soldiers stand apart in their feelings.

Women complain about having too few female mentors or peers. They say the wives of male comrades view them with jealousy and suspicion. Many female soldiers are lonely; individual women often are assigned to otherwise all-male units.

Away from base, female soldiers say they face the same family and career juggling act that civilians do, except that they can be deployed to the field for weeks or months at a time. During last month's exercise, many single parents paid round-the-clock sitters.

Pregnancy complicates commanders' planning. Lawrence says the same percentage of her men had medical or other reasons to stay back from last month's exercise as women excused for pregnancy or maternity leave.

But a report after the Persian Gulf war found women four times as likely as men to avoid service there — half of them by getting pregnant.

Some women, like Spec. Stephanie Bennett, 25, a Black Hawk helicopter mechanic at Hunter, think the Army coddles them too much. The mother of an 11-month-old, Bennett still is rankled by how the Army made her stop flying and lifting heavy objects while pregnant.

Like many women in camouflage and flight suits, she expects no favors. "Like they say in the Army, 'Suck it up and drive on.' "

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USA TODAY

Roger C. Poole, interim president of The Citadel, discloses the punishment of cadets involved in the hazing of two female classmates.

BY PAULA ILLINGWORTH—ASSOCIATED PRESS

1 Dismissed, 9 Others Punished In Hazing of 2 Women at Citadel

Associated Press

CHARLESTON, S.C., March 10—A male cadet at The Citadel was thrown out of school and nine others were given lesser punishments in the hazing and harassment of two female cadets, the military school said today.

One cadet was cleared, and the FBI and state investigators continue to look into the women's allegations for possible criminal charges.

"The college made mistakes, and individuals broke rules," interim President Roger C. Poole said. "We have gotten the facts. We have heard the evidence, and we have punished those cadets who have violated regulations."

Of 15 male cadets who faced discipline, one was dismissed and one was given the next-most severe punishment: He is restricted to campus for the rest of the semester and must do 120 hours of marching with an unloaded rifle in the barracks courtyard.

Eight of the cadets received lesser punishments, ranging from shorter marching tours and demerits to confinement to the barracks.

Three implicated cadets had already left the school and one had received marching and demerits.

Cadets Jeanie Mentavlos of Charlotte, N.C., and Kim Messer of Clover, S.C., said their clothes were set on fire and cleanser was put on their heads. They also said they were forced to drink tea until they became ill, made to drink alcohol and forced to stand in a closet while being shoved and kicked last semester.

They did not return to the state military school for the spring semester. Two other female cadets have remained at the school. It began accepting women last June after a court battle.

Poole said that the school has received applications from 42 women who want to enroll next fall and said he hoped that at least 25 women would be included in the freshman class each year.

"Hopefully this will bring to a conclusion a most painful chapter in our history," Poole said. "With these punishments, The Citadel has exhausted the remedies available to it under the college's published rules."

The school did not identify the punished cadets. The dismissed cadet can apply for readmission after a year.

The disciplining of the cadets came after private hearings held by school officials on March 1. The results were not released until today.

Neither Mentavlos nor Messer attended the hearings.

Tim Kulp, Mentavlos's lawyer, said he still wants to know who in the administration knew what about the behavior of its cadets, and when. "The administration was not trout fishing in Montana last semester," he said. "They were there, and there are those who say they let it happen."

Paul Gibson, Messer's attorney, said the fact that nearly all the cadets implicated were disciplined "substantiates the allegations that have been made by our clients and shows that they are true."

Three of the cadets could have been expelled, the most severe penalty possible, which would not have allowed them to reapply for admission. Those remaining in school must take sensitivity training.

"I hope what we teach them is what we failed to teach them last time," Poole said. The training was part of the college's plan for admitting female cadets.

Cadets facing the more serious charges appeared before commandant boards, made up of two retired military colonels and a cadet officer. Less serious charges were heard by a retired colonel.

Although The Citadel voluntarily admitted its first female cadets last fall, Shannon Faulkner was the first woman to join the corps of cadets in August 1995, after waging a legal battle for more than two years. She dropped out during her first week of school.

The New York Times

WEDNESDAY, MARCH 12, 1997

5 Women Say Sex Charges In Army Case Were Coerced

N.A.A.C.P. Suggests a Racial Motivation

By PETER T. KILBORN

WASHINGTON, March 11 — Five women who were Army recruits said today that investigators had coerced them into falsely accusing officers of sexual misconduct at the Aberdeen Proving Ground in Maryland.

So far at least 50 women have made official complaints of sexual abuse at Aberdeen, including 27 rape complaints. One officer and about 20 noncommissioned officers, mostly drill sergeants, have been implicated since the accusations first became known last November, and there have since been complaints of abuse at several other Army bases.

Five sergeants face courts-martial — one was charged today. Last month one of the women who spoke today, Pvt. Toni Moreland, was charged with disobeying a noncommissioned officer, being away without leave and making a false statement under oath.

The women, four privates and one who has been discharged, appeared at a news conference held near the post by officials of the National Association for the Advancement of Colored People. The women said they had been compelled to make statements after promises of immunity from prosecution and under threat of retaliation if they did not.

Which sergeants the women's charges involved and the exact nature of the charges were not clear. But a lawyer for the N.A.A.C.P., Stuart Jay Robinson, said that some of the women might have engaged in consensual sex and that the Army had goaded them into calling it rape.

One of the women, Pvt. Brandi Krewson, said, "I agreed to tell them what they wanted to hear in order for them to leave me alone." Another private, Darla Hornberger, said that in eliciting accusations of sexual abuse from her, "everything they said was a lie."

Kathryn Leming, who has left the Army, said, "I never admitted that I was raped." But she said she had been told that under military law consensual sex was considered rape.

"They pushed me and pushed me until basically they tried to make me say 'rape,'" she said. "But I would not do it. It was not the truth."

Pvt. Kelly Wagner said, "They are not allowing me to speak what I feel because they're afraid that it could maybe help the defense."

Paul Boyce, spokesman for the investigation command, said responding to the women's accusations would violate a "longstanding procedure" against discussing active cases.

In a statement, the command noted that investigators routinely obtained sworn statements from suspects, subjects, victims and witnesses in pretrial interviews. Those interviewed swear that "the statement is made freely without hope of benefit or reward, without threat of punishment and without coercion, unlawful influence or unlawful inducement," the command added.

The N.A.A.C.P. has become involved because of suspicions of discrimination against black sergeants. Most of the men implicated in the Army's sexual abuse cases are black, and most of the accusers are white. "There are possible civil rights violations on behalf of the accusers and the accused that ought to be looked at," Kweisi Mfume, the N.A.A.C.P. president, said at the news conference.

In an interview later, he added: "I think it may be more than just race. It may also be class and rank."

Mr. Mfume said that he was urging Army Secretary Togo D. West Jr. to permit an independent investigation of the misconduct charges and that he had spoken to him twice today and would meet with him on Wednesday.

"What we do see is a very inadequate investigation," Mr. Mfume said. The women were not allowed legal representation when they were questioned, he said, and they were threatened and intimidated into making false accusations. "They were basically put in a situation where they felt coerced."

At a brief news conference after the women's appearance, Lieut. Col. Gabriel Riesco, chief of staff to Maj. Gen. Robert D. Shadley, training ground commander, said he also could not comment on the cases. He said the post shared the N.A.A.C.P.'s concern that those involved be treated fairly and equally. "Race has never been an issue in this investigation at all," Colonel Riesco said. "It is an investigation of sin, not skin."

Army forced rape charges, women say

By Steven Komarow
USA TODAY

Five Army women, all white, charged Tuesday that overzealous investigators pressured them to file rape charges against black drill instructors.

The Army denied the charge.

The five, who all served at the Army's training base in Aberdeen, Md., appeared at a news conference sponsored by the Maryland NAACP.

The civil rights group says their stories add to its concern the Army is unfairly targeting black soldiers in its investigation of sexual harassment.

The NAACP called for outside supervision of the Army's investigation.

The first seven criminal cases from the investigation at Aberdeen, where the now Army-wide scandal emerged last November, have all been against black commanders or drill instructors. Their accusers have all been white.

"I could just keep my mouth shut and this would all go over, but something really wrong has happened," said Pvt. Darla Hornberger, 30.

Hornberger and the others said whatever relations they may have had with the drill instructors were consensual.

But sexual contact between drill instructors and their trainees is prohibited.

The Army "told me that under the Uniform Code of Military Justice, that was considered rape," Hornberger said.

The Army denies undue pressure. Lt. Col. Gabriel Riesco, chief of staff of the training center, pointed out that no rape charges resulted from interviews with the women who spoke Tuesday. He said there is no racial bias in its investigation.

"This is an issue about sin, not about skin," said Riesco.

Charges against white men have been brought at other bases.

Army Secretary Togo West rejected the NAACP call for an independent investigation.

Rep. Tillie Fowler, R-Fla., who is in a group watching the Army's investigation, said the Army's probe would be under closer scrutiny.

▶ The Army probe, 5A

Issue of race injected into Army sex probe

By Steven Komarow
USA TODAY

The Army's high-profile investigation of sexual harassment and other sexual misconduct has become entangled in charges of racism.

The issue could taint an inquiry that the Army has assured the public is being conducted vigorously and fairly.

With the use of a nationwide hot line and aggressive investigators, the Army is pursuing more than 1,000 leads into reports of sexual harassment in the ranks. Commanders have vowed a thorough job, to reassure women in the ranks that they are secure and the Army takes such offenses seriously.

But the NAACP is calling for an independent investigation of the procedures. It is asking whether the Army is singling out blacks. The NAACP held a news conference Tuesday at the Aberdeen training camp, north of Baltimore. Five female soldiers, all white, said investigators tried to coerce them into charging their drill instructors, all black, with rape.

NAACP President Kweisi Mfume said their statements call into question the entire Army investigation. "We also believe there are possible civil rights violations on behalf of the accusers and the accused."

At Aberdeen all seven of the men charged with crimes so far are black. An eighth man was being charged Tuesday, but details were not immediately available. At least a half-dozen more have been punished for breaking Army rules.

"There are going to be more people charged," said Barbara Filbert, a base spokeswoman. Investigators interviewed 700 women at Aberdeen.

Elsewhere, the Army has brought sexual misconduct charges against white men.

The most publicized sexual-harassment accusation, against Sergeant Major of the Army Gene McKinney, also is that of a black man accused by a white woman. McKinney, the Army's top non-commissioned officer, has not been charged.

Because of privacy rules, the Army and the women Tuesday would not say whether their statements were connected to the men charged at Aberdeen.

Secretary of the Army Togo West said the conduct of the investigation will be tested in courts-martial starting in April. West, who is black, rejected for now the NAACP request.

Some members of Congress already are monitoring the Army scandal, which spread from rape charges at Aberdeen last November to other Army bases in the United States and Europe.

"I'm very concerned with what came out today," said Rep. Tillie Fowler, R-Fla. "Were some of these people coerced or not?"

"Maybe we need somebody outside the Army" to look at the investigation, said Fowler, who served with Mfume in the House before he left to head the NAACP. She suggested, for example, the Pentagon's inspector general could do it.

Fowler said the Army is unlikely to pursue allegations that would not hold up, but the statements of the women portrayed what may be an overly aggressive investigation.

"They pushed me and pushed me and tried to make me say rape, and I wouldn't do it because it's not the truth," said Kathryn Leming, 22, of Harrisburg, Pa.

Last week, Pvt. Toni Moreland disavowed her statement to investigators. It did not represent her views, she said.

"They put it down on paper. All I did was sign it," said Moreland, 21, of St. Louis.

Lt. Col. Gabriel Riesco, spokesman for the Aberdeen school, said, "That is certainly not a technique that is used."

The Washington Times

DATE: 3-26-97

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Quotas after Hopwood

Apparently the Clinton administration just doesn't get it. The courts have taken an increasingly dim view of racial set-asides involving everything from government contracts to student admissions. The administration, however, insists on reading between the lines of court rulings that could hardly be more clear: No quotas allowed.

Consider the case of Cheryl Hopwood, a white woman denied admission to the University of Texas Law School notwithstanding the fact that her test scores were higher than those of minority candidates who were admitted. The school and the Clinton administration defended the minority preferences on grounds that they helped make for a more diverse student body. But the Fifth Circuit Court of Appeals said flatly that the school could not use skin color as a factor in school admissions.

Said the court: "[W]e see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional." Despite an appeal from the Justice Department, the Supreme Court didn't take the case, allowing the Fifth Circuit appeals court ruling to stand. An ever-so-reluctant Texas Attorney General Dan Morales issued an opinion advising state schools to drop racial preferences in admissions and financial-aid decisions.

But this month a top U.S. Department of Education official, Norma Cantu, wrote to Texas lawmakers to say the Fifth Circuit ruling did not really say what it said. Ms. Cantu, assistant secretary of the department's Office for Civil Rights, said the ruling was a narrow one affecting only the University of Texas' law school. She cited a Justice Department brief filed in another case "that the *Hopwood* decision by the Court of Appeals for the Fifth Circuit concerned the University of Texas Law School's affirmative action program, and should not be used to invalidate the affirmative action admission program used by the University of Texas' College of Education to assist in creating a diverse student enrollment for educational purposes."

What words in the Fifth Circuit's opinion do Ms. Cantu and the feds not understand? There was no confusion about its meaning, not even among lawyers who defended the law school set-asides. Samuel Issacharoff, a University of Texas law professor, told the Chronicle of Higher Education, "*Hopwood* is the positive law of the Fifth Circuit, and any institution that would disregard it does so at tremendous, tremendous peril."

In this case, the peril is partly financial. Mr. Issacharoff noted that the Fifth Circuit threatened to impose compensatory and punitive damages against college officials who defied the court and considered race. Money is no object for federal officials who can stick taxpayers with the tab; perhaps Ms. Cantu would like to wager her own money on the Fifth Circuit's ruling. If not, she might consider a sound investment in remedial reading.

The Philadelphia Inquirer
KNIGHT-RIDDER NEWSPAPERS

City gets pressure on police reform

Data on use of force hasn't been delivered, rights groups say. A meeting with a judge is set for tomorrow.

By Mark Fazlollah
INQUIRER STAFF WRITER

Three civil rights groups say the Rendell administration has failed to deliver on a heralded promise to provide detailed information about the use of force by Philadelphia police as a first step toward curbing misconduct.

Lawyers for the American Civil Liberties Union, the NAACP and the Police-Barrio Relations Project, a nonprofit group in Kensington, are scheduled to meet privately tomorrow with a federal judge and city attorneys to review the city's progress in making promised reforms.

Under a settlement in September that Mayor Rendell touted as a groundbreaking effort to fight police abuses, the city was required to give the organizations, by last Oct. 19, the first in a series of reports on the Police Department's monitoring of the use of firearms, nightsticks and other weapons by officers. A second report is due in the next few weeks.

The department has not supplied the information, according to the civil rights groups and administration officials.

Lawyers for the three organizations last week asked U.S. District Judge Stewart Dalzell for a conference. They said yesterday that they had tried for several months to persuade the city to comply with the agreement and had finally lost patience.

"More than a half-year after the signing, some of the monitoring and the reporting have clearly slipped," said Stefan Presser, legal director of the ACLU's local chapter. "We are one report and almost two reports late. That can't go on."

Presser said the groups had requested a meeting with Dalzell because "it's time to bring the court into a more active partnership."

Rendell's spokesman, Kevin Feeley, declined to comment on the groups' complaint. "What we have to address, we're going to address before the court," he said.

Feeley defended the administration's efforts to halt police misconduct, citing the creation of a blue-ribbon commission to study the problem and the appointment of an anti-corruption czar reporting directly to Police Commissioner Richard Neal.

"No one suggested that this would happen overnight. No one realistically believes that it can," Feeley said. "I thing we are moving very quickly."

The agreement with the groups was prompted by the city's two-year-old police scandal in which eight officers have pleaded guilty to corruption charges, including framing, robbing and beating drug suspects and perjuring themselves in court.

So far, 293 criminal cases have been thrown out by the courts because the suspects were arrested by officers known or believed to have been involved in misconduct. The city has paid $4 million to settle lawsuits by people claiming to have been framed.

The settlement averted a federal lawsuit in which the civil rights groups planned to seek court-ordered reforms. The administration pledged to appoint the blue-ribbon panel, name a police "integrity and accountability officer," develop programs to identify and counsel "at-risk" officers, and computerize its records of citizen complaints.

A key part of the settlement was Rendell's promise to grant the groups broad access to information, such as the use-of-force reports, so that lawyers could monitor reform efforts.

When the settlement was announced Sept. 4, Rendell called it "the most ambitious anti-corruption program undertaken by the Philadelphia Police Department in its history" and said "we hope it can break the cycle of corruption."

The agreement was filed with Dalzell, who retained control over the case.

Rendell said at the time that court monitoring would not be necessary. "I pledged that the city intends and the Police Department intends to carry out these goals in good faith and in the very, very best of our ability," he said.

Lawyers for the ACLU and the other groups said they were concerned not only because the city had missed the October deadline, but also because officials had given no indication when they would provide the information on the use of force.

Jerome Mondesire, who was elected head of the Philadelphia NAACP after the agreement was reached, said in an interview yesterday that he was considering withdrawing from the settlement and proceeding with the lawsuit.

"The NAACP is profoundly disappointed," Mondesire said. "If we have to go back to an antagonistic position, so be it.

"We have received nothing. We've been dissed."

Will Gonzalez of the Police-Barrio Relations Project said the city's failure to meet the reporting deadline was "a shame."

"We have to bring the court in to slap their hands for failing to comply," he said.

The New York Times

DATE: 3-26-97

PAGE: B1

In the Trenches: How Civil Rights Were Won

Terror in a Voice, Even 40 Years Later, Tells a New Generation What It Missed

By KEVIN SACK

"I tell my children today they don't know anything. You know, when I hear young folk talking about what they ain't gonna take, I like to sit down and tell 'em: 'You haven't seen anything. You just don't know what it's all about. I don't know what it is you can't take.' And when I go back to telling them some of my history, you know, they have to perk up their ears."

Mary Sanford, 74
Tenant rights organizer in Atlanta

ATLANTA, March 25 — So begins "Will the Circle Be Unbroken?," an extraordinary 26-part, 13-hour oral history of the civil rights movement that is about to have its premiere on public radio stations across the country. Seventeen years in the making, the documentary uses more than 180 new interviews and untold reels of archival tape to weave a tale of struggle and resistance in five Southern state capitals: Columbia, S.C.; Atlanta, Ga.; Jackson, Miss.; Little Rock, Ark., and Montgomery, Ala.

As Mrs. Sanford suggests, the story of the civil rights movement has lost much of its relevance for many of the nation's "young folk." But no matter how jaded listeners may be about the unfinished business of the movement or about today's racially charged debates on affirmative action and criminal justice, few are likely to be unmoved by these firsthand accounts.

"Eyes on the Prize," a documentary broadcast by PBS a decade ago, had the advantage of pictures. But in a region known for its storytellers, no method may be better suited for telling the story of the civil rights movement than oral history, and the images conveyed through deeply personal revelations about transformational moments are often chillingly vivid.

Listeners are transported to a time not so long ago when domestic workers like Dorothy Bolden in Atlanta would kiss the stubbed toes of white children, only to have the youngsters shower them with racial slurs once their parents returned home. They hear the childhood recollections of Henry Kirksey, a black Mississippian who recounts how his mother persuaded him to stop playing with a white girl by telling him that she had watched a black man being burned to death on the town square for consorting with a white woman.

The series lets listeners sense the tears in the Rev. Dr. Martin Luther King Jr.'s eyes when he entered Warren Methodist Church in Atlanta to find a crowd of black activists jeering his father for supporting a desegregation plan that many considered too gradual. It recreates the hush in the cafeteria at Central High School in Little Rock and the applause from black workers as Minnie Jean Brown, one of the school's first black students, dumped a bowl of chili on the head of a white student who was taunting her.

"You have these stories where the authenticity just breathes through them," said George King, who produced the series for the Southern Regional Council, an Atlanta-based civil rights organization. "As a documentarian, the reason I've always been fascinated with this medium is that when you get people in the moment, when their memories trip on that actual moment in time when they were walking down the street and suddenly something happens, their whole vocalization changes."

That can be heard in the terror, still raw after 40 years, in the voice of Elizabeth Eckford, who sobbingly describes the day in 1957 when she became separated from the eight other black students who were trying to integrate Central High in Little Rock. "The mob fell in behind me," she recalls. "I thought that they were there for my protection. I couldn't turn around because they were right on my heels."

The power of "Will the Circle Be Unbroken?" flows naturally from both the oral nature of its storytelling and the pure aural nature of its medium, radio.

"Here in the South, we are heirs to a legacy that is oral," said Worth Long, a folklorist and civil rights activist who conducted many of the interviews for the series. "Whether black or white, we are storytellers."

The rhythm of the voices makes for first-rate oral history, a relatively modern field that breathes life into the past through the recollections of often ordinary participants. Conceived in the 1930's, when scholars and writers began to interview former slaves, the field gained popularity in the 1970's with the advent of the cassette tape recorder.

The great contribution of oral history, say its practitioners, is the importance now placed on documenting the lives of foot soldiers, not just kings and queens. And as "Will the Circle Be Unbroken?" repeatedly demonstrates, the civil rights movement had thousands of unsung foot soldiers.

"In many ways," said Clifford M. Kuhn, a historian at Georgia State University who was a consultant on the project, "oral histories challenge what some people call the master narrative of the movement, a narrative which focuses on such things as obvious turning points, notable individuals, the role of the Federal Government, the overall liberalization of America after World War II, the central role of Martin Luther King Jr. They put a lot more players in the picture."

Some of the voices, like those of Dr. King, Julian Bond and Andrew Young, are refined and familiar. But the project relies most heavily on the singsong dialects of students, farmers and domestic workers who have largely been overlooked by traditional history and who now revel in the chance to establish their place.

The series is at its best when probing the inner workings of the movement. It tells us that organizers of the Montgomery bus boycott relied on black postal workers to map out the best routes for a makeshift fleet of black-owned cars to carry maids to their jobs. By juxtaposing quotations from separate interviews with

cont'd

Julian Bond and Lonnie King, it recreates the scene in an Atlanta drugstore when the two men decided to stage sit-ins at segregated lunch counters.

In producing the series, which consists of 30-minute episodes narrated by Vertamae Grosvenor of National Public Radio, George King said he strove to treat the movement without its traditional sanctity. He achieved that in part by offering warts-and-all portrayals of the movement's internal divisions, whether the rivalry in Montgomery between the Southern Christian Leadership Conference and the Student Nonviolent Coordinating Committee, or clashes in Atlanta between militant students and their more compromising elders.

Mr. King also lightens the tone and bolsters authenticity by using music of the period to break up thematic segments. But rather than solemnizing the mood with "We Shall Overcome" and other spirituals, he uses early rock-and-roll, often cleverly selected to make a point with the lyrics as well as with the rhythms.

After a segment about the boycott of Rich's department store in Atlanta, Mr. King interjects tape of the Miracles singing "You Better Shop Around." "It seemed rather vain to bestow on the movement yet again this sort of religiosity by just using traditional movement music," he said. "When they were 20 years old, these kids were listening to Marvin Gaye."

The project grew out of an idea conceived in 1980 by Randall and Hilda Williams, a Montgomery couple who wanted to create audiotaped guided tours of civil rights landmarks in Southern cities.

It soon won a home at the Southern Regional Council after being embraced by Steve T. Suitts, then the council's executive director, and quickly evolved into a radio series, first intended for limited regional distribution and later expanded into a national broadcast distributed by Public Radio International. As with many oral history projects, a founding impulse was the desire to preserve the memories of elderly participants before they died.

But the project proceeded in fits and starts based on the availability of money. Only in 1990 was Mr. King hired to write the scripts and produce the tapes.

Much of the research was painstaking detective work. While many of the most valuable tapes were in oral history archives, some were found in boxes in basements and under beds, often damaged by water or age. To repair tapes, Mr. King baked many of them in ovens.

"It's actually become quite a recognized technique," he said. "It's 170 degrees for three hours. It stabilizes the oxides."

Oral history has its dangers, of course. People tend to exaggerate their stories and inflate their own roles. The larger context can be lost in the focus on individual stories. One person's memory may contradict that of another.

To counteract those problems, Mr. King, a British-born resident of Atlanta who has produced documentaries for television and radio, made liberal use of academic consultants and focus groups of civil rights veterans in the five capital cities.

If there is a weakness in the work, he said, it is the paucity of voices of former segregationists, many of whom refused to talk to him. "People have recognized that it is no longer acceptable to speak publicly from a racist perspective," he said. "Several people told me they had been born again, to which I would respond, 'Well in that case you'll really be interested in talking to us.' But no, they were not *that* born again."

In the end, however, Mr. King says that failing may make the series more accessible and more instructive for white listeners who "don't feel backed up against the wall by this stuff."

"We are not trying to sanitize the past in any sense," he said. "But I think we would be doing a disservice if all we do is press people's buttons or create some hand-wringing sense of guilt out of all this. It's not a very practical emotion."

The New York Times

DATE: 3-26-97

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Texas Is Told to Keep Affirmative Action In Universities or Risk Losing Federal Aid

By PETER APPLEBOME

Compounding the uncertainties about the use of race in college admissions and scholarships, the United States Department of Education has warned Texas officials that the state could lose Federal higher education money unless it maintains affirmative-action programs in its university system — programs the Texas Attorney General says are illegal under a groundbreaking Federal court ruling.

In a letter on March 18, the Office of Civil Rights at the department told Texas officials that they must aggressively take steps like affirmative action to attract minorities or risk losing $500 million in student scholarships, work-study programs and research grants.

The Education Department's statement directly contradicts the Texas Attorney General's directive that the decision in the Hopwood reverse-discrimination case had the effect of barring any use of race in admissions and scholarships at state colleges and universities.

In the Hopwood case, a three-judge panel said that affirmative action as approved by the Supreme Court in the landmark 1978 Bakke decision was no longer permissible.

Experts say state officials are highly unlikely to risk legal sanctions from the Federal court by ignoring Attorney General Dan Morales's interpretation of the case.

Still, the conflicting directives are the clearest display of the nation's widespread uncertainty about what the law allows for affirmative action and what further guidance will be coming from the courts.

Lawsuits in Washington and Georgia have the potential to become the next major tests of affirmative action. Ballot initiatives banning affirmative action are being proposed in several states including Florida, Colorado, Ohio and Washington.

In the other direction, two civil rights groups have filed complaints challenging the decision of the California Board of Regents to bar affirmative action in hiring and admissions at public colleges and universities.

"What's needed is some authoritative statement by the Supreme Court of where Bakke stands," said Samuel Issacharoff, a University of Texas law professor and a lawyer for the university in the Hopwood case. "One of the ironies of the situation is that until Hopwood came along Bakke stood in a vacuum. Bakke came in 1978 and there's been no interpretive case law since then."

"I can't think of any other area of law," Mr. Issacharoff added, "where there's been one major Supreme Court decision that's stood by itself for 25 years and then a lower court comes along and says it's to be disregarded."

In fact, while officials for the Attorney General's office in Texas disagree with the Education Department's interpretation of Hopwood, Ron Dusek, a spokesman for Mr. Morales, said the conflicting directives could provide an avenue for further court review.

Contradictory statements over an issue that is already uncertain.

The Texas case stems from a lawsuit filed in 1992 by Cheryl Hopwood and three other white law-school applicants at the University of Texas. They asserted that they were denied admission because affirmative action policies gave unfair preferences to less-qualified minority applicants.

The three-judge panel, by the United States Court of Appeals for the Fifth Circuit, in New Orleans, shook the academic world last March by ruling not only that the law school's admissions policies were illegal but also that the Supreme Court's ruling in the Bakke reverse discrimination case was no longer valid.

The Bakke decision said schools could not adopt racial quotas but race could be used as one of several factors in admissions. The Fifth Circuit ruling said the law school "may not use race as a factor" in admissions, "even for the wholesome purpose of correcting perceived racial imbalance in the student body."

But the decisive language of the ruling has not been affirmed elsewhere. Instead, the Supreme Court let the ruling stand, leaving it in effect only in the Fifth Circuit. But even the two other states covered by the Fifth Circuit, Louisiana and Mississippi, are under court orders to further desegregate their colleges and universities and have not adopted the strict interpretation of Hopwood being used in Texas.

And even in Texas, despite Mr. Morales's directive, there is still disagreement over how far the Hopwood ruling extends. Lawmakers have vowed to amend Hopwood though legislative action and until Mr. Morales's directive, the University of Houston was continuing some race-based scholarships after other state universities had decided they were not permitted.

The Education Department's stance is the latest wrinkle. It was offered in response to a letter from Texas legislators asking for an interpretation of Hopwood. It is also part of a review of progress toward desegregation in six states first announced in 1994.

In a letter to Texas legislators, Norma Cantu, head of the Office of Civil Rights at the Education Department, said the Hopwood decision applied only to admissions programs used by the law school at the time the suit was filed.

The old policy of separate application tracks for different races is no longer in effect, and both sides agree it was not permissible.

Instead, Ms. Cantu said, under the terms of the 1992 Ayers v. Fordice ruling in Mississippi, Texas is required to continue to root out current discriminatory practices and the vestiges of past discrimination and make its campuses more accessible to minorities.

Not only can race be used as a factor in admissions, universities "have a clear legal obligation to do so to remedy current discrimination or the effects of past discrimination," Ms. Cantu's letter said.

"The Texas Attorney General's office has interpreted the Fifth Circuit decision much more broadly than necessary," Ms. Cantu said in a telephone interview. "Unless the facts are identical to those in place at the time at the University of Texas Law School, universities may use appropriate affirmative action."

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THE WALL STREET JOURNAL

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Asides

Auditing the IRS

The Clinton Administration now has the distinction of being the first since the days of Richard Nixon to have Congress probe whether its Internal Revenue Service was conducting audits of political adversaries. This week, the chairmen and ranking Democrats of both the House and Senate's tax-writing panels jointly called for a full investigation of recent reports that the IRS may have skewed its audits of tax-exempt organizations toward conservative groups. The last time the Joint Committee on Taxation looked at the IRS was during Watergate, when it found that IRS Commissioner Johnnie Walters had successfully resisted White House pressure to politicize the agency. But at the same time it found that career IRS agents had created a rogue strike force called the Special Services Staff to hound dissidents and political enemies. It was disbanded, and until now there have been few allegations that the IRS has been used as a political weapon.

Ms. Cantu said she hoped to meet with Texas officials to help craft "a more reasoned reading of the Fifth Circuit decision that would permit the universities to continue appropriate use of affirmative action."

Critics of affirmative action said Ms. Cantu's statement reflected the degree to which the Clinton administration remains committed to affirmative action no matter what the courts say.

"It seems to me this is an outright flouting of very clear Supreme Court precedent," said Clint Bolick, litigation director of the Institute for Justice, a conservative public-interest legal organization. "This Administration has not found a preference policy it will not abide."

Meanwhile, officials in Texas said there was no way to comply with both sets of contrasting directives.

"I can't imagine the University of Texas is going to undertake to ignore the Fifth Circuit opinion and the directive of the Attorney General of Texas," said Michael Sharlot, dean of the University of Texas Law School.

"If the Department of Education's Office of Civil Rights seeks to require us to engage in affirmative action," Mr. Sharlot said, "maybe we should let Ms. Cantu fight it out with them, and we'll hold their coats."

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Texaco Settlement In Racial-Bias Case Endorsed by Judge

By ANNE REIFENBERG
Staff Reporter of THE WALL STREET JOURNAL

A federal judge endorsed the $176 million settlement in the Texaco Inc. racial-bias case, but reserved judgment on a plan to allot $29 million in fees to the plaintiffs' legal team and $800,000 in "incentive awards" to the six African-Americans who filed the discrimination lawsuit in 1994.

U.S. District Judge Charles Brieant said in a ruling issued Friday and made public yesterday that the class-action settlement "is fair and reasonable, and highly beneficial" to the more than 1,300 current and former Texaco employees who will receive payments averaging more than $63,000 each. He didn't, however, similarly bless the proposed formula for doling out lawyers' fees and special awards to the original plaintiffs, saying "this matter requires further study."

The lawyers suggested that they receive about 25% of the $115 million Texaco deposited into an escrow account last fall for eventual distribution to the blacks eligible to participate in the payout. The rest of the $176 million—the largest racial-bias settlement in U.S. history — is earmarked for a task force on diversity and other programs the oil company agreed to fund.

Also recommended by the lawyers was special compensation, also to be doled out from the $115 million, of $200,000 each for the two chief plaintiffs and $100,000 each for the other four who brought the suit. Daniel Berger, a member of the legal team, said these plaintiffs' "assistance in prosecuting the case was invaluable." Mr. Berger also said that he and his colleagues believe the lawyers' fees sought are "reasonable and justified."

"Obviously, it's up to the judge," he said. "Whatever he does will be appropriate."

In his ruling in White Plains, N.Y., Judge Brieant said he had received several "form letters" objecting to the "amount and disbursement of fees." He said he would resolve the matter in a separate decision.

The lawsuit against Texaco, based in White Plains, claimed the company denied promotions and raises to blacks. Texaco decided to settle after the release of transcripts of secretly taped conversations that appeared to show white officials belittling black employees and considering the destruction of documents sought by plaintiffs in the suit. The man who made the audiotapes and who is also quoted in the transcripts, former personnel coordinator Richard Lundwall, has since been indicted on a criminal charge of federal criminal obstruction of justice. He has pleaded not guilty.

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Discrimination: More employers than ever being penalized

Continued from Page A1

"There's just a different atmosphere," said Christopher C. North, a Newport News employment lawyer. "(Brown's) predecessor in the office was very employer-oriented. Now, twice as much work is getting done with half as many people."

Scott M. Reed, a Virginia Beach lawyer who has filed more discrimination cases in Norfolk's federal court than any other attorney in the past year, agrees.

"Herb Brown was a breath of fresh air," Reed said. "His coming, along with the change of plans, was a real boost to the agency. . . . It boosted the morale there because it freed them from having to investigate every case."

It is impossible to know exactly which employers have been slapped with adverse rulings from the EEOC. Complaints are confidential. The EEOC cannot release names of offending employers, even after investigations are over.

Also, many cases are settled confidentially, though Brown said he tries to avoid that. Other settlements are not confidential, but they can be divulged only by the parties themselves, Brown said.

One point is clear: The numbers are way up.

In fiscal 1995, the agency found cause to support discrimination claims in 13 cases. That doubled in fiscal 1996 to 26 cases. It is on pace to double again this year, Brown said.

That means more money for more victims. Last year, 88 discrimination victims got awards totaling $2.3 million. That's an average of $26,136 each.

The message is not lost on corporate bosses, North says.

"In the old days, there were very few for-cause findings. They very seldom got to that point," North said. "I think the employers are starting to realize this."

Details of those cases, however, seldom trickle out.

In Norfolk and around the country, few discrimination cases ever get to federal court, where the paperwork is nearly always public. The EEOC files only two or three cases a year on behalf of victims in Norfolk's federal court. Individuals filed 69 discrimination lawsuits last year in the same court. Such lawsuits are almost always settled or dismissed before they get to trial.

Still, the EEOC does release a statistical glimpse of discrimination in the Norfolk region.

The Norfolk office is not big, comparatively. It had 733 cases pending in March 1996, compared with 999 in Richmond and 1,843 in Baltimore.

But in one respect, the Norfolk area is unusual, Brown says: Many complaints come from city government employees.

Today, 92 of the 444 pending Title VII discrimination cases in Norfolk — charges of race, sex, religion or national origin discrimination or retaliation — are against local governments.

That compares badly, Brown said, with his experience in Boston and St. Louis. Brown would not say which city governments or agencies have attracted the most complaints.

"My philosophy is the city should be the best corporate citizen," Brown says. "Unfortunately, a lot of cities and local government agencies here have not changed very much."

In other ways, the Norfolk area is more typical.

When Herbert Brown, director of the EEOC, arrived in Norfolk in late 1995, about 1,300 cases were pending. Some had been around for three or four years. Today half as many cases — 652 — are pending, split among seven investigators and one trainee.

In Norfolk, the most common complaints involve race discrimination (29 percent), sex discrimination or harassment (18 percent), disability discrimination (14 percent) and retaliation against employees who file EEOC complaints or who cooperate with EEOC investigations (18 percent).

Relatively few involve age, religion or national origin.

In the past, these complaints swamped Norfolk investigators. They had to investigate every case that walked through the door, even those in which the investigator suspected there was no support.

But last year, investigators were freed to dismiss some cases quickly — often within 30 days — and spend more time on others that they deem more serious. (Employees whose cases are not investigated can go directly to federal court and file suit.)

The result was dramatic, Brown said. When Brown arrived in Norfolk in late 1995, about 1,300 cases were pending. Some had been around for three or four years. Today half as many cases — 652 — are pending, split among seven investigators and one trainee.

"We now, as an office, have more control over our destiny and our daily workload," Brown said.

Brown's advice to companies facing discrimination complaints is blunt: "If you demonstrate immediate and appropriate action (to eliminate discrimination), you're free of liability. If you don't get rid of it now, you'll pay for it later."

5th Circuit Curbs EEOC's Time To Probe Companies

The Hearst Corp., seeking finality, hails the ruling as a victory for employers.

BY KATE THOMAS
SPECIAL TO THE NATIONAL LAW JOURNAL

LAWYERS FOR media giant Hearst Corp. are hailing as a victory for employers, a 5th U.S. Circuit Court of Appeals decision limiting how long the Equal Employment Opportunity Commission can investigate a company.

A three-judge panel ruled that the EEOC must stop its own investigation once it has given a charging party a right-to-sue letter and that party has filed suit.

"This gives employers a benchmark on when there is a finality to an investigation," said defense counsel L. Michael Zinser, of Nashville's Zinser & Patterson. He said the EEOC's position put Hearst in the unfair position of having to deal with the agency's demands as well as a court case.

EEOC officials in the Houston district office see the ruling differently. Houston district director Harriet Joan Ehrlich and senior regional attorney Jim Sacher predict it will force them to play hardball with employers. The Houston district may change its attitude from one of "reasonableness" with employers who want more time to respond to agency requests to a more hard-line approach, said Mr. Sacher.

"The Chronicle stonewalled us," he said. "You better believe we will not lose our right to investigate cases" again, which means the agency may be heading into court more often to get its subpoenas enforced.

Houston agency officials will also be more inclined to file requests for commissioner's charges. Ms. Ehrlich said it is her intent to seek a commissioner's charge in the Chronicle case on behalf of others at the newspaper.

In instances in which a charging party isn't willing to come forward, or in very large cases, EEOC field personnel may file a request with one of the five EEOC commissioners asking that commissioner to initiate an investigation.

In a sexual harassment case involving a vice president of the Houston Chronicle newspaper, a Hearst division, the EEOC argued that, if a valid charge is filed by an injured party, the agency has the right to continue investigating an employer indefinitely.

"Finality," observed Judge E. Grady Jolly in a 12-page Jan. 22 decision, "is apparently not a word in the EEOC lexicon." *EEOC v. Hearst*, 96-20042.

Get Tough? *Harriet Joan Ehrlich says the EEOC may have to play hardball with companies.*

Two female employees had complained formally to the agency in December 1994 about alleged continuing sexual harassment by a Chronicle sales and marketing vice president. The incidents allegedly occurred at a company meeting in Galveston, Texas, at the newspaper offices and in other locations.

The agency investigated the charges and sought various records and interviews, including personnel files, copies of any internal investigation documents, a list of advertising department employees and permission to conduct an on-site investigation. The Chronicle supplied the personnel files but refused all other requests, asserting that no additional information was relevant to the women's specific charges.

In response, the EEOC issued two administrative subpoenas demanding the previously requested documents and information as well as the testimony of a third woman. Hearst petitioned to have them revoked.

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Wilson also notes that employers don't respond well to the attitudes that black men tend to display. As his colleague, Richard Taub, observes of the individuals in their study:

> This group of African American men has attitudes toward work quite different from the Mexican-Americans, which bear close examination. It is clear that they do not like the jobs the Mexican-Americans often take and that they will not work as hard for those same low wages.

Though Wilson's findings are complex, he, like other researchers looking at local labor markets, concludes that inner-city black men are losing out in the competition with immigrants.

But labor-market competition doesn't tell the whole story. There are plenty of other arenas in which disadvantaged black Americans might compete with immigrants. Politics, for example, springs to mind. Certainly in L.A., the competition between blacks and Latinos for public recognition and visibility is intense. From all sides you often hear the lament: "There's only room for one minority in this town." More concretely, recent redistrictings have revealed struggles for dominance between the two groups. With regard to public housing, schools and health facilities, disadvantaged blacks also clearly feel threatened by immigrants. Again in L.A., the classic case is Martin Luther King Jr. Hospital in Watts, built in response to the 1965 riots and now dominated by Latino immigrants.

Then there's the dispute that erupted a few months ago when the only Hispanic on the Board of Governors of the U.S. Postal Service, the nation's largest civilian employer, charged that blacks were "overrepresented" and Hispanics "underrepresented" among postal employees. Governor Tirso del Junco pointed to a recent General Accounting Office report revealing, for example, that in L.A. in 1993 blacks made up about 10 percent of the regional labor force, but 62 percent of the postal work force. For Hispanics, the corresponding figures were 35 percent and 15 percent. The irony here is that the postal service is one of the few institutions where established job networks have benefited blacks. This may present an extreme case, but it points out how even better-situated blacks will be pitted against immigrants and their progeny.

Is the competition between immigrants and black Americans all to the bad? Maybe not. If fewer blacks go to work for the post office (a rather moribund operation, after all), more may go to work for Federal Express. And perhaps it isn't a tragedy if poor blacks leave inner cities in search of opportunities elsewhere. This seems to be the position of Ron Unz, the conservative Silicon Valley software entrepreneur who challenged Governor Pete Wilson in the Republican primary last June on an aggressively pro-immigration platform. In a *Policy Review* article provocatively titled "Immigration or the Welfare State: Which Is Our Real Enemy?" Unz asserted that immigration "can be the issue that sparks a massive rollback of the welfare state and the ethnic group policies of the past twenty or thirty years."

Maybe such immigration-induced competition could help disadvantaged blacks, although we don't really know enough to judge. In the meantime, there is considerable evidence that what some regard as bracing competition, blacks themselves regard as shock therapy. Frey's demographic research indicates that rather than leaving immigrant-heavy metropolitan areas for bright prospects elsewhere, poor blacks are simply being pushed out by diminished opportunities where they now live. Reinforcing this pessimistic interpretation of the evidence are years of opinion survey data that have long demonstrated black Americans to be less than enthusiastic about immigration. California's Proposition 187 passed with significant support from blacks. Despite the uniform and vehement opposition of black leaders to 187, California blacks split on the measure, 47 percent in favor and 53 percent against. According to Harold Meyerson of the leftish *L.A. Weekly*, there was even greater support for 187 among blacks in South-Central L.A., where the physical displacement of blacks by Latino immigrants has been most visible in recent years. Wilson, who placed anti-immigration themes at the center of his re-election campaign, won 20 percent of the statewide black vote—twice the historic level of black support for Republican candidates, Meyerson notes.

Similarly telling are the various civil disturbances that have occurred over the past decade. In Miami, black disaffection with immigrant competitors has erupted in mass violence on several occasions. Though not so clear-cut, recent riots in Washington, D.C., and of course in Los Angeles arguably reflected similar sentiments among blacks. Such episodes suggest that blacks won't respond to immigration and its attendant urban changes passively.

None of this should be construed as excusing vicious, violent or unlawful behavior. Nor is it to excuse the actions, or inactions, of politicians such as David Dinkins, who, as mayor of New York, turned his back on the abuse heaped upon Korean businesses by black demagogues. But such behavior is a fact of political life that reflects a growing sense of isolation and despair on the part of black Americans.

But this conclusion doesn't carry with it any clear prescription for immigration policy. Blacks continue to have a strong claim on America's conscience. Yet this doesn't necessarily point to restrictionist policies. The advantages of high levels of immigration to the general welfare may outweigh any specific negative impacts on blacks. Or perhaps such impacts can be addressed by compensatory policies and programs, though our record here is spotty at best. But one day, the same black leaders who are today so silent on this issue may stake yet another claim of injustice against American society. Such claims will be hypocritical and opportunistic. If the rest of us persist in evading the issue, such charges will also have the ring of truth.

PETER SKERRY is a fellow at the Woodrow Wilson International Center for Scholars in Washington, D.C.

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Bad Law on Affirmative Action

For two decades the governing principle of affirmative action in higher education has been that race and ethnicity may be a factor, but only one factor, in choosing among applicants in pursuit of the legitimate purpose of a diverse student body. That was the judgment of the Supreme Court in the celebrated 1978 case of Allan Bakke, a white applicant who sued for entry to a California state medical school.

Now a panel of the U.S. Court of Appeals for the Fifth Circuit declares that the Bakke decision is no longer good law. In a lawsuit by four rejected white applicants, the court strikes down a program of the University of Texas Law School to bring more blacks and Mexican-Americans into its student body. This tool is impermissible, say the judges, "even for the wholesome purpose of correcting perceived racial imbalance in the student body."

The ruling is hasty, aggressively activist and legally dubious. If the Bakke decision is no longer the law, it is for the Supreme Court to say so. We hope the high court does not, for its basic rule is sound. Rigid racial quotas are out, but no serious educational institution should be forced to disregard the goal of educating a diverse population.

To reach this result, the appeals judges engaged in exotic reasoning. They found that a now-retired Justice, Lewis Powell, who announced the judgment in Bakke, spoke only for himself on the racial diversity question. It is true that he was joined in the judgment by four other justices who relied on different legal grounds, but Justice Powell's announcement has soundly been regarded as the rule of the Bakke case for nearly a generation. Moreover, it has been widely hailed as the work of a respected moderate well grounded in experience as head of the school board in Richmond, Va.

Texas higher education officials have commendably sought diversity, but they cannot fairly be accused of adhering to rigid quotas. The diverse statewide population is 11.6 percent black and 25.6 percent Hispanic, while the 1992 law school entering class was 8 percent black and 10.7 percent Hispanic. Yet the appeals court says the school may not use "ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors."

That is the doctrine of a "color-blind" Constitution, but it speaks to a time not yet here when the historic stain of racial oppression is erased, competition is truly equal and diversity comes more naturally. As another former Justice, Harry Blackmun, observed in the same Bakke case, "In order to get beyond racism, we must first take account of race.... And in order to treat some persons equally, we must treat them differently. ... The ultimate question, as it was at the beginning of this litigation, is: Among the qualified, how does one choose?"

The appeals court judges, eager to be the first to declare the battle for equal rights over, have rendered a judgment that should not stand.

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A Color-Blind Constitution

. . . the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.

—JUDGE JERRY E. SMITH
Fifth Circuit Court of Appeals
Hopwood v. State of Texas

With that unequivocal statement, the Fifth Circuit this week moved to demolish the admissions standards that have been in place since the 1960s in most American universities. In a unanimous decision, a three-judge panel struck down an admission policy at the University of Texas Law School that gave preference to black and Mexican-American applicants. If the Supreme Court upholds the decision, it will apply to practically every American university, and the implications rocket far beyond the campus.

The ruling is aimed right at the heart of our national debate on affirmative action; the Fifth Circuit is offering up a much-needed reality check on a system that started off with the best of intentions but has instead run amok.

Consider the facts of this case. In *Hopwood v. State of Texas*, four white students argued they had been denied admission to the University of Texas Law School because of their race. The school's system was to assign each applicant an index based on his grade-point average and LSAT score. Applications were sorted into folders color-coded by race, and then divided into three rough categories: admit, discretionary, reject. In 1992, the cutoff score for the admit category was 199 for applicants who were white or other non-preferred race and 189 for blacks and Mexican-Americans; the automatic-reject scores were 192 and 179 respectively. The plaintiffs in *Hopwood* all fell in the discretionary category for whites but scored higher than some minority students who were accepted.

The law school defended its system by arguing that 1) it was the only way it could meet its diversity goals of 10% Mexican-Americans and 5% blacks, and 2) it was making up for past discrimination. It maintained that this was permitted under the *University of California v. Bakke*, the 1978 reverse-discrimination case in which the Supreme Court ruled that universities' compelling interest in diversity justified racial preferences.

But the Fifth Circuit marshaled an array of recent affirmative action decisions to argue that the Supreme Court narrowly defines compelling interest as remedying specific past wrongs. The University of Texas Law School, which opened its doors to black students more than 30 years ago and never barred Mexican-American students, failed the strict-scrutiny test. As for the university's overall diversity aims, discrimination on the basis of race is not permissible, even for what the court called "the wholesome practice of correcting perceived racial imbalance in the student body."

As an example of appropriate diversity, the court cited the lead plaintiff, Cheryl Hopwood, a young woman who had put herself through college, married a military officer and was the mother of a severely handicapped child. "Her circumstance would bring a different perspective to the law school," the court said. Affirmative action preferences now often go to the children of minorities who have already made it to the middle class, not to the disadvantaged. One Texas law professor told us black applicants are "typically at least as advantaged as white applicants."

With or without *Hopwood*, it's clear that affirmative action as we know it is heading for a change. A referendum on affirmative action is on its way to the ballot in California, and at least a dozen states are considering bills that would bar universities from considering race in making admission and hiring decisions. Come November, all Americans will get a proxy vote on it in the form of a choice between Bill Clinton, whose view on affirmative action depends on whom he's talking to, and Bob Dole, who is sponsoring legislation to prohibit it in federal programs.

The Supreme Court is likely to get *Hopwood* next fall, just in time for the President to offer a friend-of-the-court brief if he can first figure out which side to support. (Don't laugh; the Administration keeps switching sides in a New Jersey affirmative action case.) In this election year, it should be noted that the three *Hopwood* judges were Reagan and Bush appointees.

From the beginning, affirmative action was supposed to be about equal opportunity; today, it is more about quotas and preferences. Along the way, some important principles got waylaid—such as the idea that it is wrong to judge a person's character by the color of his skin. What the Fifth Court is saying in *Hopwood*, in essence, is that racial discrimination is not an appropriate remedy for racial discrimination.