





sidered extremely unlikely to try to bring it up.

The House version of that legislation, introduced by Rep. Charles T. Canady, R-Fla., chairman of the Judiciary Subcommittee on the Constitution, was approved by that body on March 7 on an 8-5 party-line vote. The legislation would prohibit the federal government from using racial or gender preferences in hiring, procurement, contracting and other programs. It would define "preference" as not only quotas and set-asides, but also goals and timetables. But now it looks as if that bill may also remain in limbo, too hot a potato for the full Judiciary Committee or the House leadership to touch.

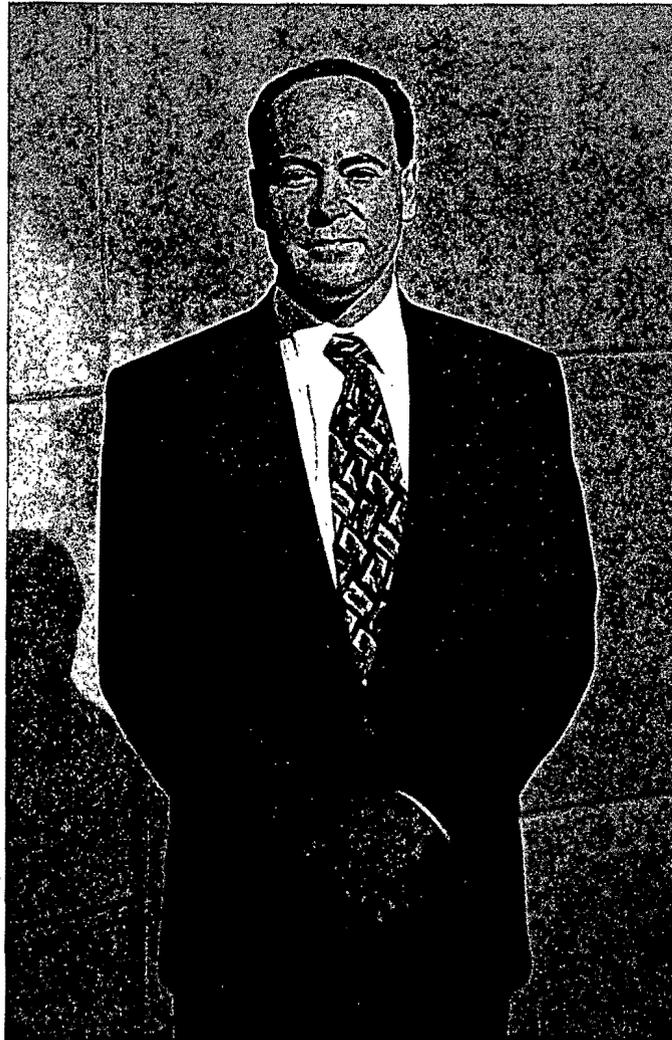
Mixed signals emanate from the Dole camp. Dole's campaign staff refused to speak on the record about the subject. But issues director Dennis Shea was characterized in an April 8 *National Review* article as looking "forward to a debate on the topic" and was quoted as saying, "Race and gender preferences are a big defining difference between Dole's campaign and Clinton's campaign." But subsequent public discussions of issues that Dole plans to feature in his campaign have notably avoided any mention of affirmative action.

The waning of affirmative action as a political issue would come as a major blow to conservative activists. After winning several court decisions over the past year to severely limit affirmative action in federal procurement programs and in college admission policies, they had all but declared victory for their side. They still insist they have the momentum to win.

"I'm not one of the deluded people who think that political battles are won when you win the point of principle," said Michael S. Greve, executive director of the Washington-based Center for Individual Rights. "That's when the battle really starts."

Supporters of affirmative action also don't see the fight as over, either in the political arena or the judicial sphere.

"This is an issue that will be with us, no



Richard A. Bloom

"The Republicans have been gutless wonders on this issue, and it's been very, very frustrating," declares Clint Bolick, author of *The Affirmative Action Fraud*.

question," said Ralph G. Neas, a Washington attorney who now serves as counsel for the Leadership Conference on Civil Rights, an organization he used to direct. "This is not a new issue. We've had titanic battles in the past. But there has been—and there still is—a bipartisan consensus in support of affirmative action in this country."

CALIFORNIA BREEZE?

Republican strategists who want to employ the wedge issue but not risk the

backlash see California as providing the cake they can both eat and keep. The vehicle is an initiative approved for the California ballot in November that would abolish state-sponsored affirmative action programs in education, hiring and contracting.

"It could be we get enough play out of riding the wind of [the California initiative] so we don't need to push it" in Washington, said a Republican congressional staff member who deals with affirmative action legislation.

Clinton opposes the initiative. Dole endorsed it last November but has not made a big deal about it. In campaigning for the California primary in late March, for example, Dole mentioned it only once and then as part of a speech to Asian-Americans in which he stressed the importance of advancing through individual merit.

Backers of the initiative paint it as a rallying point for Republicans. "This is an issue that the Republican Party by a margin of about 80-20—which is about as solidified as it can become—is united around," Ward Connerly, a Sacramento businessman who is chairman of the initiative drive, said in a telephone interview. (In an exit poll of Republican voters conducted during the March 26 California primary by Voter News Service, 55 per cent said they favored doing away with affirmative action programs, 29 per cent said to change them, 12 per cent said to leave them alone (4 per cent had no response).

The California Democratic Party opposes the initiative but is fighting it on the basis of gender rather than race. The *Los Angeles Times* on March 28 quoted acting state Democratic Party chairman Art Torres as saying, "The initiative destroys the rights of women and girls in California."

Pre-primary polls showed the initiative favored to win by a huge margin. But that was before a large coalition of civil rights, women's, labor and other groups organized a well-financed campaign to oppose it.

The business community hasn't

weighed in. Many large corporations support affirmative action policies but shy away from the politics of initiatives and referenda. Their involvement in this initiative battle, which could be important to the outcome, is still uncertain.

"There appears to be some movement on the part of business to at least, if not addressing specifically the California initiative, to talk about the benefits that have been derived from diversifying the workforce," Ronald Knox, vice president for diversity at the Oakland-based Kaiser Permanente Medical Care Program, said in a telephone interview. "That may influence the outcome of the initiative."

"I am hopeful that the private sector will take a position in opposition to [the initiative], but I am not optimistic that that will occur," said Dave Barclay, vice president for workforce diversity at the Hughes Electronics Corp. in Los Angeles. "I think that those of us who are supportive of affirmative action and oppose [the initiative] have got to make a better business case why this initiative should be defeated and we retain affirmative action."

A central strategy of the anti-initiative campaign is to redirect the focus from race to discrimination against women—a potentially much larger voting base that Republicans can ill-afford to write off.

"This initiative was very cleverly drafted to try to use buzzwords and play on people's emotions," said Marcia Greenberger, co-president of the National Women's Law Center in Washington. "We want to make sure that people do understand what's behind those buzzwords and what the real effect would be, and that's especially true for women."

"Making sure that more and more people understand that affirmative action is for women as well as minorities immeasurably enhances our prospects," Neas said. "It's not just a race issue; it's a race and gender issue."

Maybe. But foes of affirmative action hope that approach might backfire on the Democrats.

"People have the perception that the Democratic Party now consists largely of feminists, racial minorities and labor

unions—that that's what they're down to," Greve said. "To the extent you can reinforce that perception, the civil rights issue is a very good issue for the Republicans."

DRIVING THE WEDGE

The strategy to use affirmative action as a wedge against Democrats counts on driving home the perception of affirmative action as racial and gender quotas or preferences.

The anti-affirmative action stand thus can present itself as championing individual rights. So, in the March 24 California speech in which he endorsed the initiative, Dole intoned: "This is America. It ought to be based on merit. That's what the United States is all about."

To underscore this point, the Dole-Canady legislation is titled the 1996 Equal Opportunity Act, and Wilson's ballot measure the California Civil Rights Initiative.

"We don't want discrimination and we

don't want preferences," Connerly said. "We fully intend to prevail, No. 1, because we're on the side of the angels. I have no doubt that our cause is right." Connerly, who is black, is the member of the California Board of Regents who has spearheaded the successful move to eliminate race and ethnicity as factors in admissions decisions at the University of California's nine campuses beginning next year.

If they could carry it off, backers of this strategy would indeed have a powerful political issue, because polls have consistently shown that the American public opposes quotas or preferences by as much as 80-20 per cent.

Even most dyed-in-the-wool liberals oppose preferences, Paul M. Sniderman, a political science professor at Stanford University, has discovered through surveys designed to ferret out hidden attitudes that people refuse to acknowledge on straightforward polls.

"Take people who are markedly positive in their feelings towards blacks, sym-

pathetic, who feel it is very important to try and build a country where racial tolerance is valued," Sniderman said in a telephone interview. "If by affirmative action you mean preferential treatment or racial quotas, the odds are about 8 out of 10 they also will reject affirmative action."

That leaves proponents of affirmative action with the difficult task of proving a negative—showing that their policies do not constitute preferences or quotas.

"We have to explain what affirmative action is and what it is not, and it is not preferences," Neas insisted. "If you ask Ralph Neas, 'Do you oppose selecting people simply because of race or gender?' I would oppose that also."

"It's easy to make a bumper sticker argument," Roger Wilkins, a longtime civil rights activist who now teaches history at George Mason University in Northern Virginia, said in an interview. "Our argument [for affirmative action] is a complex argument, and bumper stickers usually beat complexity until you begin to amass numbers and prestige against the bumper stickers."



Marcia Greenberger of the National Women's Law Center
The bill "declares war on women's legal rights."

John Escobar

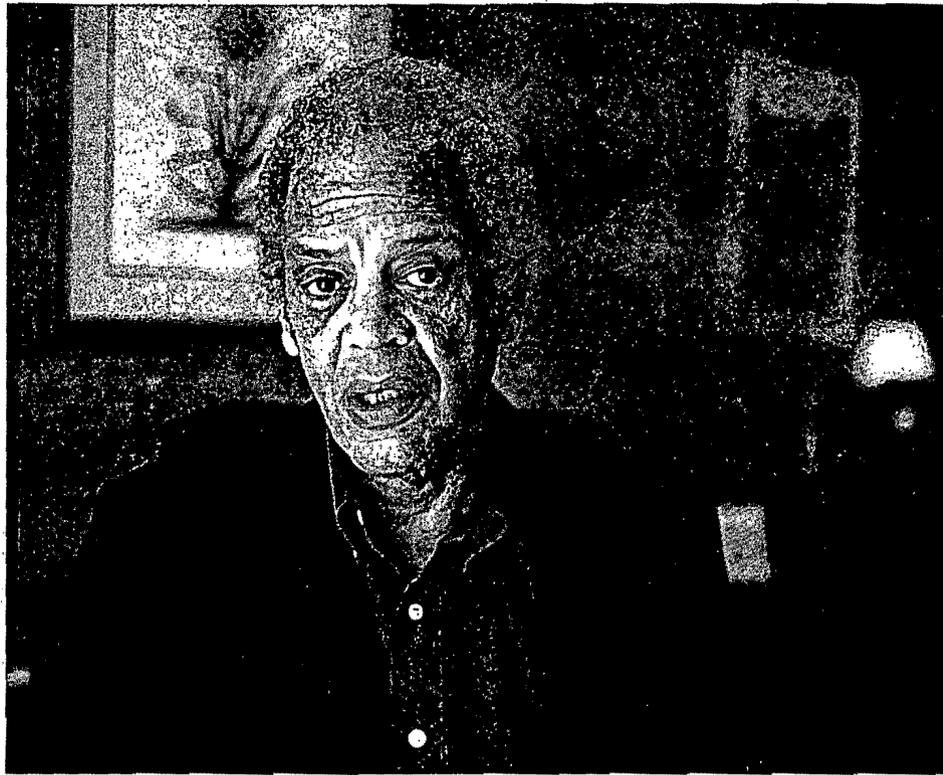
To the dismay of the hard-line conservatives, a substantial number of moderate Republican governors and Members of Congress are sticking with complexity. Ohio's Voinovich, for example, just overhauled the state's affirmative action procurement policy to align it more closely to the federal program that is the target of the Dole-Canady bill. New Jersey's Whitman has also tried to reform state affirmative action programs, not end them.

Rep. Harris W. Fawell, R-Ill., chairman of the Economic and Educational Opportunities Subcommittee on Employer-Employee Relations, whose ratings by conservative groups usually soar above the 80 per cent mark, held a hearing on the Canady bill on Feb. 29. In his opening statement, he expressed his own ambivalence on the matter: "The courts are prompting us to move away from a reflexive reliance on racial and gender preferences, yet the instinct and sense of fairness that led to the original promulgation of Executive Order 11246 [which established affirmative action in federal procurement] remains relevant." He added, "Most Americans continue to believe, as I do, that affirmative action is still an important tool in creating opportunities for a wide diversity of our citizens."

Even several of Canady's Republican colleagues on Judiciary's Constitution Subcommittee had misgivings about some of the bill's provisions—for instance, the provision that would outlaw the practice of setting goals and timetables for achieving greater diversity in the workplace as a step leading to quotas and preferences. Two Republican subcommittee members balked at the measure, pointing out how the Army has used goals and timetables in an effective affirmative action program without lapsing into quotas.

Some opponents of the California initiative also see their task as having to employ more-complex arguments to counter anti-preference slogans. "I think when the soundbites like 'affirmative action is reverse discrimination' or 'affirmative action is discriminating against Caucasian males' are taken out and we look at the facts, at the reality of changing demographics and what the state has to do in order to remain competitive in a global environment," Kaiser Permanente's Knox said. "I think then the facts will speak for themselves."

The Census Bureau estimates that in 1995, California's population was about 10 per cent black, 15 per cent Asian and 36 per cent Hispanic. By comparison, the bureau reports that the nation's population was about 13 per cent black, 4.5 per cent Asian and 10 per cent Hispanic.



Richard A. Bloom

"I don't expect this struggle to be over in my lifetime or my children's lifetime," says civil rights activist Roger Wilkins. "To root it out is going to take, probably, 200 years."

Knox said that having a diverse workforce enables Kaiser Permanente to deliver "culturally competent and sensitive" care.

HOT POTATO

In the cost-benefit analyses made by campaign strategists, the usefulness of affirmative action as an issue will probably depend heavily on how hot a potato it is perceived to be as well as on who is likely to get burned. The frequent conclusion is that the Republicans could end up with charred fingers.

"It could get really ugly, yes, and really ugly can backfire in all sorts of ways and on all sorts of people," Greve said. "This is not something for firebrands. You can't just throw these matches."

Opponents of affirmative action are quick to characterize supporters as the militants. "I think that there's a very strong consciousness on the side of people who want to eliminate racial preferences that this has to be handled in a sen-

sitive fashion," said Wittmann of the Heritage Foundation. "What I'm concerned about is the other side throwing everything because they don't want to debate the actual merits of it."

In California, "people are frightened about being labeled or claimed a racist for something they believe is a matter of fundamental fairness," Sean Walsh, Wilson's press secretary, said in a telephone interview.

Nonetheless, the Republicans are very wary of their own hotheads. Referring to Buchanan, for example, Walsh acknowledged. "The bottom line is that he sometimes demagogued on the issue, while Sen. Dole has been very measured and kept a very baseline approach."

Before the California presidential primary, Connerly refused to participate in a news conference with Buchanan. In a subsequent interview, however, he said carefully: "If it so happens that Pat Buchanan supports [the initiative], I welcome his support. My support of his support of this initiative is not my support of

BIG DIFFERENCES OVER JUST A FEW WORDS

Race may underlie much of the emotion in affirmative action, but it's the sex-discrimination provisions that generate the nastiest name-calling over the Dole-Canady bill to limit federal affirmative action. The hottest argument over what are called "bona fide occupational qualifications" literally come down to a handful of words.

The Canady bill says simply: "This act does not prohibit or limit any classification based on sex if... sex is a bona fide occupational qualification reasonably necessary to the normal operation of the entity subject to the classification."

The reason for that language, according to a Republican staff member of the House Judiciary Subcommittee on the Constitution, is to permit such things as federal prisons hiring female guards for

women's prisons and male guards for men's prisons. "If we didn't exempt it, it would be illegal because it's an intentional discrimination based on sex," the staff member said.

Opponents of the legislation say this concept is OK, but that the language of the bill is not specific enough. They fear employers might take advantage of the general language to ban women from jobs where gender is not really a bona fide qualification.

They point to Title VII of the 1964 Civil Rights Act that specifies that it is not unlawful for an employer to hire on the basis of sex, etc., "in those certain instances" where that is a bona fide occupational classification necessary to "that particular business or enterprise." Such limiting terms as "certain" and "particular" are what they demand be

added to this section of the Canady bill. Calling the opponents' arguments "petty," the subcommittee aide said, "The simple answer is that the bill as drafted is not susceptible to the interpretation they have put on it."

Is too! the opponents reply. They even have a U.S. Supreme Court opinion to back them up. Title VII "thus limits the situations in which discrimination is permissible to certain instances where sex discrimination is 'reasonably necessary' to the normal operation of the particular business," Justice Harry M. Blackmun wrote in the 1991 opinion in *United Automobile Workers v. Johnson Controls Inc.* "Each one of these terms—certain, normal, particular—prevents the use of general subjective standards and favors objective, verifiable requirement."

him—it just so happens that maybe we agree on something."

But Connerly also allows himself to get personal in his attacks on opponents of the initiative. "Somebody is paying for these frequent-flier flights for Rev. [Jesse] Jackson to go from the [East] Coast to wherever there's a microphone to oppose this initiative," he said.

Connerly also publicized a March 18 letter that he wrote to Angela Davis, the 1960s radical who now teaches at the University of California (Santa Cruz) and is touring college campuses to organize stu-

dents against the initiative. "I consider your tactics an even greater threat to our society than your philosophy," he wrote. Calling Davis "a Marxist ideologue," he added, "I suspect that you yearn for race and gender warfare as much as you do for class warfare."

Much of the angry rhetoric is directed at substance. In discussing the section of the Dole-Canady bill that deals with sex discrimination, for example, Greenberger of the National Women's Law Center said: "I think that it is so hostile to women that it's hard for me to understand why it

would be a primary election campaign issue. It really is a bill that declares war on women's legal rights."

"They are lying. . . . Theirs is a willful, knowing misrepresentation of the bill, which is not a permissible interpretation," a Republican subcommittee aide said in disputing that characterization. "Our bill does nothing, nothing, nothing to touch, weaken, undermine, supersede, preempt or change those [anti-discrimination] laws." (See box, above.)

Conservative activists appear less concerned about a possible backlash than do the political strategists, however. "We're either going to have a short period of ugliness and get this issue behind us, or we're going to fight over this, and this will rack America's soul for a long time to come," the Institute for Justice's Bolick said. "Others may be squeamish, but [I believe] the healing process cannot begin until this gets behind us."

"It may not necessarily be a major issue in the campaign, but it won't be swept under the rug," Wilkins said. "I don't expect this struggle to be over in my lifetime or my children's lifetime. It took 346 years [from the first slave auction in Jamestown in 1619 to 1965] to form a very deep strain of racism in our culture. To root it out is going to take, probably, 200 years."

"I would treat this as a stealth issue," William L. Taylor, vice chairman of the Citizen's Commission on Civil Rights in Washington, said. "Sometimes it's on the radar screen and sometimes it's not—and you still don't know how it's going to play out in the elections." ■



Marshall Wittmann of the Heritage Foundation
Opponents of affirmative action will handle the issue "in a sensitive fashion."

John Eisele

DEALS & SUITS

Chamber of Commerce of the United States of America, et al. v. Reich

A group of business associations is challenging the constitutionality of President Bill Clinton's March 8 executive order prohibiting the awarding of federal contracts to firms that hire striker replacement workers.

In a lawsuit filed last month in U.S. District Court here, lawyers for the U.S. Chamber of Commerce, the American Trucking Associations Inc., and other groups allege that the president lacks statutory or constitutional authority to regulate the use of economic weapons in the collective-bargaining process or to punish federal contractors for hiring replacement workers during a strike. The suit also alleges that the executive order explicitly violates the National Labor Relations Act, which guarantees employers the right to hire replacement workers in an economic strike.

The plaintiffs, which also include the Labor Policy Association, the National Association of Manufacturers, and Bridgestone/Firestone Inc., are seeking an injunction barring the enforcement of the order.

The lawsuit was filed against Secretary of Labor Robert Reich, since his department is charged with enforcing the order.

In its response to the complaint, the government claims that the lawsuit should be dismissed because it disregards Supreme Court precedent holding that courts lack authority to review claims that the president exceeded or abused his statutory authority. The government cites *Dalton v. Specter*, a 1994 Supreme Court decision involving President Clinton's acceptance of military-base closure recommendations under the Defense Base Closure and Realignment Act of 1990.

The government also contends that the lawsuit is premature because the Labor Department has yet to take any enforcement action under the order.

The business group has turned to **Timothy Dyk, Andrew Kramer, Willis Goldsmith**, and associate **Stephen Smith** of the D.C. office of **Jones, Day, Reavis & Pogue**.

The coalition is also looking to several in-houseers. The U.S. Chamber of Commerce has turned to **Stephen Bokat**, executive vice president of the **National Chamber Litigation Center Inc.**, a public-policy law firm affiliated with the chamber. Bokat is also the chamber's general counsel. **Mona Zeiberg**, senior labor counsel for the litigation center, is also working on the case.

Also representing the coalition are **Daniel Barney**, the American Trucking Associations' general counsel; ATA's deputy general counsel **Lynda Mounts**; **Daniel Yeager**, general counsel to the Labor Policy Association; **Douglas McDowell** of D.C.'s **McGuiness & Williams**, outside counsel to the Labor Policy Association; **Jan Amundson**, general counsel to the National Association of Manufacturers; and **Quentin Riegel**, NAM's deputy general counsel.

The government is relying on a battery of litigators from the departments of Justice and Labor. The Justice Department team includes **Dennis Linder**, director of the Civil Division's Federal Program Branch, as well as **Sandra Schraibman** and **Margaret Hewing**, both staff attorneys for the branch. Also appearing for the government are **Frank Hunger**, assistant attorney general in charge of the Civil Division, and **Eric Holder Jr.**, U.S. attorney for the District of Columbia.

Also representing the government are **Thomas Williamson Jr.**, the solicitor of labor, and **Oliver Quinn**, deputy solicitor of labor. They are being assisted by **Allen Feldman**, **Steven Mandel**, **Edward Sieger**, and **Deborah Greenfield**, all staff attorneys with the Labor Department's

Division of Special Appellate and Supreme Court Litigation.

—Daniel Klaidman

In re Operator Communications Inc. d/b/a Oncor Communications Inc.

The Federal Communications Commission is hoping for a slam dunk against Oncor Communications Inc. of Bethesda, Md.

On March 31, the commission issued a notice of apparent liability against Oncor, seeking a fine of \$1.41 million from the privately held long-distance operator. According to the FCC, Oncor took over long-distance service on 94 pay telephones owned by New York's Metropolitan Transportation Authority without permission—a practice known in the telephone industry as "slamming."

The action against Oncor marks the FCC's first formal filing against a phone company for slamming, an FCC official

says. An investigation last year into another company was settled for \$500,000 before the FCC filed a notice of apparent liability.

The commission alleges that between November 1993 and April 1994, Oncor submitted to the New York mass-transit agency unauthorized requests to substitute Oncor as the long-distance provider on its pay phones. The transportation authority reported that it received the requests but adds that it returned them to Oncor with a note saying that it chooses long-distance providers through competitive bidding.

The Oncor matter stems from alleged violations of FCC rules aimed at putting an end to slamming. The rules say companies such as Oncor must secure signed authorizations before substituting their long-distance service on customers' telephones.

Under the rules, the FCC is seeking \$15,000 for each of the 94 phones allegedly slammed.

The FCC has turned to **Mary Beth Richards**, deputy chief of its Common

Carrier Bureau, who is in charge of the bureau's enforcement division; **Gregory Weiss**, acting chief of the enforcement division; **Thomas Wyatt**, chief of the Formal Complaints and Investigations Branch; and **Heather McDowell**, a staff attorney in the enforcement division.

An in-house attorney for Oncor denies the FCC's charges.

"We feel that the fine is unwarranted," says **Gregory Casey**, senior vice president of regulatory affairs at Oncor. Casey says, in fact, that Oncor has been "instrumental" in an industry-wide effort to end slamming.

Oncor has 30 days to file a response with the FCC on why the proposed forfeiture should be reduced or should not be imposed at all.

In addition to Casey, Oncor is looking to **Brad Mutschelknaus**, **Danny Adams**, and associate **Steven Augustino** of D.C.'s **Wiley, Rein & Fielding**.

—Richard Barbieri

Facilities Management

Get More Than You Bargained For.

When you outsource to **Balmar Legal**, expect a lot more every day.

On normal days, you'll have an expert on-site managing your copying, faxing and mailroom—so you can concentrate on running your law firm. On peak days, when big cases threaten to overwhelm your in-house facilities, you'll have the immediate support of Washington's largest legal support network—so you can rest assured everything will be delivered on time.

202-682-9800



Balmar Legal
The way it should be.

INTERVIEW

Affirmative Action: Don't Buy the Hype

Affirmative action, always a hot-button issue, is getting even hotter as the 1996 presidential campaign gets under way. Republicans, bolstered by the angry white male voters that helped elect them, are raising the issue in congressional debates and on talk shows.

Last month, President Bill Clinton got into the act when he designated Christopher Edley Jr., an Office of Management and Budget associate director, to review the federal government's affirmative action programs. Edley, a longtime Harvard law professor, argues that affirmative action would be a less contentious issue if people paid less attention to the hype and more to the facts. He discussed his views with Court TV anchor Fred Graham on March 31 on Washington Watch, a weekly program produced in association with Legal Times.

FRED GRAHAM: How do you define [an affirmative action] program that works? Let's say there is one that has been very successful in bringing in minorities and women, but has produced a number of white men who say they have been victims of reverse discrimination. Does that work?

CHRISTOPHER EDLEY JR.: Well, if they have actually been victims of reverse discrimination, in the legal sense of reverse discrimination, then clearly it is not working. There is a lot of misperception out there about how much reverse discrimination actually occurs. There is a distinction, of course, between a violation of law and a disappointment. But having said that, I hasten to add that even a disappointment, even a frustration, is a concern. It is a cost. The question is how do the benefits compare with the cost.

GRAHAM: There was a study out that was commissioned by the Labor Department, just came out, and it concludes that, as a matter of fact, many of the claims by white men of reverse discrimination, when you study them, are without merit. Now, that is a study. Do you agree with that?

EDLEY: Well, I have reviewed the study in draft form. The authors were gracious enough to give us a copy to take a look at. It is an interesting study. It reviewed over 3,000 reported cases in the federal courts over a period from 1990, I believe, to 1994. And of those 3,000 reported decisions, only about 3 or 4 percent involved any kind of a reverse-discrimination claim, and almost all of those were thrown out by the court.

GRAHAM: So what is happening? Why all of this resentment? Is this politics? Is it racism? What is happening here?

EDLEY: Well, racism continues to be a problem. But it is

a lot more than that. One of the things that the president has spoken about is the fact that with corporate restructuring, with global competition, with the economic insecurity that so many families feel, the times are really ripe for resentments of varying sorts. We have seen that in the immigration arena. We are seeing it now with the efforts by some to make affirmative action a wedge issue.

But one of the other things that goes on, quite frankly, is in a situation in which you have 10 people applying for a job or applying for a promotion, and a woman is selected, and you have nine white men who feel disappointed and a manager who says to all nine white men, gee, you would have been great for the job, but I had to promote a woman. Well, you have nine white men who now feel that affirmative action is the reason that they did not get the promotion. They can't all be right, and it may be that all nine of them are wrong. But yet sometimes people take the easy way out of explaining what is going on.

When affirmative action is done the right way, the legal way, it does not result in discrimination, it is not based on race alone, and it does not sacrifice merit.

GRAHAM: You mentioned President

Clinton and him talking about cutting back on corporate jobs and so forth. My understanding was when he first launched this and asked you to do this that it was a broad look at all affirmative action programs. But I read just recently that really you are not looking into these private companies, for instance, and you are only looking at a rather narrow slice of government set-asides. How broad is this study?

EDLEY: His charter to us was to take a look at the government's programs, and to ask what works and what does not work. So we have not been looking at what the private sector does... nor have we been looking at enforcement of the various civil rights statutes. What really motivated his concern was that as this issue exploded politically several weeks ago he began to read voluminously. He went into vacuum cleaner mode. But as he read the material that we were feeding him, he said it looks to me like a lot of people who are writing and talking about this don't know the facts. They don't know what they're talking about. I want to learn how these programs operate, what works, what doesn't work.

GRAHAM: Well, you say government programs. There are programs that are

mandated or that result from the Civil Rights Act of 1964. That is a government program in a major way. And, for instance, one of the most controversial affirmative action issues flows from this Piscataway, New Jersey, discharge of a white school teacher because of her race so that a black school teacher could get that job. That is going to be the center of much of this discussion here. Why aren't you advising him on that?

EDLEY: Well, the Justice Department, of course, is continuing to enforce the laws and continuing to enforce the Supreme Court doctrine as it exists.

GRAHAM: But—pardon me—they reversed what the Bush administration had done, and took a different position. So they changed the perception by the Justice Department of what the law was.

EDLEY: Well, that's what the election was about, and the Justice Department's conclusion was that the Bush administration had misinterpreted the law and it was moving in the wrong direction. I think it's important to get to talk a little bit about what the facts were in the Piscataway case.

This was a situation in which the school board was operating with an affirmative action plan, but they had to downsize. One of these teachers had to leave. There was a black teacher; there was a white teacher. They were equivalent in virtually every respect. In fact, they had been hired on the same day, so they had equal seniority. Their performance appraisals had been the same. They were equally qualified in terms of their credentials.

The question posed in court was: does the law require that they make a decision between these two teachers by flipping a coin, or does the board have discretion within the law to choose to try to apply its affirmative action plan in pursuit of diversity and decide to try to retain the black teacher? The Justice Department position was that the school board is permitted under the law to decide to try to advance its goals of diversity, with the understanding that on every other criteria the two candidates had been equal. It is a very extreme case.

GRAHAM: Well, but don't you think the president is going to be—it's going to be a little difficult when he runs for reelection because he will be upholding his administration, the firing of this school teacher because she was white, because of her race, and the other earlier Justice Department, before President Clinton got elected, saw it the other way. So it has to be a close question.

EDLEY: It is close in some respects. I think the key to this is the question of whether or not the federal statute was going to be interpreted in a way that would control the discretion of the local school board. And the Justice Department's conclusion was that under these extreme circumstances, under these very unusual circumstances where the two teachers were otherwise so identical, that the law should not prohibit the school board from trying to advance diversity goals.

Remember, if there had been any difference in merit, in seniority, in qualifications of the two teachers, race would never have been an issue.



Longtime Harvard Law Professor Christopher Edley Jr., an associate director in the Office of Management and Budget, is reviewing the federal government's affirmative-action programs.

SEE INTERVIEW, PAGE 19

PHOTOCOPY
PRESERVATION

INTERVIEW FROM PAGE 18

GRAHAM: Now, you will be studying, as I understand it, the federal set-aside programs, and some of these result in quite wealthy minorities and women being given preferences. Do you see any problem with that?

EDLEY: Well, I do not want to prejudice the conclusions that the president is going to draw about which of these programs he supports and doesn't support. But clearly, that is one of the issues that we are looking at. What does economic disadvantage mean in the context of these set-aside programs?

GRAHAM: Well, he mentioned that himself. Is there any way to structure, let's say, some of these programs so that it is purely economic disadvantage, rather than say race or gender?

EDLEY: Well, again, that's one of the things that we're certainly looking at in the review. I would say, however, one of the ways that he has approached this in press conferences in the last couple of weeks is he's talked about the importance of opportunity and inclusion in the society, and he has emphasized that the best way to provide opportunity is through broad-based programs that help everybody on the basis of need. The question, as he's put it, is when you have done the most that you can as a practical matter to enforce the anti-discrimination laws and to provide opportunities in broad-based programs, have you done enough inclusion to build a strong society economically and to build strong institutions, be they firms or universities or what have you.

GRAHAM: And the answer to that, I assume, is that if you haven't, then you give preferences to minorities or women.

EDLEY: Well, the answer is that if you haven't, then you have to consider circumstances in which it makes sense to take race or sex into account in decisionmaking, but it is a question of how you do that, and even under current law you cannot do that in a way that is rigid and involves quotas, and you should not do it—you cannot do it in a way that compromises qualifications.

GRAHAM: But if either race or ethnicity or gender is the deciding factor, won't you have a problem? Isn't that really what's the whole problem here, resentment against that?

EDLEY: I don't think that it's simply that. It is very rare—the Piscataway case is one extreme example—when race actually becomes the single deciding factor. What the courts have spoken about, of course, is the permissibility of using affirmative action plans where race or gender is one of several factors, and it is used flexibly.

GRAHAM: But if it is, not the deciding factor, then the person doesn't get the job, and so it is done on the basis of other factors, and this affirmative action doesn't play any real role here.

EDLEY: Well, I don't think that's quite right, Fred. I mean, I think that the question is are there positions that are reserved for women only.

GRAHAM: That's not the only question, is it?

EDLEY: Or the question is, are there situations in which somebody who was not qualified got a job or got an opportunity merely by virtue of...

GRAHAM: Well, I don't think that's it either, Mr. Edley, because people, rightly or wrongly, feel aggrieved not that the person who got the preference was unqualified, but that the preference based on ethnicity or gender put them above the person who got no preference.

'When affirmative action is done the right way, the legal way, it does not result in discrimination, it is not based on race alone, and it does not sacrifice merit.'

CHRISTOPHER EDLEY JR.
Office of Management and Budget

EDLEY: Well, when you are dealing with a situation in which there are multiple factors—let's take the military, for example. The military believes that diversity, inclusion, affirmative action, are essential to its mission, essential to building a fighting force that's the best in the world. They also believe that they have to do affirmative action the right way, it's a matter of life or death. They can't compromise merit in order to do it. But when they look at a pool of people that they are considering for promotion, there are dozens of factors that are brought to bear in deciding who is going to get the promotion or who is going to get that critical assignment. So just as they pay attention to the rating in a particular training course and the kinds of experiences that someone has, they are paying attention to what do they need in order to build an inclusive military force.

GRAHAM: You know, we are almost back to where we started, and that is, I think I hear you say that in many, and maybe most instances, the people who feel aggrieved by this are simply misguided and don't understand.

EDLEY: I think that I would not put it that way. I would say that in some circumstances people are mistaken in believing that they have lost an advantage purely because of sex or race, when many factors have been at issue in the decision.

Second, I'd say that it is important for the public to understand the importance to the economy, not just the private fairness of an intended beneficiary, but the importance to institutions generally, the importance to the society generally, of being a more inclusive America. There is too much data about continuing discrimination and continuing exclusion to suggest that the time for these kinds of programs is long passed.

GRAHAM: Let me ask you this: I am starting to hear now actually from the White House that President Clinton may appoint some sort of a bipartisan commission. Is it possible that your report will simply be shelved, never see the light of day, and we will move on to this, and maybe there won't be any kind of position by the president until after the next election?

EDLEY: No. That's not at all possible. There has been discussion both on Capitol Hill and within the administration about the possibility of a commission. The president hasn't made up his mind about whether there should be such a commission or what its charter ought to be. But one thing is clear: There is nobody within the administration who is thinking about a commission instead of the president discussing his vision and beginning this national conversation.

GRAHAM: When is that likely to start? When is he going to come with that?

EDLEY: Within a couple of weeks. Weeks, not months.

GRAHAM: Based on your report to him?

EDLEY: Well, I think that the facts that we are trying to gather for him, about what works and what doesn't work, are important to him in making his decisions about what kinds of changes in these programs to recommend.

GRAHAM: What does that say about Jesse Jackson and people who agree with him that it was a mistake for the president to even dignify that? I understand that's his position.

EDLEY: The president's view was that too much of the debate about affirmative action was uninformed by the facts, untroubled by the facts. The best way to have a national conversation about the continuing need for inclusion and what programs are best able to produce that inclusion is to try to introduce some facts into the discussion. And the best way to try to blunt the political wedge issue that's being pursued by some is to try to introduce some facts into the

discussion about what's the reality of the way in which these programs are working and not working.

GRAHAM: So is the importance of what President Clinton is going to do as a result of what you're up to and the study you're making now going to be sort of education of the public, or a change perhaps in some of his policies?

EDLEY: Well, it will certainly be an education for the public. We expect that as he reviews the results of this study that we're doing he will draw some conclusions and identify some programs perhaps that need to be reformed, perhaps some that need to be scrapped, perhaps others that are working well where we should be doing more. But again, I don't want to get out in front of the president. He'll be speaking about his conclusions.

GRAHAM: Those that should be scrapped, why? Why don't they work, because they don't create more diversity, or because they generate resentment and a backlash?

EDLEY: Both. Either. Either would be a basis upon which to say that a program needs to be wiped off the books. And now bear in mind, everybody can't be pleased by everything all the time. On any side of this issue, it is not a political issue. If you talk to the political pundits about it...

GRAHAM: Oh, sure, it's a political issue. Please.

EDLEY: Well, the decision cannot be a political one, frankly, because when you talk to pundits on either side of the issue they give you opposing advice: There's no clear—even if you wanted to make this decision on the basis of politics, you wouldn't know which way to turn. The answer here is to talk about a vision for what kind of America we want to create.

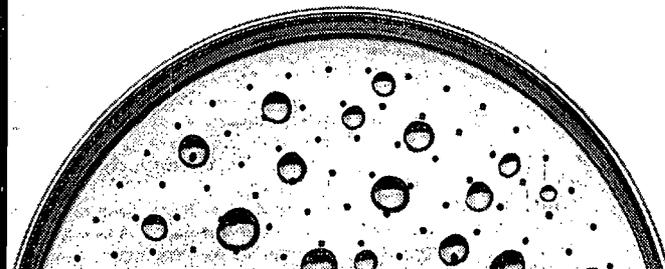
The
only time
you'll get steamed
is in the
shower.

The Latham Hotel
Georgetown-Washington, D.C.
A grand hotel for small meetings.

If you've ever had a small meeting become a huge disappointment, next time call The Latham Hotel. We specialize in small meetings, but with nine newly renovated meeting rooms, were not exactly short on space. All 8,800 elegant square feet can be flexibly arranged for an intimate board dinner up to a large cocktail reception.

And every bite is prepared by a big name: Chef Michel Richard and the staff of Citronelle. With food that hot and service so warm, you'll be keeping your cool.

Call our sales department at 202.726.5000 for more information.



ADA Touches Off a Battle Over Disabilities

ADA FROM PAGE 2

law in keeping with the Republican promise to reduce regulation of employers.

The EEOC itself has recognized that more clarity is in order. Agency spokeswoman Helia Pico says she expects new definitions to be issued by September.

But not everyone agrees that the definitions need narrowing. Evan Kemp, former EEOC chairman under President George Bush says the broad definition of disability is key to the law.

"You've got to look at the individual and see what he can do or can't do," says Kemp, who is confined to a wheelchair.

'LEGALIZED EXTORTION'

Employers and their lawyers, however, feel that some employees have taken advantage of the broad definition of disability, thereby causing companies to pay for costly litigation.

Michael Casey, a partner with Muller, Mintz, Kornreich, Caldwell, Casey, Crossland & Bramnick in Miami, says employers typically spend \$50,000 to \$75,000 on cases that are quickly tossed out by the courts. Because the legal costs are so high, most employers who are hit with a claim opt to settle, he says.

"That's what companies are faced with nowadays—legalized extortion," Casey says. "Out of hundreds of ADA cases that our firm has handled, I can recall two, three, four max that were legitimate cases."

If companies feel they are the victims of legal extortion, says Robert Meyers, a Fort Lauderdale, Fla., lawyer who represents the disabled, it is their own fault for settling frivolous claims.



Kim Watson has filed suit, claiming that his complaint to the EEOC got him fired.

"If management does its job," Meyers says, "it will be able to defend itself properly. The best defense the employer has is that the person just couldn't do the job."

Similarly, complaints that business has to foot the bill for defining a new law are met with little patience from lawyers like Peter Thomas, an associate at D.C.'s Powers, Pyles, Sutter & Verville, who advises employers and employees; and F. Scott Fistel who works with Meyers representing employees in ADA claims.

"The fact of the matter is this law is a very reasonable law," says Thomas, who wrote a book on the subject, *Complying with the Americans With Disabilities Act: A Guidebook for Management and People With Disabilities*.

"No business has ever gone or will go bankrupt as a result of ADA. And if they do, they're doing something wrong."

Employers, Fistel says, have brought their problems on themselves by ignoring the handicapped for so long.

"Why did it take 195 years to give the



Robert Meyers (left) and F. Scott Fistel, who represent employees in Americans With Disability Act claims, suggest employers bring some ADA problems on themselves.

disabled their civil rights?" Fistel asks. "What management is crying about is the disabled population crying for their rights."

NO IMPACT ON HIRING

But at the same time, according to a study by Vocational Econometrics Inc., the ADA hasn't increased employment of disabled people: The private Kentucky company studied census data and found that employment of the handicapped in 1993 was down 3 percent from 1992, while non-disabled people had higher levels of employment.

"It's still premature to draw conclusions on the ADA's overall impact, but the preliminary data are less than encouraging," A.M. Gamboa, the author of the study, said in a press release.

Robert Goodman, job development and placement coordinator for the Fort Lauderdale Lighthouse for the Blind Inc., says the ADA hasn't helped his clients get jobs.

"Even though the law is there, people are still reluctant to hire people with disabilities," he says. Goodman says employers are reluctant to hire disabled people in part because they don't want to pay for specialized equipment that might be necessary, even though they can get tax credits for these purchases.

The ADA may have had little impact on hiring, but the EEOC is being flooded with ADA-related complaints about terminations. Charles Caulkins of Fisher & Phillips' Fort Lauderdale office cites EEOC statistics that show 50.5 percent of the claims filed between July 26, 1992, and Dec. 31, 1994, involved employee discharges. Only 10 percent involved job applicants alleging they were denied employment because of a disability. Most of the rest of the complaints were brought by employees who allege their employer has failed to provide reasonable accommodation, followed by allegations of harassment and denied promotions.

"When you look at data like this," Caulkins says, "you question, do we even need the law? The law is not doing what it is designed to do."

That may be, McCormack says, but he disputes that it's an abuse of the system.

"Even though these might be claims that weren't contemplated when the law was passed, I don't think the law is being abused," McCormack says. "I think it is being tested."

And Powers, Pyles' Thomas says that reports of unreasonable claims are not as widespread as some news reports and defense counsel claim.

"Who wants to know that the law is

working well?" Thomas says.

But those who represent employers insist that employees are unfairly taking advantage of a broadly written law.

"Any little cut or scratch and they can level a charge," says Donald Works III, a partner at Fort Lauderdale's Ruden, Barnett, McClosky, Smith, Schuster & Russell.

"Employers lawyers are most annoyed by stress-based claims."

"The ones I find the most troublesome are the cases where people claim they are disabled because they have a stress disorder," says Terence Connor, a partner with Morgan, Lewis & Bockius in Miami and chairman of the Florida Bar's Labor and Employment Law Section. "When someone is disciplined on the job and can't take it, to what extent do you have to accommodate that disorder?"

"When we were all talking about adjusting to the arrival of the ADA, we were talking about wheelchairs," he says. "The stress-adjustment disorder is certainly beyond what people were thinking about when the ADA was passed. It is really critical that the courts determine if that will be treated as a disability or not."

So far, courts have allowed stress cases to go forward if the employee's problem is related to an underlying physical or mental disability.

In *Carrozza v. Howard County*, a federal judge in Baltimore held in April that Howard County, Md., did not have to eliminate stress from a clerk-typist job in order to accommodate a woman with a manic-depressive disorder. But in June, a federal judge in Illinois refused to dismiss an ADA claim involving stress that was filed against Household Finance Corp. The court ruled that an accounting clerk who is suffering from a physiological disorder that causes pain in her jaws; headaches, anxiety, and depression, could proceed with her claim that her company had failed to accommodate her under the ADA.

Since stress is impossible to see and individual reactions to it vary, stress disability claims are difficult for employers, says Maria Vila, human resources manager and EEO officer at Post, Buckley, Schuh & Jernigan, a Florida-based engineering company.

"A pregnancy is a pregnancy—you see a pregnancy," Vila says. "Stress is just how a person feels, not necessarily physical symptoms."

Miami lawyer Casey says stress is just one disability claim employers shouldn't have to defend, and he cites three other examples: In August, a California jury rejected the argument of a woman who

claimed Citicorp Credit Services violated the ADA by failing to make accommodations for her offensive body odor, and in April, a federal judge in Alabama dismissed a case filed by a food-service worker whose panic attacks left her unable to work during the busy hours at a seafood restaurant.

"It's terrible," Casey says. "The ADA gives virtually anybody a way to get into court."

Employees lawyer Robert Weisberg, a solo Miami practitioner, says corporate counsel have a "legitimate frustration."

"I think part of the problem is the ADA was designed to mainstream a huge segment of our population into the work force," Weisberg says. "It may take some time for the court system to give everyone guidance. . . . But you can't fault plaintiffs for seeking protection under the law for areas that are unclear."

Fort Lauderdale employee lawyer Fistel says employers create a lot of their own problems by retaliating against workers who file discrimination complaints rather than trying to accommodate them.

Fistel now is suing on behalf of a Florida Metrozoo employee who has one leg shorter than the other and spastic cerebral palsy. Kim Watson asked for a truck with an automatic transmission because his disability made it hard to drive a stick shift, Fistel says.

"They basically ignored his request," Fistel says. "It isn't like they didn't have one," since Watson's supervisor was driving an automatic. After Watson complained to the EEOC, he received bad reviews and was fired, Fistel says.

Dade County is fighting the case, saying that Watson's job was eliminated in a job reduction because he had the least



Lawyer-author Peter Thomas says the ADA is a "very reasonable law."

seniority—not because he was disabled.

Susan Norton, with Hogg, Allen, Norton & Blue in Coral Gables, Fla., says employers can protect themselves by not rushing to judgment when confronted with complaints of a disabling condition.

"You should ask if there is any reason they are not performing and open it up. Explore it and find out what is the accommodation," Norton says. "You don't have to take the employee's recommendation. . . . You show what you tried to do. Then, if the employee does not work out, you have documentation."

Morgan, Lewis' Smith says he advises his corporate clients to be "prudent, cautious." But in certain circumstances, he tells them, if the employees can't perform the job with practical accommodation, "we don't think you have to accommodate them."

—Janice Heller is a reporter for the Daily Business Review in Miami. This article was distributed by the American Media News Service. Judy Sarasohn, managing editor of Legal Times, contributed to this report.

PHOTOCOPY
PRESERVATION

ARMSTRONG WILLIAMS

Future course for affirmative action

I argue that affirmative action must not be reformed — but replaced. Two critical points must be addressed in this debate. First, what is appropriately practical in a real-world sense? Second, depending on the answer to the first question, must affirmative action then be a tool used as a redressing agent?

One might argue that the appropriate replacement for affirmative action is that which should have been used in the first place. That is, in the United States, following the abolition of slavery, the white majority should have paid a monetary penalty, both compensatory and punitive, for abuses and humiliations resulting from the "peculiar institution," in much the same way that Japanese-Americans were compensated (years later) for being interned in World War II. This is the reparations argument.

One of the advantages of this concept is that it seeks a specific economic response to a situation that started out economic (the slave trade) and became social (segregation). However, the current affirmative action approach has a social goal — "diversity" as its objective — with the issue of economics a mere afterthought.

Another advantage to reparations — one that should appeal to whites and, for that matter, minorities — is that it gets whites off the hook. It is a one-time payoff. No more white guilt. Just like a court case — the judgment is made, the plaintiff is paid by the defendant and people get along with their lives. Clear and simple.

But, of course, there is the world to think about. While reparations might be an appro-

redress to illegal discrimination, the truth is it is impractical to administer. Can you imagine? The Department of Reparations — larger than the IRS, no doubt — charged with authenticating the claims of all black people in the United States. Who are the legitimate descendants of slaves and who are not? And do they all get the same cash payment, or is it apportioned by how much "black" blood you have? Ah, the Jim Crow miscegenation rules return in a new guise.

Of course, African and West Indian immigrants and their descendants will assert that they have been discriminated against in the same way as their American cousins — because they look like them — and that they, too, should get part of the judgment. Does anyone doubt that under such a system the number of "black" people in America would triple or quadruple overnight? It would literally pay to be black. Needless to say, this will also be a full-employment bill for lawyers as well.

With the reparations argument failing the practicality test, let us turn to the second point. Must we think of affirmative action as a redressing agent? My belief is that if we constantly think in terms of "redressing," we are not going anywhere. Sad to admit, we are so many years removed from slavery that figuring out who should and should not be compensated is an impossible fantasy.

Although I believe current anti-discrimination laws, such as the Civil Rights Act of 1964, should remain on the books and be vigorously enforced, I do not find the argument that women's and minorities' rights would never have been realized without affirmative action persuasive. Too often, we seek easy and superficial reasons for massive social changes. In the case of women, there is a host of reasons why they have been able to excel economically — not the least of which are that more were beginning to attend college in the early '60s, before affirmative action was introduced at the academic level. New birth control measures allowed many women to put off having children, so they could choose to stay in occupations longer.

Similarly, for blacks, anti-discrimination laws and affirmative action regulations were enacted almost simultaneously. How can we say it was definitely one and not the other that brought some degree of economic lift to the black community? The answer is: We can't.

I will admit affirmative action has made many companies explicitly color- and gender-conscious. But part of the discussion we are having here is whether that consciousness does more harm than good.

Nonetheless, there are pockets of grievous economic deprivation across this country. We can't close our eyes to it. Much of it is concentrated in the black community, but there are many impoverished whites as well. As we enter the 21st century, a compassionate society should not be spending money on figuring out the many ways poor communities got that way. Instead, it should figure out how to get them out of poverty. Part of the problem with affirmative action is that it focuses too much on social inequities without developing an economic structure to truly benefit those most in need.

Thus, the best replacement for affirmative action would focus on economic opportunity and development — and not on social engineering.

Armstrong Williams is a Washington business executive, talk-show host and nationally syndicated columnist.

Washington Wire

A Special Weekly Report From
The Wall Street Journal's
Capital Bureau

EARTH DAY will be filled with a lot of political mudslinging.

Environmentalists will crash GOP media events Monday. Some will hand out a zero scorecard for Texas Rep. Stockman's record when he attends a beach cleanup. A Sierra Club cartoon shows an imaginary "Sen. Janus Hoodwink" bashing green laws "every day but Earth Day." The group runs radio ads attacking California Rep. Seastrand and others for their records on wetland protection.

Gingrich plans to spend Earth Day at Atlanta's zoo with schoolchildren. The Environmental Information Center issues a flier which claims that zoos are "the only place you'll see many of those animals" after "phony" environmentalists in Congress gut "the Endangered Species Act." Clinton plans a walk along the C&O Canal in Washington to unveil a parks initiative and attack the GOP.

The House GOP threatens to investigate the EPA for allegedly planning Earth Day events in districts of vulnerable GOP freshmen; the EPA denies it.

The 8(a) Awards Are Dropping

SBA Program's Minority Contracts Decline, Reflecting Legal Uncertainties

By Peter Behr
Washington Post Staff Writer

Federal agencies have significantly reduced purchases in recent months from minority contractors who rely on an embattled affirmative action program being reviewed by the Clinton administration.

From October through March, federal agencies awarded \$1.51 billion in contracts to minority-owned firms nationwide under the Small Business Administration's 8(a) program, which permits qualified minority-owned companies to get sole-source federal contracts or compete among themselves for other government business.

That amount is about 9 percent less than the \$1.66 billion in contracts awarded under the program during the same period in fiscal 1995, according to the SBA. By contrast, last year's funding was substantially above the fiscal 1994 level.

A similar pinch also is being felt by minority contractors in the Washington region, which has 1,300 firms in the 8(a) program, the largest concentration in the nation. Contracts awarded under

the program from October through March in the area—which includes Prince George's County, Montgomery County, the District and Northern Virginia through Loudoun County—fell to 270 contracts worth \$85 million from 385 contracts worth \$96 million in the year-earlier period, according to the SBA.

Also during that period, the number of modifications, or add-ons to existing contracts, awarded to Washington area firms under the 8(a) program fell to \$130.3 million from \$368.9 million a year earlier.

Federal purchases from all Washington area contractors rose in the course of fiscal 1995, by 9.2 percent.

Some minority contractors and their advocates say the sharp decline in 8(a) awards in the past year stems from uncertainty about the fate of the program, which faces stiff opposition by Republicans in Congress and a growing number of court challenges. The Clinton administration is expected to propose significant changes to the program soon in the wake of last year's Supreme Court ruling in the Adarand affirmative action case.

"With all of the rhetoric floating around about the life of the 8(a) program, a lot of my [government] clients are apprehensive" about using it, said Stephen C. McKinney, president and chief executive of Simtec Inc. in Manassas, a minority contractor that produces training simulators for use in tanks, aircraft and submarines.

"The uncertainty is having a major impact," said McKinney, whose firm has \$12 million in annual revenue. Contracting officers worry that if they earmark a project for 8(a) companies, funding could be jeopardized if the program is killed or altered, he said.

"A certain climate has been created," added Anthony W. Robinson, president of the Minority Business Enterprise Legal Defense and Education Fund. "We're finding contracting officials becoming very hesitant to channel contracts to benefit minority businesses."

The decline in 8(a) contract awards coincides with the Clinton administration's decision last October to suspend a Defense Department affirmative action program that set aside contracts for minority firms. Administration officials said then that 8(a) awards would increase to offset the demise of the defense program, but that has not happened.

Meanwhile, the administration has pursued a lengthy review of the 8(a) program to assure it meets requirements of the Adarand decision, which held that race-based affirmative action programs must be narrowly tailored to address specific instances of discrimination.

The White House has assured minority contractors and their allies that the administration's support for the 8(a) program remains strong. Senior White House adviser George Stephanopoulos, who is heading the administration's review of affirmative action programs, made that point last week at a meeting with minority contractors.

"We are not contemplating dismantling the program," Stephanopoulos said. He said the administration is

looking into the possibility that contracting officials are shying away from the program. "We've called the Cabinet in to make it clear we don't expect that to happen," he said.

That defense of the 8(a) program reassured Willie Woods, chief executive of Digital Systems Research Inc., an Arlington contractor that receives about 40 percent of its \$70 million in annual sales from the program. "I take him at face value," Woods said.

Nevertheless, a move to eliminate the 8(a) program will begin this spring in the House Small Business Committee, said Rep. Jan Meyers (R-Kan.), the committee chair. "I'm not against the firms. I am against the system," Meyers said.

"Sixty percent of the money stays right here in the Beltway. For the most part, it doesn't go to start-ups," she said. "Maybe for a time it [the program] was appropriate to make up for past discrimination. We're past that time now."

To rally support for the program, the National Federation of 8(a) Companies will begin a voter registration drive aimed at employees of such contractors, their family members, the companies' suppliers and community organizations where the firms are based.

Fernando Galaviz, the federation's chairman and head of Centech Group, a computer services firm in Arlington, said eliminating the program would prevent thousands of small, minority-owned firms from getting a chance to move up in the federal procurement process. "If not for 8(a), we would never have gotten the opportunity to break into the system."

Foes of Affirmative Action Target SBA's 8(a) Program

By PAUL M. BARRETT

Staff Reporter of THE WALL STREET JOURNAL

McCrossan Construction Co. has already helped hasten the demise of a \$1 billion-a-year federal affirmative-action program. Now the firm is coming back for more.

Last fall, facing a lawsuit filed by the Minneapolis-based builder, the Clinton administration decided that, in light of a tough new constitutional standard imposed by the Supreme Court last June, the government couldn't plausibly defend the \$1 billion Pentagon contracting set-aside program. The administration killed the program instead.



Tomorrow, in a closely watched hearing in U.S. district court in Las Cruces, N.M., lawyers for McCrossan will press a new lawsuit that seeks to strike down as reverse-discrimination an even bigger federal set-aside, the Small Business Administration's \$4.6 billion-a-year Section 8(a) program. This time, the administration will fight back.

The largest and best-known device for steering government procurement dollars to small minority-owned businesses, the 8(a) program is also under attack in federal court in Washington, D.C., where a similar hearing in a separate case is scheduled for 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 two suits have drawn intense attention among companies that do business with the government, both white-owned and minority-owned. The prospect that the 8(a) program will get struck down "scares me terribly," says Roxanne Rivera, who hopes that, with the SBA's help, her Albuquerque, N.M., firm can obtain a \$3 million-a-year general-construction contract at the White Sands Missile Range. "If they do away with these programs," she adds, "we'll go back to the way things were in the 1950s."

On the other side of this clash, Charles Gaasland, a former laborer who heads McCrossan's operations in New Mexico, maintains, "This whole [affirmative-action] thing is getting to the point of being

ridiculous, and we're going to try to stop it." McCrossan's latest suit was sparked by the setting aside of the very contract Ms. Rivera has her eye on. At full value, the work could be worth \$15 million over five years, and Mr. Gaasland declares that "any company that can handle that scale of work isn't disadvantaged."

As a formal matter, McCrossan's lawyers will be asking Judge Howard Bratton, a semi-retired Lyndon Johnson appointee, for a preliminary injunction stopping the government from reserving the White Sands contract exclusively for 8(a) participants. But McCrossan's legal arguments, if logically extended, could be used as the basis for striking down the entire program. The rulings from Judge Bratton and his counterpart in Washington, which could come in a matter of weeks, won't necessarily be definitive. But they likely will set

some of the preliminary terms of battle for other already-launched court fights involving a wide range of affirmative-action programs.

In its 5-4 ruling last June, the Supreme Court said for the first time that federal affirmative-action programs had to meet the same tough constitutional standard—known as "strict scrutiny"—imposed six years earlier on state and local programs. Justice Sandra Day O'Connor left some ambiguities in her majority opinion. But she rejected the Clinton administration's argument in the case that Congress, because of its position as a "co-equal branch of government" and its authority to enforce the constitutional guarantee of "equal protection," should get far greater leeway to use racially oriented policies than, say, a city council.

The \$1 billion Pentagon set-aside that was the target of McCrossan's first suit couldn't stand up under strict scrutiny, which requires that a program serve a "compelling government interest" in a "narrowly tailored" fashion. The military set-aside resulted in huge percentages of construction work in some areas being reserved for minority-owned firms—a result that clearly violated the narrow-tailoring requirement and would have resulted in its being eliminated even if there hadn't been the pressure of litigation, says Associate Attorney General John Schmidt.

In contrast, says Mr. Schmidt, the Justice Department's top affirmative-action official, the 8(a) program has safeguards designed to ensure that it narrowly serves its purpose of nurturing businesses owned by members of minority groups histori-

cally excluded from the commercial mainstream. Named for its place in the statute book, 8(a) gives the SBA authority to serve as an intermediary between minority-owned companies and federal agencies that want to see some of their work handled by such firms. The safeguards Mr. Schmidt points to include personal net-worth limits that are supposed to keep out the wealthy, oversight to make sure that companies are genuinely owned by minorities, and rules that force 8(a) companies to seek private-sector work and leave the program after a maximum of nine years.

"The contracts are targeted in a way that is reasonably directed at remedying the discrimination Congress is worried about," Mr. Schmidt asserts. Moreover, he adds, the O'Connor opinion left some room for lower courts to give Congress "deference" in determining whether there's a need for affirmative action in procurement. And Justice Department lawyers will point to voluminous congressional findings, as well as to statistics generated by the SBA, to illustrate the fact that nonwhites haven't been proportionately represented in the pool of companies getting government work.

McCrossan's lawyers will fire back that the Supreme Court has demanded much more: "particularized" findings of discrimination in the specific industry and market—in this instance, construction in the Southwest. The Clinton administration doesn't have those numbers—at least for now—and insists it isn't obliged to produce them. "It really is an open question... what statistics we'll need," says Eric Benderson, the SBA's litigation chief. "These cases will begin to answer it."

Affirmative action: Dole stirs black anger

Pat Buchanan and Bill Clinton aren't the only hurdles that remain in Bob Dole's path to the White House. There's another one — of his own creation — that threatens to reduce the Kansas senator to a footnote of presidential history.

It's a bill now making its way through Congress that is meant to gut federal affirmative action laws. Co-sponsored by Florida Rep. Charles Canady, the legislation was approved by a congressional subcommittee earlier this month. It's called "The Equal Opportunity Act." But don't let the name fool you.

What Dole and Canady are pushing is the neutron bomb of civil rights. The bill would wipe out the heart and soul of federal remedies for racial and gender discrimination while cynically leaving laws that prohibit such bias untouched. Dole, who once used a federal set-aside program to help a former aide land a \$26 million, no-bid contract with the Department of Defense, now decries the kind of preferential programs he took advantage of.



By DeWayne Wickham

Dole's conversion seems politically inspired. He introduced the Senate version of the legislation last year just as the campaign for the GOP presidential nomination was starting to heat up. It was a calculated effort by Dole to establish his conservative pedigree in a field of candidates that at the time included

Texas Sen. Phil Gramm, California Rep. Robert Dornan and Buchanan — three certifiable right-wingers. And it worked.

Having baited the social and cultural conservatives who populate the ideological tundra of the Republican Party into his fold, at least in part, with his attack on affirmative action, Dole remains committed to his bad bill. That could prove to be a costly mistake for the Senate majority leader's presidential ambition and the GOP's chances of reversing its decades-old loss of support among black voters. Dole's position plays into the hands of those who are trying to energize the black vote.

Bill Clinton would love nothing more than to see black voter turnout increase without his having to do much to bring it about. Like most Democratic presidential candidates in recent years, he struggles to hold onto the party's black voter base without losing more whites to the GOP.

Jesse Jackson's efforts to return the House to Democratic control also stand to gain. In recent weeks he's quietly mounted a campaign to increase black voter turnout in nearly three dozen congressional districts that were won by Republicans in 1994 with fewer votes than GOP candidates amassed two years earlier in losing efforts. Historically, blacks go to the polls in the greatest numbers when we vote against something — or someone. If Congress enacts the legislation before November, both Dole and the bill's other Republican supporters could become the targets of outraged black voters.

In 1956, Dwight Eisenhower won nearly 40% of the black vote. Four years later, in his race against John Kennedy, Richard Nixon was backed by 22% of all blacks who went to the polls. But the GOP's outreach to the anti-civil rights, white-flight Democrats who started leaving the party in the 1960s has eaten away at black support for the party we favored for most of the 100 years following the Emancipation Proclamation.

It's been nearly a quarter-century since Gerald Ford got 16% of the black vote in 1976. Since then, Republican presidential candidates have struggled to keep their support among blacks in the double digits as the party of Abraham Lincoln has become the bully pulpit of Buchanan and Dornan.

In anticipation of what might result from passage of the bill, Rep. John Boehner, chairman of the House Republican Conference, launched an effort last week at spin control. He sent a letter to House Republicans, telling them what to say, and do, in defense of the Dole-Canady anti-affirmative action bill. But no amount of doublespeak is likely to save Bob Dole — or the GOP — from the wrath of black voters come November.

Klan Members Face Federal Charges in Church Burning

By Pierre Thomas
Washington Post Staff Writer

Two members of the Christian Knights of the Ku Klux Klan face federal arson charges in connection with the June 1995 burning of a predominantly African American church in Greeleyville, S.C., that President Clinton visited last month, the Justice Department announced yesterday.

Gary Christopher Cox, 23, and Timothy Adron Welch, 24, each face up to 20 years in prison if convicted in the burning of the Mount Zion African Methodist Episcopal Church. The men were formally charged by federal authorities on May 10, but their case was kept sealed until yesterday. Justice Department officials declined to comment further, saying an investigation is ongoing to determine if others were involved in the blaze and if the two suspects might have participated in other church fires.

The two men have been in prison since June of 1995 on separate state charges.

The federal charges are in part based on an eyewitness account by Welch's brother, Richard, who asserts that he was riding with Cox and Welch on the night of the burning.

At 3:30 a.m. on June 20, 1995, Cox parked a car a short distance from the church, according to a federal affidavit describing Richard Welch's account.

Cox and Timothy Welch left the car and the witness observed them "approach the church, and take turns kicking door of the church," according to the affidavit filed by Bureau of Alcohol, Tobacco and Firearms agent Soott Etheridge. After a few minutes, Richard Welch walked into the church and "saw trash cans on fire inside the church, and Tim Welch adding paper to fire burning inside the trash cans, and Chris Cox standing on either a ladder or church pews, lighting insulation or rafters through a hole in the ceiling."

Cox later allegedly admitted in an interview that he attempted to set fire to carpet and sheet rock in the ceiling, but that Timothy

Welch set fire to wicker collection baskets and then fueled the blaze with Bibles and wooden chairs.

The burning of the Mount Zion A.M.E. Church is one of dozens that have captured national attention in recent weeks and sparked the most expansive federal civil rights investigation in the last decade. Since June 1, there have been fires at more than 50 houses of worship across the country, many of them African American churches. Justice Department officials say a federal task force of ATF and FBI agents has made arrests in nine of the recent incidents. Nine other fires have been ruled accidental.

Last month, Clinton visited the site of the burned church and attended the dedication of a new church built to replace it. Clinton recently signed legislation eliminating the \$10,000 in property damages threshold to engage federal law enforcement and doubling the prison penalties for certain crimes from 10 to 20 years.

'Rat Line,' Wrong Idea

VMI Official Rejects Using Rigor to Stop Women, Sees Decision Delay

By Spencer S. Hsu
Washington Post Staff Writer

RICHMOND, July 8—The Virginia Military Institute likely will wait until at least September before deciding how to respond to the Supreme Court ruling that struck down the college's men-only admission policy, the chairman of VMI's Board of Visitors said today.

Chairman William W. Berry also sharply rebuked VMI graduates who have said that the college should not alter its rigorous physical training program—known as the "rat line"—to accommodate women, a move that some alumni hope would dissuade women from applying to the 157-year-old Lexington school.

Women's rights groups that hailed the court's VMI ruling have said such a move would violate the decision's intent, and Berry seemed to agree.

"There is . . . a very small segment of alumni that say, 'Shave her head. Put her in a rat line. She won't last long.' . . . That's emotion talking, not logic," said Berry, a Richmond utility consultant.

In ruling that VMI cannot exclude women and keep its state funding, the court did not set a specific date for the college to change its admission policy. VMI officials will meet this week to begin deciding how to respond to the ruling. Their options are to keep VMI all-male by making it a private college—a move that state financial

reports indicate could cost as much as \$400 million—or to enroll women, which officials say probably would begin in the fall of 1997.

Berry said today that VMI directors need to study what would be involved in admitting women and that the Board of Visitors will appoint a panel this week to study the college's options and report back to the board in September. Berry said the review likely will include an examination of how the U.S. service academies made the transition to accepting female students two decades ago.

"The vast majority of people I've talked with . . . say [that] if the decision is made to go coed, we do it in the VMI style—that is, something we can all be proud of," Berry said. "That view completely rejects the idea of throwing them in the rat line. . . . It would be a program that would attract wom-

en, and then we would want those women to succeed and not fail."

Berry's comments contrasted with those of some bitter VMI alumni in the days after the court's ruling and were an effort to tone down the rhetoric just before the Board of Visitors begins three days of meetings Thursday in Lexington. They also reflected increasing questions among many VMI alumni and state officials about the feasibility of a plan backed by some of the college's graduates to take VMI private by having wealthy donors buy it.

State asset reports and fund-raising estimates indicate that buying VMI's buildings and equipment and creating an endowment to cover operating and capital expenses could cost as much as \$400 million. That's more than double the VMI alumni foundation's \$180 million endowment.

A report May 31 by the state's Division of Risk Management estimated the value of VMI's 81 buildings at \$137 million and their contents at \$38 million. The college gets \$10 million annually in state support, and replacing that could require an endowment of as much as \$200 million to generate an equivalent income, officials said.

Officials at VMI, the State Council for Higher Education and state budget analysts cautioned that the estimates give only broad outlines of the cost of taking VMI private. The figures don't reflect the value of VMI's 140 acres, its historic status and architecture, and the fact that the whole of an institution's value can differ from the sum of its components.

A VMI panel studying privatization has hired fund-raising, financial and educational consultants, but they have not yet reported their findings.

"I don't think there's any possibility [the Board of Visitors] could decide the issue this week," Berry said. The board's next meeting is Sept. 21.

About 200 female high school students a year have inquired about applying to VMI in recent years, but only six have done so since the June 26 court ruling, VMI officials said.

State lawmakers and Gov. George Allen (R) have kept their distance from VMI's deliberations. Allen reiterated through a spokesman today that any attempt to end VMI's status as a public college would face "significant hurdles."

Even if alumni could scrape together the money needed to take the school private, some lawmakers warned that the school would be accused of continuing sex discrimination and evading federal authority.

Are You White? Black? Red? Yellow?
All of the Above?

FORGET THE OLD LABELS.
HERE'S A NEW WAY TO LOOK AT

RACE



BY MICHAEL ORENSTEIN FOR THE WASHINGTON POST
1/11/94

By Boyce Kemsberger
Washington Post Staff Writer

YOU'RE NOT A RACIST. You know that deep down inside, all people are pretty much the same, no matter what color their skin or what shape their eyelids.

But you are curious about differences among these groups that we call races. Everybody is.

Why do most people from Europe have pale skin? Why is the hair of Africans tightly curled? Why do most Africans and most Europeans—and their descendants in this country—have eyes that are shaped alike but are so different from an Asian's eyes? Or maybe you wonder why people come in so many colors and facial forms in the first place. And many people wonder whether the differences are more than skin deep.

These are honest, scientifically worthy questions. In

fact, scientists have tried for centuries to answer them. After discarding many mistakes in their interpretations, today's researchers generally agree on three major discoveries:

① There are many more differences among people than the obvious ones such as skin color and facial form. Dozens of other variations have been found that are more than skin deep. We'll look at some of them shortly.

② These differences have been good for the human species. If we were not so diverse, we would not be such an evolutionary success. For example, without the protection of dark skin, our ancestors in Africa could not have survived the strong tropical sun. And when some of those ancestors migrated to the climate of northern

We all descended from black people.
Because humans evolved in Africa, the first people probably had dark skin. The white people of Europe descended from Africans who migrated north, between 100,000 and 200,000 years ago, and lost their coloring.

See RACE, H6, Col. 1

PHOTOCOPY
PRESERVATION

[Washington Post 11/16/94]

Human Variation Is More Than Skin Deep But Is Not Linked to 'Race'



Indian woman from Ecuador

Europe, where there is less sunlight, they could not have survived unless they lost most of their skin color. We'll get back to this too.

⑤ The third conclusion is probably the hardest to understand—races don't really exist, at least not outside our imaginations. We all use the word "race" as if it meant something specific and clear-cut. We talk and act as if blacks, whites and others belong to different groups that developed naturally long ago. But, according to most anthropologists today, that isn't true. They say races are mostly arbitrary categories invented by people in an attempt to understand a bit about how human beings evolved.

A few centuries ago, European scientists claimed that races were natural divisions of the human species. Some even argued that races represented a series of evolutionary stages, some "more advanced"

deal with the fact that within Africa live several kinds of people with much more dramatic differences than skin color. There are the world's smallest people, the Mbuti pygmies of Zaire who average 4-foot-7 and whose size is very similar to that of a group in the Philippines called the Negritos. And there are the world's tallest, the Tutsi of Rwanda, who average 6-foot-1—close to the average for the very, pale-skinned Scandinavian peoples. The two African ethnic groups live just a few hundred miles apart but have remained separate. In size, they more closely resemble other ethnic groups who live very far away.

Among Africans are still other kinds of diversity that are more than skin-deep. Such differences within the usual broad racial groups have led most anthropologists to say it makes no sense to think that races are biological categories. You can classify specific traits but not people who are bundles of different combinations of traits.

Sherwood L. Washburn, an anthropologist at the University of California at Berkeley, has long questioned the usefulness of racial classification. "Since races are open systems which are upgrading, the number of races will depend on the purposes of the classification."

vantage in survival, eventually those with it will outnumber those without it. Skin color provides an excellent example. People whose ancestors have lived a long time in the tropics have dark skin. And the farther people lived from the equator, the lighter their skin. Even southern Europeans usually are darker than northern Europeans. In Africa, the darkest skins are near the equator, but at the northern and southern ends of the continent, the skins are lighter. In southern India, many people are as dark as the black Africans.

⑥ The mutations that change genes are about as light as a southern Euro-pean. Whatever the skin color, it is all due to different amounts of a dark brown substance called melanin.

⑦ Genes that really fit: A gene is a unit of genetic code (made of DNA) that tells a cell how to make one kind of protein. This can make a small difference or trigger a cascade effect with many large differences. The mutations that change the gene's code usually are the result of errors in copying the DNA when it is being prepared for a new sperm or egg.

PHOTOGRAPH BY GUY LAWRENCE

This north-south spectrum has evolved in response to the sun's intensity in local regions. Too much sun causes sunburn and skin cancer. Too little deprives the body of vitamin D. Without this vitamin, bones grow crooked, resulting in a disease called rickets. In the tropics, the sun is so strong that enough rays through dark skin to make all the vitamin D a person needs.

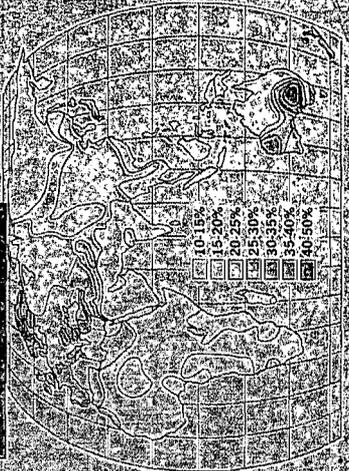
When (dark-skinned) people first migrated out of Africa and into northern climates, they may well have suffered rickets, which also can deform the pelvis, making childbirth dangerous or impossible. But because skin color can vary slightly even within a family, lighter-skinned children would be less affected. As a result, they would probably have more children than their darker relatives. And those children would be even more likely to have lighter-skinned children of their own.

After many generations, the natural effect of the combination of dark skin and low sunlight would select for people who had both more and more of their original color. This is Darwin's famous selection at work.

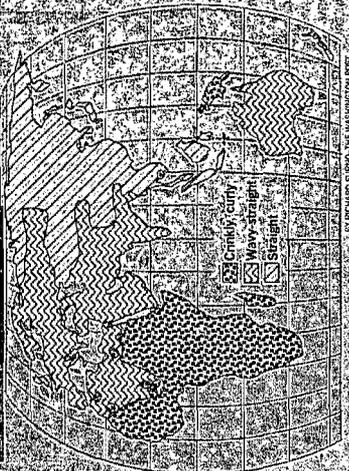
Only a few external differences other than color appear to provide a survival advantage. The strongest case can be made for nose shape. People native to colder or drier climates tend to have longer, more-beak-shaped noses than those living in hot and humid regions. This is because the nose's job is to warm and humidify air before it reaches the sensitive lungs. The longer the air path to the lungs, the warmer and more humid the air.

Migration is a key player in the evolutionary drama.

FREQUENCY OF BLOOD TYPE BY CLIMATE FORM



HAIR FORM



SO HOW COME PEOPLE ARE DIFFERENT?

Biologists say most racial differences arose as a result of a process called natural selection. This is the Darwin discovered in the 19th century and it explains a lot about how evolution happens in a nutshell. It means that if a mutation—a change in a person's genes—provides a useful feature, the person with that change is more likely to be healthier, live longer and most important, for evolution, have more children. Since the change is in the genes, the children inherit it. Because the change gives each person an advantage, it tends to spread.

There really are races, shouldn't you be able to see them by looking at these? The maps show the distribution of three genetic traits in people whose ancestors were living in each area since ancient times. Where would you draw the racial boundaries?

The fact is that these and all other heritable traits are distributed independently in other words, just because you have one trait, it has nothing to do with whether you have another one. Consider the abnormalities of Australia. Their hair form (wavy-straight) is like that of European natives. Their skin color is like that of African blacks and their prevalence of blood type O resembles that of the majority of the world from Europe to southern Asia.

You might think it would help to consider additional features such as the shape of noses, lips and eyes. But it doesn't. They do not seem to be genetically distributed in the same way as their distribution would be even more confusing.

SET UP YOUR OWN RACIAL CLASSIFICATION

There really are races, shouldn't you be able to see them by looking at these? The maps show the distribution of three genetic traits in people whose ancestors were living in each area since ancient times. Where would you draw the racial boundaries?

SKIN COLOR



HOW COME PEOPLE ARE DIFFERENT?

Biologists say most racial differences arose as a result of a process called natural selection. This is the Darwin discovered in the 19th century and it explains a lot about how evolution happens in a nutshell. It means that if a mutation—a change in a person's genes—provides a useful feature, the person with that change is more likely to be healthier, live longer and most important, for evolution, have more children. Since the change is in the genes, the children inherit it. Because the change gives each person an advantage, it tends to spread.

There really are races, shouldn't you be able to see them by looking at these? The maps show the distribution of three genetic traits in people whose ancestors were living in each area since ancient times. Where would you draw the racial boundaries?

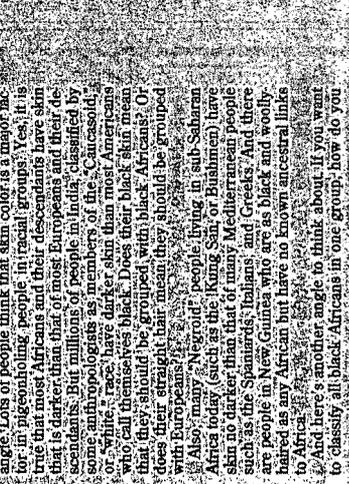
The fact is that these and all other heritable traits are distributed independently in other words, just because you have one trait, it has nothing to do with whether you have another one. Consider the abnormalities of Australia. Their hair form (wavy-straight) is like that of European natives. Their skin color is like that of African blacks and their prevalence of blood type O resembles that of the majority of the world from Europe to southern Asia.

You might think it would help to consider additional features such as the shape of noses, lips and eyes. But it doesn't. They do not seem to be genetically distributed in the same way as their distribution would be even more confusing.

SET UP YOUR OWN RACIAL CLASSIFICATION

There really are races, shouldn't you be able to see them by looking at these? The maps show the distribution of three genetic traits in people whose ancestors were living in each area since ancient times. Where would you draw the racial boundaries?

SKIN COLOR



...of evolution. ... source more accurate than others. The old-time researchers knew of very few differences among various peoples and did not fully understand how evolution works. In fact, the concept of race was developed long before 1859, when Charles Darwin, the English naturalist, published his discoveries about evolution.

In 1735, Carl von Linné, the Swedish naturalist, better known as Linnaeus, said there were four races: Over the years, dozens of different classifications have been proposed. A four-color rainbow? In the early 18th century, Linnaeus established the system of classifying living things that is still in use. That's the one that goes kingdom, phylum, class, order, family, genus and species. In 1735, Linnaeus classified people in these four groups, which have long since been dropped.

More important, the more that researchers study people worldwide, the more they realize that if they take into account all the individual differences, they get a very different picture of what is similar or dissimilar among groups. If you consider each feature by itself, you see that a person of one race can be more like a person of another race than he or she is like someone of their own race.

Take blood, for example. African blacks may be any of the four major blood types: A, B, O and AB. The same is true of European whites and of Asiatic peoples. If you're type O, your blood is more closely related to that of any other type O person—regardless of race—than it is to a type B or type A of your own race. If you need a blood transfusion, you shouldn't care whether the donor's skin color is like yours; you want someone with blood like yours. The same is true of organ transplants: Your closest genetic match for a donated kidney, for example, could easily be somebody of another race.

The same, race-blind relationships are true of many physical factors, from the critical to the trivial. Take ear wax, which comes in two kinds. One is wet and sticky; the other is dry and crumbly. The vast majority of Africans and Europeans have the same kind—wet and sticky—while the vast majority of Asians have the dry kind.

We can also look at racial differences from another angle. Lots of people think that skin color is a major factor in grouping people in racial groups. Yes, it is true that most Africans and their descendants have skin that is darker than that of most Europeans and their descendants. But millions of people in India, classified by some anthropologists as members of the "Caucasoid" or "white" race, have darker skin than most Americans who call themselves black. Does their black skin mean that they should be grouped with black Africans? Or does their straight hair mean they should be grouped with Europeans?

Also, many Negro and people living in sub-Saharan Africa today (such as the Kung, San, or Bushmen) have skin no darker than that of many Mediterranean people such as the Spaniards, Italians, and Greeks. And there are people in New Guinea who are as black and woolly haired as any African but have no known ancestral links to Africa.

And here's another angle to think about. If you want to classify all black Africans in one group, how do you

PHOTOCOPY PRESERVATION

RACE AND INTELLIGENCE

Arguments that one human population is intellectually superior to another are fairly new in human history, dating mainly from the time of massive enslavement of Africans. The idea of using Africans in the New World, however, grew out of the racist assumption that they were superior to the American Indians. Bartolome de las Casas, a Spanish priest of the 1500s, argued that Indians being enslaved by the Spanish conquerors were not up to the "civilized" work demanded of them in farming, mining and industry. He argued that the colonial rulers should import more advanced peoples such as Africans.

Much later, when some people challenged the morality of slavery, defenders claimed that Africans were not fully human, especially in intellect.

In modern times, researchers have made many tests of the mental powers of all groups of people and repeatedly found that if they test people of equivalent social and educational background, they find no significant differences. In 1961, the council of the American Anthropological Association ruled unanimously that it knew of no evidence that any population was less capable than any other of participating fully in modern, complex society. Further studies have reinforced that conclusion.

their genes to become so different that the groups no longer can interbreed. The fact that all peoples can intermarry and have healthy children proves that we all remain members of the same species. Our differences are trivial in a biological sense. In fact, geneticists have estimated that the variations in genetic makeup that account for racial differences occupy only about 0.01 percent of our genes.

SO, WERE THERE EVER PURE RACES?

Until the mid-20th century, most researchers assumed that so-called pure races once existed. Those early thinkers had great trouble figuring out who belonged in which race and decided that was simply because migrations and intermarriage had mixed up, or blended, the once-distinct traits. Today, most anthropologists hold that pure races never existed. They think that human beings have always been migrating and intermarrying, spreading new genes worldwide.

Genes useful in all parts of the world would spread quickly—those, for example, that might improve the immune system. Surely, the fastest to spread were the genes that improved the brain. In fact, anthropologists who study the earliest human beings agree that a fully modern brain evolved long before any of today's races came into existence.



Ainu man from Japan

Genes useful only in some areas would tend not to become common when they were carried to other places. Dark skin, for example, is not an advantage in cold climates. Light skin is a serious disadvantage in tropical climates. So skin color genes could not flow far and persist, at least not until the age of milk fortified with vitamin D, large hats and long sleeves.

Still, many genes that had no significant good or bad effects—such as those of blood type or ear wax—can spread far and did. But few have come to 100 percent prevalence anywhere. In fact, the varying degrees of prevalence of certain traits provides a clue to the kind of race mixing and genetic blending that has always been part of human history.

Look at the three maps with this article. They plot the Old World distribution of three major genetically controlled features: type A blood and two supposed markers of race—hair form and skin



Geneticists know that if all members of a species stay in one breeding population, all will stay the same or change in the same ways. But if some members move away and become isolated from the rest of the species, the two groups evolve in different ways. Any mutation in one group eventually can change it forever, but can have no effect on the other group as long as the two don't interbreed.

So what's a geneticist? It's a scientist who studies how various traits and diseases are inherited.

Human beings are very mobile. They like to pull up stakes and move long distances before setting down. Many times, the migratory group loses all contact with the old folks at home. This is why hundreds of different languages have developed. If our ancestors had stayed in touch over thousands of years, we'd probably all speak the same language today. Another result of losing touch is reproductive isolation, which means that any changes in the genes cannot be transmitted to another group.

The fact that people of so many different physical types do exist is proof of long periods of reproductive isolation.

SEXUAL SELECTION PLAYS A ROLE

Aside from the examples above, there is little evidence that any other visible differences among people have any practical advantage. For example, nobody knows why Asiatic people have that special form of upper eyelid or flatter facial profiles.

The thin lips of northern Europeans and many Asians have no known advantage over the full lips of many Africans and Middle Eastern people. Why do middle-aged white men go bald so much more often than the men of other backgrounds? Why does the skin of the Kung, San, or Bushmen wrinkle so heavily in middle age when that of most other Africans resists wrinkling far better than that of Europeans?

One possible explanation is another evolutionary process that Darwin also discovered—sexual selection. This differs from natural selection, in which the environment chooses who will survive. In sexual selection, the choice is up to the prospective mate.

In simple terms, ugly persons will be less likely to find mates and pass on their genes than will beautiful people. And, of course, the definition of beauty varies from culture to culture. Consider the fact that white Europeans and their descendants are usually so much hairier than Africans or Asians. Some anthropologists have suggested that this evolved because white women like female lions, preferred males with imposing facial fur.

There is a third way that differences can appear in isolated groups—especially traits that are neither good nor bad for a person. Imagine a family with straight fingerprints. If the children marry people with curved fingerprints, their new genes (offering no advantage) might never become common or might even disappear. But if this one family strikes out on its own and founds a new settlement in some remote region, straight fingerprints eventually might be the rule among all the family's descendants. This kind of evolution is called genetic drift.

Although reproductive isolation is essential to produce differences, there is plenty of evidence that no group of humans has stayed isolated for more than a few thousand years. For one thing, a very long separation between two groups allows



Woman from Italy

Going with the gene flow. Biologists often find it useful to think of some kinds of change happening as a result of gene flow, as if genes and the traits they influence were moving from one human population to another. Of course, the flowing actually happens as people from one group interbreed with those from another.

color. The traits are largely independent of one another. No combination of traits can be offered as defining any race.

The bottom line, anthropologists agree, is that the science does not support the idea of races as natural units, now or in the past. You cannot pick just one or even a few traits and claim that they define a biological category. People have tried to do this using the most visible features such as skin color, facial form, but have ignored all unseen genetic variability, which doesn't fit the visible pattern.

Perhaps if humans were blind to everything but ear wax, we would say there are two races. If all that mattered was ABO blood type, we would argue that there are four races.

SO WHAT?

After the many misunderstandings of the past, the great lesson of anthropology, biology, and genetics is that all people are the same in the essentials but are highly diverse in a few things. These differences have arisen not because there are fundamentally different kinds of people but simply because we are a restless, curious, hopeful, migratory species whose intelligence has allowed us to make a good living in almost every environment on Earth.

Human beings are more mobile than ever, and genes are flowing farther and more widely than ever. In many parts of the world this is blending once-diverse features. But if the past is a guide, no amount of blending is likely to take away the diversity that has made the human species so successful and that surely will prove useful as the environment on Earth changes in centuries ahead.

IF YOU WANT TO KNOW MORE, HERE ARE THREE GOOD BOOKS:
Human Variation: Races, Types and Ethnic Groups, 3rd edition by Stephen Molnar, Prentice-Hall, 1992. A detailed look at what science knows about variation among humans.
The Mismeasure of Man, by Stephen Jay Gould, Norton, 1981. A highly readable treatment of science's early misadventures, some brutal and tragic, with the concept of race.
The Evolution of Racism, by Pat Shipman, Simon & Schuster, 1994. A history of race theory and racism from Darwin's day through the ill-conceived eugenics movement and Nazism to the modern view.



Man from Ethiopia



Woman from Thailand