Recent Developments in American Affirmative Action Law and Their Implications for Japanese-Owned U.S. Companies

PAULINE C. REICH, J.D.*

Introduction

During the Spring and Summer of 1995, a major rebellion against thirty years of American legislation, government policy and incoherent court interpretations erupted and picked up momentum throughout the United States at the Federal and state levels. Similar to the Boston Tea Party, when the American colonists rebelled against the British by throwing tea into Boston Harbor to protest unfair taxation without representation, and Proposition 13, a state referendum passed in California to halt state spending and intolerably rising property taxes, the latest movement is an outpouring of repressed public dissatisfaction with Federal, state and local government measures viewed by some citizens as unfair, oppressive, excessive and denying them equal protection of the laws.

The rolling back of thirty years of Affirmative Action may prove to be not only the rallying cry of the next Republican candidate for the U.S. Presidency, but the undoing of case law, legislation and policy requiring American employers to engage in Affirmative Action to recruit, hire, promote and occasionally to retain women and minority group employees when they are downsizing. Affirmative Action requirements have also been applied to U.S. branches and subsidiaries of Japanese and other foreign-owned companies which are 1) required to voluntarily take such steps because they are contractors of Federal, state and local governments; or 2) have been

* Associate Professor, Waseda University, School of Law, Tokyo. Member of the Bar of the State of New Jersey, U.S.A.

The author wishes to thank Counsel Connect for the opportunity to access the latest legal developments in the United States on-line from Japan via its Affirmative Action seminar held in Spring 1995, and the library of related documents.

found to have violated Title VII of the Civil Rights Act of 1964 with respect to discrimination against individuals or classes of employees; or 3) have agreed to take Affirmative Action as the result of a compliance audit by the Office of Federal Contract Compliance Programs, U.S. Department of Labor, in order to continue to receive the benefit of Federal government contracts. This article will review the latest developments and possible future implications for Japanese-owned U.S. companies. Longstanding American concepts of Affirmative Action are also under siege with respect to contracts and subcontracts with government entities, university admissions, appointments to boards, commissions and judicial nominating bodies. Recent related developments in these areas will also be briefly surveyed.

The intent of the article is to provide a scholarly review of the latest legal, legislative and policy developments in Affirmative Action law arising in 1995. Although the author intends to be neutral, she admits to a predisposition in favor of Affirmative Action when it is justified by past history and present individual disadvantage, and an antipathy when it is overly broad and unduly trammels the rights of some members of society. It is difficult to be perceived as neutral when emotions are running high. Trying to maintain a detached, analytic stance in this situation is analogous to trying to mediate a heated controversy, or trying to remain a friend to both parties after a divorce. To my friends on both sides of this round of the great debate, I ask your patience with each other and openness to the opposing view, in the hope that there is a way to develop a moderation of both viewpoints into a working consensus for the future. In the words of Abraham Lincoln:

> A house divided against itself cannot stand. I believe that government cannot endure permanently, half slave and half free.
>
> I do not expect the Union to be dissolved—I do not expect the house to fall—but I do expect it will cease to be divided.

It will become all one thing, or all the other...[1]

We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching... to every living heart and hearthstone, all over this broad land, will yet swell the chords of the Union, when again touched, as surely they will be, by the better angels of our nature.[2]

Background to Recent U.S. Developments

The requirement that government contracts contain a clause prohibiting the contractor from discriminating in employment on the basis of race, color, creed and national origin has been a part of Federal contracting policy since 1941, when President Roosevelt signed Executive Order 8802, outlawing discrimination in the Federal government and in the defense industries. It has been strengthened in Executive Orders issued by five successive Presidents: Roosevelt, Truman, Eisenhower, Kennedy and Johnson.

The early Executive Orders prohibited discrimination alone, but it was found that something more than a policy of non-discrimination was needed to overcome the lingering effects of past discrimination and continuing barriers that prevented minorities from being hired and promoted on the basis of merit. In its Final Report to President Eisenhower, the President's Committee on Government Contracts, headed by then-Vice President Richard Nixon, concluded:

> Overt discrimination, in the sense that an employer actually refuses to hire solely because of race, religion, color or national origin is not as prevalent as is generally believed. To a greater degree, the indifference of employers to establishing a positive policy of nondiscrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality.

1 Abraham Lincoln, Speech, Bloomington, Indiana, (May 19, 1856), *in* THE BULLY PULPIT; QUOTATIONS FROM AMERICA'S PRESIDENTS 244 (Elizabeth Frost, ed., 1988).

2 Abraham Lincoln, First Inaugural Address (March 14, 1861) Frost, *supra*, note 1.

President John F. Kennedy incorporated the concept of "affirmative action" into Executive Order 10925, which he issued in 1961. Affirmative action was not contingent upon a finding of discrimination. Rather, Executive Order 10925 imposed on all covered contractors a general obligation requiring positive steps designed to overcome obstacles to equal employment opportunity. In 1965, President Johnson issued Executive Order 11246, which assigned responsibility for the government's contract compliance program to the Secretary of Labor. The Nixon administration issued regulations providing a blueprint for Affirmative Action programs, including numerical goals, for the first time in 1970.[3]

Title VII of the Civil Rights Act of 1964: Employment Discrimination against Individuals and Classes of Employees

The U.S. Equal Employment Opportunity Commission (EEOC) is charged with enforcing the Federal anti-discrimination laws which apply to employment. Its principal focus is on individual charges of discrimination, while the Office of Federal Contract Compliance Programs (OFCCP) of U.S. Department of Labor is charged with addressing systemic discrimination. The EEOC enforces Title VII of the Civil Rights Act of 1964, Titles I and V of the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the Equal Pay Act. OFCCP pursues enforcement through an administrative hearing process, while EEOC may litigate on behalf of employees or grant them rights to bring their own lawsuits. Both agencies also conciliate cases.

The Office of Federal Contract Compliance Programs and Executive Order 11246

The Office of Federal Contract Compliance Programs (OFCCP)

3 Hearings on Affirmative Action in Employment: Hearings Before the House Committee on Economic and Educational Opportunities, Subcommittee on Employer-Employee Relations, 104th Cong., 1st Sess. 2 (June 25, 1995) (testimony of Shirley J. Wilcher, Deputy Assistant Secretary for Federal Contract Compliance, Employment Standards Administration, U.S. Department of Labor).

of the United States Department of Labor administers equal employment opportunity programs that apply to government contrators and subcontractors under Executive Order 11246 and Section 503 of the Rehabilitation Act of 1973. These laws ban discrimination and require Federal contractors and subcontractors, as a condition of receiving government contracts, to take affirmative action to ensure that minorities, women, and individuals with disabilities have an equal opportunity to compete for employment.[4]

Approximately 22 per cent of the U.S. labor force (about 26 million workers) is employed by Federal contractors or subcontractors subject to the above laws. In Fiscal Year 1993, the covered Federal contractors included 92,500 non-construction firms and an estimated 100,000 construction firms. The Federal government awarded more than $161 billion, including 176,000 prime contracts, in Fiscal Year 1993.[5]

Federal Contractors' Obligations: Affirmative Action

The regulations implementing Executive Order 11246, found at 41 CFR Part 60, set forth the procedures for implementing the nondiscrimination and affirmative action requirements. Under the regulations, a non-construction contractor or subcontractor, i.e., a contractor that provides supplies and services to the Federal government under a Federal contract for $50,000 or more, and which has 50 or more employees, is required to develop a written Affirmative Action Plan (AAP) for each of its establishments. The Affirmative Action Plan is kept on file and a program is carried out by the contractors. It is submitted to OFCCP only if requested to carry out a compliance review, a type of audit.

OFCCP indicates that viable affirmative action programs have several common components: problem identification (absences from and concentrations in certain occupations of women and racial minorities); self-analysis to determine causes(s) of problems; action-oriented programs to overcome the problems; and goals to measure

4 Wilcher *supra* note 3 at 13.
5 *Id.* at 2.

the outcome of the action taken.

The first step required in developing an Affirmative Action Plan is to prepare a workforce analysis, which is a diagram of the contractor's workforce and the representation of employees by race, gender and ethnicity. The analysis is used to help the contractor determine whether there are jobs within the business that either do not employ minorities or women, or whether women or minorities are clustered or concentrated. The result of the analysis may yield information that suggests that such groups are not being hired, advanced or compensated comparably to other employees. The employer may then determine, through self-analysis, how the absences or concentrations came about.

The contractor is then expected to prepare a utilization analysis by 1) dividing the workforce into job groups; 2) determining the percentage availability of qualified minorities and women for each job group; and 3) comparing the utilization of women and minorities in the contractor's then-existing workforce with their availability for each job group. If there are fewer minorities or women in a job group than would be reasonably expected by their availability, the contractor must establish a goal. When underutilization is identified by the contractor, it must assess its employment procedures to determine which, if any, have contributed to the underutilization, eliminate any such policies, procedures or practices that are unjustified, and initiate action measures as part of its Affirmative Action Program.[6]

Goals, Timeframes, Preferences and Quotas

The regulations by which OFCCP administers Executive Order 11246 explicitly state that, "Goals may not be rigid and inflexible quotas which must be met, but must be targets, reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."[7]

OFCCP was one of the signatories to a 1973 Inter-agency Memorandum, which is a policy statement on the subject of quotas.

6 *Id.* at 4–5.

7 15 U.SC. §§637 (d)(2), (3).

The Memorandum described goals to be "a numerical objective realistically established based on the availability of qualified applicants in the job market and expected vacancies," while quota systems were described as "any system which requires that considerations of relative abilities and qualifications be subordinated to considerations of race, religion, sex or national origin in determining who is to be hired, promoted or otherwise favored in order to achieve a certain numerical position...."[8] The opponents of any form of Affirmative Action call it an unfair, preferential quota system; the supporters call it a tool for bringing about equal opportunity which, once it has achieved its goal, should not be continued.

Minority and Women-Owned Business Enterprises and Set-Asides

Certain Federal programs have been set-aside programs, that is, they have been designed to benefit certain classes of persons presumed to suffer from a disadvantage due to race or gender. This has also been the case with respect to minority admissions to medical school and some special scholarship programs for minorities. The Small Business Administration, for example, requires that a subcontracting clause must appear in most Federal agency contracts. It requires the clause to state that "(t)he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the (Small Business) Administration pursuant to section 8(a) of the Small Business Act."[9]

There is a complex scheme of Federal statutes and regulations applying to such contractors. The Small Business Act,[10] declares that it is "the policy of the United States that small business concerns, (and) small business concerns owned and controlled by socially and economically disadvantaged individuals... shall have the maximum practicable opportunity to participate in the performance

8 Wilcher *supra* at 5–6.

9 41 C.F.R. 60–2.12(e).

10 72 Stat. 384 (codified as amended at 15 U.S.C. §631 *et seq.*)

of contracts let by any Federal agency."[11] The Act defines "socially disadvantaged individuals" as those who "have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities,"[12] and it defines "economically disadvantaged individuals" as those "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[13] To further the policy stated in §8 (d)(1), the Act established a "Government-wide goal for participation by small business concerns owned and controlled by socially and economically individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year."[14] The Small Business Administration implements the statutes in a variety of ways, two of which have been reviewed recently by the U.S. Supreme Court (see *Adarand* discussion *infra.*). The §8 (a) program is available to small businesses controlled by socially and economically disadvantaged individuals as the SBA has defined the terms. The program automatically confers subcontractor compensation to participating contractors. To participate in the §8 (a) program, a business must be "small" as defined in 13 CFR §124.102 and it must be 51% owned by individuals who qualify as "socially disadvantaged". The SBA presumes that Black, Hispanic, Asian Pacific, Subcontinent Asian and Native Americans, as well as "members of other groups designated from time to time" by SBA are "socially disadvantaged". It also allows any individual not a member of a listed group to prove social disadvantage "on the basis of clear and convincing evidence" as described in §124.105 (c). Social disadvantage alone is insufficient to establish eligibility; SBA requires each program participant to prove "economic disadvantage" as well according to the criteria in §124.106 (a).

The other SBA program at issue in *Adarand* (see discussion, pages

11 §8 (d)(1), 15 U.S.C. 637 (d)(1).
12 §8 (a)(5).
13 §8 (a)(6)(A), 15 U.S.C. §637 (a)(6)(A).
14 15 U.S.C. §644 (g)(1).

18–21, *infra*) is the 8 (d) subcontracting program. The SBA presumes social disadvantage based on membership in certain minority groups, as in the 8(a) program, and requires an individualized yet less restrictive showing of economic disadvantage. A different set of regulations says that members of minority groups wishing to participate in the 8(d) subcontractng program are entitled to a race-based presumption of social *and* economic disadvantage.[15] The Surface Transportation and Uniform Relocation Assistance Act of 1987,[16] adopts the Small Business Act's definition of "socially and economically disadvantaged individual" and adds that "women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection."[17] It is this type of presumption of disadvantage that has been attacked in the courts and legislatively in the past months. Non-minority contractors have felt that they have been denied the equal protection of the laws by overly broad presumptions about minority groups reflected in federal and state legislation, policies and programs.

Equal Protection

The Fourteenth Amendment of the United States Constitution provides that "No State shall...deny to any person within its jurisdiction the equal protection of the laws". A number of the legal challenges to Affirmative Action have stated that special treatment for some racial and ethnic groups—and women—constitute unequal and unfair application of the laws. Recently there has been concern that the Federal government is not applying the same standard to its programs as is required of State governments under the Fourteenth Amendment. The parallel Constitutional provision applicable to the Federal government is the Fifth Amendment, which provides that, "No person shall... be deprived of life, liberty, or property without due process of law."

15 48 CFR §§19.001, 19.703 (a)(2)(1994).
16 Pub. L. 100–17, 101 Stat. 132.
17 §106 (c)(2)(B), 101 Stat. 146.

The Concept of Affirmative Action in the United States and Elsewhere

A. Lack of Definition under U.S. Law

There is no formal definition of Affirmative Action under United States law. There is a general notion under American law and the laws of a number of other countries that some members of society are presumed to be disadvantaged by historic or present discrimination, and require special action by public or private sector entities in such areas as employment, education, securing government contracts or appointment to selective bodies such as committees, boards, and commissions.

B. Functional Definitions of Affirmative Action

A few working definitions of Affirmative Action as practiced in the United States have been found in reviewing the literature and testimony before legislative bodies. For example, in the July 19, 1995 report to the President of the United States of his staff's review of Federal Affirmative Action programs, the working definition for purposes of the review is that affirmative action "is any effort taken to expand opportunity for women or racial, ethnic and national origin minorities by using membership in those groups that have been subject to discrimination as a consideration."[18] The definition did not include instances in which Affirmative Action was adopted due to a court order or a consent decree after a finding of discrimination by the court.

Under Executive Order 11246 and in the employment context, Affirmative Action is "the set of positive steps that employers use to promote equal employment opportunity... (It) refers to the process that requires a government contractor to examine and evaluate the total scope of its personnel practices for the purpose of identifying and correcting any barriers to equal employment opportunity. Where problems are identified, the contractor is required to develop a program that is precisely tailored to correct the deficiencies. Where appropriate, the contractor is required to establish reasonable goals

18 Affirmative Action Review: Report to the President, The White House, July 19, 1995, at 1.

to measure success toward achieving that result."[19]

Other definitions are also more functional than legal. One commentator states:

> In its weaker form, the term encompasses largely process-oriented requirements, such as revised screening, recruitment, education and training procedures to expand opportunities for underrepresented groups. In its stronger, more substantive form, affirmative action refers to preferential treatment for members of such groups if they are basically qualified for a given position. There is a range of intermediate alternatives, including tie-breaking procedures that favor underrepresented candidates whose qualifications are equal to their competitors. In practice, such distinctions often blur, since what constitutes equal or basic qualifications is open to dispute. For conceptual purposes, however, it is useful to focus on programs incorporating some form of preference, since these approaches have proven most effective and most controversial.[20]

In a speech delivered at the National Archives on July 19, 1995, President Clinton expressed his view of what Affirmative Action is and how it must be used. In reviewing the history of emancipation of slaves, women's suffrage, civil rights, voting rights, equal rights and the rights of the disabled, he described them as "milestones on America's often rocky, but fundamentally righteous journey to close the gap" between American ideals found in the Declaration of Independence, Constitution, Bill of Rights and "the reality of our daily lives."[21]

In his July 19, 1995 speech, the President explained the purpose of Affirmative Action in America and how it has evolved:

> The purpose of Affirmative Action is to give our nation a

19 Wilcher, *supra* note 3 at 4.

20 DEBORAH L. RHODE, JUSTICE AND GENDER; SEX DISCRIMINATION AND THE LAW 184 (1989).

21 President William Clinton, Remarks on Affirmative Action, The Rotunda, National Archives, (July 19, 1995) in Press Release, (July 19, 1995) at 3.

way to finally address the systemic exclusion of individuals of talent on the basis of their gender or race from opportunities to develop, perform, achieve and contribute. Affirmative Action is an effort to develop a systematic approach to open the doors of education, employment and business development opportunities to qualified individuals who happen to be members of groups that have experienced longstanding and persistent discrimination...

It is a policy that grew out of many years of trying to navigate between two unacceptable pasts. One was to say simply that we declared discrimination illegal and that's enough. We saw that way still relegated blacks with college degrees to jobs as railroad porters, and kept women with degrees under a glass ceiling with a lower pay check...

The other path was simply to try to impose change by leveling draconian penalties on employers who didn't meet certain imposed, ultimately arbitrary, and sometimes unachievable quotas. That, too, was rejected out of a sense of fairness...

So a middle ground was developed that would change an inequitable status quo gradually, but firmly, by building the pool of qualified applicants for college, for contracts, for jobs, and giving more people the chance to learn, work, and earn. When affirmative action is done right, it is flexible, it is fair, and it works.

I know some people are honestly concerned about the times Affirmative Action doesn't work, when it's done in the wrong way. And I know there are times when some employers don't use it in the right way. They may cut corners and treat a flexible goal as a quota. They may give opportunities to people who are unqualified instead of those who deserve it. They may, in so doing, allow a different kind of discrimination. When this happens, it is also wrong. But it isn't Affirmative Action, and it is not legal...

> Let me be clear what affirmative action must not mean and what I won't allow it to be. It does not mean—and I don't favor—the unjustified preference of the unqualified over the qualified of any race or gender. It doesn't mean—and I don't favor—rejection or selection of any employee or student solely on the bases of race or gender without regard to merit...[22]
>
> Most economists who study it agree that affirmative action has also been an important part of closing gaps in economic opportunity in our society, thereby strengthening the entire economy."[23]

The President continues to say that there is no longer any systematic discrimination in the United States, but he cites higher unemployment rates for minority group members and earning gaps as examples of the effects of employment discrimination on American minority group members and women.

C. Concepts of Equal Opportunity and Affirmative Action in Other Countries

The United States is not the only country in the world to have noted that there are certain groups and classes of persons who require special treatment by government, public and private entities and employers in order to be on an equal footing with other members of society. In many societies there are efforts to distribute benefits and privileges in such areas as education and employment to historically disadvantaged persons after studying the extent of their exclusion from such benefits. A brief survey of Affirmative Action in a number of countries outside the Unites States and Equal Opportunity in Japan indicate a variety of theories and mixed results.

1. Japan

The Japanese Equal Employment Opportunity Law[24] prohibits sexual discrimination only in training, welfare and termination, and encourages non-discrimination in recruitment, hiring, job assignment

22 *Id.* at 6.
23 *Id.*

and promotion. The enforcement of the obligation to "endeavor" at non-discrimination is to be carried out through "advice, consent and recommendation" by the local Women and Young Workers' office, which is a national government agency with local offices in each Japanese prefecture. Local mediation committees created by the Act have no enforcement power, nor do Japanese courts, which cannot order either specific performance or affirmative action. The courts' power is to declare discriminatory dismissal null and void based on the Constitutional principle of equality under the law. A court may issue a cease and desist order as an injunction against unlawful discrimination and grant damages under a tort theory.[25]

2. Italy

A new affirmative action law, called a "positive action law," was adopted by the Italian Parliament on April 10, 1991. The Law, Act No. 125, provides for affirmative action "to achieve equal treatment of men and women in employment".[26] Its objective is to "promote the employment of women and to attain substantive equality between men and women at work...by eliminating any obstacles that, in practice, are preventing the realization of equal opportunities."[27]

The Italian model is result-oriented in its definition. It calls for preferential hiring. It is aimed at equalizing the distribution of male and female workers throughout the work force. It allows for assistance in the terms and conditions of employment, and may allow quota hiring when job segregation is severe. It may also allow for the implementation of training programs for women to provide them

24 Koyo no Bunya ni Okeru Danjo no Kintona Kikai Oyobi Taigu no Kakuho nado Joshi Rodosho no Fukushi no Zoshin ni Kansuru Horitsu [(Law Respecting the Improvement of the Welfare of Women Workers, Including the Guarantee of Equal Opportunity and Treatment between Men and Women in Employment] was passed on May 17, 1985, and became effective on April 1, 1986. An English overview of the law may be found in KAZUO SUGENO, JAPANESE LABOR LAW 129, 129–135 (Leo Kanowitz, tran., 1992)

25 Tadashi Hanami, *Legal System and Practices of Employment Discrimination—The U.S.-Japan Comparison in* THE JAPAN—U.S. JOINT RESEARCH PROJECT ON EMPLOYMENT DISCRIMINATION (INTERIM REPORT) 52 (Japan Institute of Labor, July 1993) ("Japan Institute of Labor Report")

26 Act No. 125 of Apr. 10, 1991, Providing for Affirmative Action to Achieve Equal Treatment of Men and Women, I.L.O. LEGISLATIVE SERIES (English trans.)

27 *Id.* at art. 1, para. 1.

with technical education needed to obtain non-traditional jobs.[28]

Under the Italian law, affirmative action may be justified wherever there is evidence of general gender disparties in the workforce, even in the absence of employer discrimination. Employers have been granted "unrestrained freedom to create programs and modify institutional structures in order to abolish women's disparities in fact and to augment their involvement in the workplace."[29]

The new statute identifies as its ultimate goal the "substantive" equality of women, not equal opportunity. It goes beyond equal opportunity by providing assistance to women even after they have been granted access to employment. It recognizes that there are women's "bio-psychological differences" that preclude them from succeeding at jobs if they are held to the same standards as men.[30]

3. India

The Indian Constitution, effective in 1950, explicitly authorizes discrimination on behalf of so-called backward castes and tribes.[31] The Indian model is referred to as "compensatory discrimination". The benefits given to eligible groups are acknowledged to be preferential treatment, and include quotas in college admissions and scholarships, and in government hiring and promotion.[32] Several Indian commentators have argued that the two Indian Constitutional doctrines, of equality for all and special treatment for some, supplement rather than clash with each other. One commentator, Raj Kumar Gupta, reasons that true equality can only be achieved if the State maintains an integrated society but adopts unequally beneficial measures to help those who were previously disadvantaged.[33] The tension

28 Deidre A. Grossman, Comment, *Voluntary Affirmative Action Plans in Italy and the United States: Differing Notions of Gender Equality*, 14 COMP. LAB. L. J. 185, 189 (1993).

29 *Id.* at 190.

30 *Id.* at 191.

31 Robert Meister, *Discrimination Law through the Looking Glass*, 1985 WIS. L. REV. 937, 939 (1985) (reviewing MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA (1984)).

32 *Id.* at 942.

33 Samuel M. Witten, Comment: *Compensatory Discrimination in India: Affirmative Action as a Means of Combatting Class Inequality, 21 COLUM. J. TRANS. LAW* 353, 362 (1983).

between general rights to equality and special treatment based on class membership appears in Indian case law concerning compensatory discrimination.[34] Three constitutional issues that have arisen include: How many places may be reserved without violating the general constitutional provisions of the Right to Equality under the Indian Constituion? Who are the classes for whom preferential treatment should be allowed and how are they to be selected from deserving groups of citizens? Is compensatory discrimination by the State permissible outside the two constitutional provisions or are those provisions strictly limited exceptions to the Right to Equality (the Indian concept of equal protection)?[35]

4. Northern Ireland

The Fair Employment (Northern Ireland) Act (1989) is an attempt by the British government to reduce the disparities of employment opportunities for Catholics and Protestants in Northern Ireland.[36] The Act defines affirmative action as "action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including: the adoption of practices encouraging such participation, and the abandonment of practices that have or may have the effect of restricting or discouraging such participation."[37] The term "fair participation" is not defined in the legislation, which does state that proportionate representation of Protestants and Roman Catholics in the population as a whole need not be reflected in every job category, occupation or position in each undertaking throughout the province.[38] The legislation has been characterized by critics as vague, confusing and ineffective in bringing about the desired representation of both religious groups in the workforce.

---

34 *Id.* at 358.

35 *Id.* at 363–364.

36 Kevin A. Burke, *Fair Employment in Northern Ireland: The Role of Affirmative Action*, 28 COL. J. L. AND SOC. PROBS. 1,3 (1994).

37 The Fair Employment (Northern Ireland) Act (1989) amended by the Fair Employment (Amendment) (Northern Ireland) Order (1991), §58(1).

38 Department of Economic Development, Fair Employment Code of Practices §6.5.7.

5. Sri Lanka

In Sri Lanka, the Ceylonese Tamils had become over-represented in the professions and in government service in proportion to their numbers.[39] In a system where all students take standardized qualifying examinations for entrance to the universities, the students from schools with poorer facilities were severely disadvantaged.[40] In 1970, the government decided to change the admission criteria to give less privileged secondary students, who were mainly the under-represented Sinhalese, an opportunity to enter the university with lower qualifying grades. In 1974, this lowered grade was supplemented by a district quota system which allotted a given number of university seats to the highest-scoring students from each district based on the total population of each district,[41] thus creating criteria of need and merit. By 1975, there was opposition due to the large disparity in admission test scores among entrants. Classes became difficult to conduct, students less able to compete were frustrated, and there was concern voiced about overall academic standards.[42]

After much criticism and review, in 1979, the government abandoned a media standardization plan (to reconcile differences in grading between the two language groups) in favor of raw marks and came up with an admissons formula: 30% of the university places were to be filled on an all-island merit basis; 55% of the places were to be allocated to the 24 districts in proportion to their respective populations; and the remaining 15% were to be allocated to 12 districts deemed to be educationally under-privileged in proportion to their respective populations.[43] The compromise admissions formula remained in effect as of 1990, although not without heated debate and a demand for a return to the "pure merit" system.[44] The

39 Michael M. Burns, *Lessons from the Third World: Spirituality as the Source of Commitment to Affirmative Action*, 14 VT. L. REV. 401, 408 (1990).

40 *Id.* at 412.

41 *Id.* at 415.

42 *Id.* at 416.

43 *Id.* at 420, citing UNIVERSITY GRANTS COMM'N, SRI LANKA, REPORT OF THE COMMITTEE APPOINTED TO REVIEW UNIVERSITY ADMISSIONS POLICY at 7 (December 1987).

44 *Id.* at 421.

Commissioners' desire to return to a "pure merit" system was based on their belief that the rural schools had improved enough to eliminate any meaningful disparity between the two linguistic groups, however there was no supporting evidence for this view.[45]

6. Ontario, Canada

On July 14, 1995, the new Ontario Premier Mike Harris announced he was repealing the Employment Equity Act, a 1992 law designed to prevent discrimination against women, minorities and the disabled in the workplace. The employment-equity legislation, designed by the previous Socialist government, required Ontario employers to compile a detailed workforce report, identify underrepresented groups, and devise an affirmative action plan to rectify any problems found. Harris stated that the legislation was defective because it did not allow employers to hire the best candidate for the job, and did not really address discrimination. He characterized it as "quota driven". He pledged to replace the law with an "equal opportunity" plan to help eradicate discrimination. The repealed Ontario legislation was characterized in the press as "one of the toughest affirmative action plans in North America".[46]

Affirmative Action in the U.S.—Will It Continue?

A. Recent U.S. Supreme Court Developments: *Adarand*

On June 12, 1995, the United States Supreme Court decided a case which requires the United States government to reassess all of its Affirmative Action programs and policies. In *Adarand Constructors, Inc. v. Pena*,[47] there was a challenge by a non-certified small business which had submitted a low bid for a subcontract which was granted instead to a company that was certified as a small disadvantaged business. This was a challenge to a voluntary statutory program under the Surface Transportation and Uniform Relocation

45 *Id.* at 422.

46 *Ontario to Repeal Affirmative Action Plan*, Reuters, July 19, 1995, available in Counsel Connect Library.

47 ___ U.S. ___, No. 93-1841, 63 *U.S.L.W.* 4523, 1995 U.S. LEXIS 4037.

Assistance Act of 1987,[48] under which prime contractors receive an increase in the amount of their contracts if at least 10% of the award is expended with "small business concerns owned and controlled by socially and economically disadvantaged individuals." There is a rebuttable presumption that members of certain minority groups are socially disadvantaged; it is unclear to the Court if the presumption extends to the economic disadvantage criterion as well. White persons were permitted to benefit from the program, although they had to go through additional steps, rather than a presumption of disadvantage, to qualify.

In *Adarand*, the Supreme Court's principal holding is that the "strict scrutiny" standard enunciated in prior cases applies to all race-conscious government programs, that is, Federal, state and local government programs. Strict scrutiny means whether a government program is "a necessary means of advancing a compelling government interest."[49] In the *Adarand* opinion, the Court reviews a prior Equal Protection challenge under the Fourteenth Amendment of the U.S. Constitution, which was a challenge to another form of remedial racial classification. In *Wygant v. Jackson Board of Education*,[50] the issue was whether a school board could adopt race-based preferences in determining which teachers to lay off. In *Wygant,* Justice Powell in the plurality opinion observed that the level of scrutiny does not change merely because the challenged classification operates against a group (non-minority) which historically has not been subject to governmental discrimination. He stated that the two-part inquiry should be "whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored."[51] The plurality concluded that the school board's interest in providing minority role models for its minority students as an effort to alleviate the effects of societal discrimination was not a compelling interest that could justify the use of a racial classification. It added that "(s)ocietal dis-

48 Pub.L. 100–17, 101 Stat. 132, and §8 of the Small Business Act, 15 U.S.C. §637.
49 Concurring opinion of Justice Powell in *Fullilove v. Klutznick,* 448 U.S. 448, 496 (1980).
50 476 U.S. 267 (1986).
51 *Id.* at 274.

crimination, without more, is too amorphous a basis for imposing a racially classified remedy"[52] and stated that a "public employer...must ensure that, before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination."[53] The Court in *Adarand* also referred to *Richmond v. J.A. Croson Co.*,[54] which challenged a city's determination that 30% of its contracting work should go to minority-owned businesses. A majority of the Court in *Croson* held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification" (in other words, Equal Protection as a concept protects the majority group individual as well as the minority individual) and that the Fourteenth Amendment Equal Protection clause requires such a program to be "narrowly tailored to remedy the effects of prior discrimination."[55] The "narrowly tailored" test, coupled with strict scrutiny, would require, for example, an inquiry into whether non-racial means were considered and whether the program will last longer than the evils it is intended to address.[56]

The Supreme Court overruled those portions of *Fullilove v. Klutznick*[57] and *Metro Broadcasting, Inc. v. FCC*[58] which suggested that a standard less than strict scrutiny could be applied to Congressionally-enacted race-conscious programs. The Supreme Court in *Adarand* took pains to explain that a "strict scrutiny" standard does not inevitably prove fatal to a race-conscious program, and that different circumstances may result in different outcomes when such programs are challenged. Nor did the Court reach the question of whether any purpose other than providing a remedy for past discrimination could satisfy the "compelling interest" test. *Adarand*'s impact remains to be seen after remand to the lower court

52 *Id.* at 276.
53 *Id.* at 277.
54 488 U.S. 469 (1989).
55 488 U.S. 496 at 508.
56 Adarand Constructors Inc. v. Pena, No. 93–1841, Slip op. at 36 (U.S., June 12, 1995).
57 448 U.S. 448 (1980).
58 497 U.S. 547 (1990).

and after various legislative initiatives, policy changes and reviews of existing affirmative action discussed in this article have been completed.

Justice Scalia's concurrence seems to summarize the drift in the Court's view of preferential treatment for certain groups and the general trend in the legislatures:

> ...In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction... Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as a creditor or debtor race. That concept is alien to the Constitution's focus upon the individual, see Amdt. 14, §1 "(N)or shall any State... deny to *any person*" the equal protection of the laws.... To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.[59]

The Court's subsidiary holdings in *Adarand* are that three principles govern the limitations on race-conscious actions by public agencies (Federal, state, local):

(1) scepticism—racial classifications are inherently suspect and can be justified only after the most searching scrutiny;
(2) consistency—the standard of review does not differ depending on the race in question, or whether the consideration of race benefits or burdens the race in question;
(3) congruence—the limitations on Federal race-conscious actions under the Fifth Amendment of the Constitution are the same as the limitations placed under prior case law on State and local race-conscious actions based on the Fourteenth Amendment of the U.S. Constitution.

59 Adarand Constructors, Inc. v. Pena, No. 93–1841, June 12, 1995, Concurrence of Justice Scalia.

B. The White House Response to *Adarand*

1. President Clinton's July 19, 1995 Speech

In his July 19, 1995 speech at the National Archives, President Clinton gave his response to the June 12, 1995 decision in *Adarand Constructors, Inc. v. Pena*. His interpretation of the latest U.S. Supreme Court decision is that the U.S. government must comply by "focusing set-aside programs on particular regions and business sectors where the problems of discrimination and exclusion are probable and are clearly requiring Affirmative Action."[60]

The Supreme Court ordered the Federal Government to meet the more rigorous standard for Affirmative Action programs which the state and local governments were ordered to meet several years ago.[61] The President directed the Attorney General and Federal agencies to move forward to expeditiously comply with the *Adarand* decision. He noted that he did not interpret *Adarand* to require the dismantling of Affirmative Action or set-asides, but as a reaffirmation of the need for Affirmative Action.

On July 19, when President Clinton ordered all Federal agencies to comply with *Adarand* and apply four standards of fairness to all Federal Affirmative Action programs, he directed that there be:

> No quotas in theory or in practice; no illegal discrimination of any kind, including reverse discrimination; no preference for people who are not qualified for any job or other opportunity; and as soon as a program has succeeded, it must be retired. Any program that doesn't meet these four principles must be eliminated or reformed to meet them.[62]

The President stated that Affirmative Action sometimes is imperfect and needs to be a temporary rather than a permanent measure:

> Affirmative Action has been good for America...Affirmative Action has not always been perfect, and Affirmative Action should not go on forever. It should be changed now to take

60 President William Clinton, *supra*, note 21, at 11.
61 *Id.*
62 *Id.* at 15.

> care of those things that are wrong, and it should be retired when its job is done. I am resolved that that day will come. But the evidence suggests, indeed, screams that the day has not come...[63]

The President reflects that it is pragmatic for the country to continue to have Affirmative Action programs:

> If properly done, Affirmative Action can help us come together, go forward and grow together. It is in our moral, legal and practical interest to see that every person can make the most of his life.[64]

2. Justice Department Legal Guidance

On June 28, 1995, the Assistant Attorney General of the U.S. Department of Justice Office of Legal Counsel sent preliminary legal guidance to General Counsels of Federal agencies concerning the implications of *Adarand*. He interpreted the Supreme Court as saying that race-based remedial measures may be justified in certain circumstances, and that the Court was not completely banning Affirmative Action.[65]

3. Report to the President

On July 19, 1995, White House staff members submitted a report to the President containing a Review of Federal Affirmative Action Programs. The report concludes that Federal affirmative action programs have worked to advance equal opportunity. The staff report examined concerns about fairness and concluded that, on the whole, federal programs are fair and not unduly burdensome to non-preferred groups. The report also concluded that some reforms would "make the programs work better and guarantee their fairness."[66]

The problem is that Affirmative Action programs in employment, contracting and education viewed as excessive and improperly ap-

63 *Id.* at 16.

64 *Id.*

65 Memorandum to General Counsels, Walter Dellinger, Assistant Attorney General, U.S. Department of Justice, June 28, 1995 at 1.

66 Affirmative Action Review, *supra*, note 18 at 2.

plied have caused the backlash seen in the legislatures and courts in 1995 and even before. The question is whether the American people will want to continue the effort, or will want to return to a national policy of non-discrimination rather than one that calls for Affirmative Action programs.

Legislative Initiatives and Their Probability of Success

The California Civil Rights Initiative

California has been the forerunner in the rebellion against Affirmative Action. The California Civil Rights Initiative, a proposed constitutional amendment, can be placed on the ballot either by a 2/3 vote in the California legislature or by receiving as many petition signatures as are equal to 8 per cent of the number of Californians who voted in the election for governor, approximately 693,000 signatures. The language in the referendum (Appendix *supra*)[67] mirrors legislation introduced by State Senator Quentin Kopp (SCA 10).

Due to the preemption by Federal law and the United States Constitution in the field of civil rights enforcement, it must be noted that any resulting California state law could be declared invalid by the Federal courts and the United States Supreme Court.

State Legislation

Half of the states developed affirmative action-related legislation in 1995. Twenty states introduced bills or resolutions that would limit, ban, or weaken preferential policies. Approximately sixteen states had proposals introduced which would strengthen or expand Affirmative Action programs. In eleven or more state legislatures, some measures that support Affirmative Action and some that oppose Affirmative Action have both appeared.[68] It is a very unclear picture at best.

67 *Id*, at 44.

68 *Affirmative Action after Adarand; a Legal, Regulatory, Legislative Outlook*, DAILY LABOR REPORT SPECIAL REPORT, August 1, 1995, at S-25.

Initiatives and Pending Legislation for the Federal Government

Federal Legislation

Since Spring 1995, there has been a proliferation of legislative initiatives to prohibit affirmative action in employment and education by government entities and government contractors. On March 3, 1995, Sen. Jesse Helms introduced S497 IS, an Act to End Unfair Preferential Treatment, prohibiting agents or agencies of the Federal government from using race, color, gender, ethnicity or national origin 1) as a criterion for either discrimination against, or granting preferential treatment to, any individual or group, or 2) in a manner that has the effect of requiring that employment positions be allocated among individuals or groups, with respect to providing public employment, conducting public contracting, or providing a Federal benefit for other activities.[69]

On July 27, 1995, Senetor Bob Dole and Representative Charles Canady introduced comprehensive legislation to eliminate all Federal preference programs. The legislation (S 1085, HR 2128), entitled the Equal Opportunity Act of 1995, "mounts a direct attack on President Clinton's endorsement of affirmative action." It would prohibit the use of racial and gender preferences in Federal government programs and would specifically prohibit the government from "requiring or encouraging" Federal contractors or subcontractors to grant such preferences. It defines "preferences" as the use of "a quota, set-aside, numerical goal, timetable, or other numerical preference," for example those required of Federal contractors by OFCCP.[70]

Polls: An Unclear Picture

A USA Today/CNN/Gallup poll of 1,220 Americans conducted from March 17–19, 1995 shows that most Americans want to help minorities and women succeed in school and the workplace, but reject any programs that give one group unfair advantage over

69 S 497 IS (*104th Congress, 1st Session*), *amending title 28, United States Code, to provide for the protection of civil liberties and for other purposes.*

70 *Special Report, Affirmative Action after Adarand; A Legal, Regulatory, Legislative Outlook*, DAILY LABOR REPORT (BNA), August 1, 1995 at S-4 to S-5.

another.[71] The poll shows that Americans most strongly support job training (82% overall, 94% of blacks, 80% of whites), special educational classes (75% overall, 90% blacks, 73% whites) and special recruitment efforts (73% overall, 87% blacks, 71% whites). The strongest opposition was found for policies favoring minorities for jobs when they are not as well qualified as white applicants (84% overall opposed, including 86% of whites, 68% of blacks). Overall, 63% of those polled oppose quotas for hiring minorities and women (68% of whites opposed, 30% of blacks). 57% oppose quotas for school admissions, including 61% of whites, but only 27% of blacks. When asked how much discrimination and affirmative action have touched their lives, those polled responded in the following ways: 1) about a fifth say they have personally been affected by affirmative action policies, by either failing to get a job, being passed over for promotion or not being admitted to a school in favor of a minority or a woman; 2) a third of all whites in the workplace say they have seen minorities get undeserved jobs where they work because of affirmative action; 3) a fourth of blacks and women say they've failed to get jobs, been passed over for promotion or were not admitted to schools because of discrimination; 4) a third of blacks and almost a fourth of whites have witnessed the positive side of affirmative action where they worked, when a minority or woman was hired for a job they would not have obtained without affirmative action; 5) a fifth of the workers polled (36% of blacks, 20% of whites) report seeing cases of job discrimination where they work. The poll, which included 837 whites, 324 blacks, and 59 of other racial backgrounds, has a margin of sampling error of plus or minus three percentage points.[72]

State Developments

The California Executive Order

On June 10, 1995, Republican Governor Pete Wilson of California signed an executive order repealing the state's longstanding policies

71 USA TODAY, March 24, 1995 at 3A, 3B.
72 *Id.*

to promote the hiring of women and minorities and mandating that individual merit is to be the new standard for employment in and contracting with the California state government. The executive order repeals three executive orders which Governor Wilson says have resulted in the promotion of racial and gender-based preferences and set-asides. The new executive order prohibits all preferential treatment based on race or gender that is not specifically required by law. It directs the California State Personnel Board to rewrite state hiring regulations so that employment goals are focused on the number of women and minorities possessing the requisite skills and qualifications for a given job (the "relevant labor pool"), not merely the numbers of women and minorities in the overall labor force.

Other steps required by the executive order and related directives include elimination of record-keeping and reports, such as forms requiring written justification for hiring non-Affirmative Action candidates. The order disbands state advisory councils, terminates consulting contracts, and abolishes performance recognition awards linked to meeting Affirmative Action goals and timetables. It abolishes a requirement that the racial and gender composition of members on job interview panels for civil service and career executive assignments reflect social demographics.[73]

University of California Admissions

On July 20, 1995, the Regents of the University of California voted to end affirmative action programs in hiring, contracting and admissions in the nine-campus system. They voted 5–10 to eliminate using ethnicity and gender for preferential hiring and business by January 1996. In another vote, of 14–10, they ended affirmative action in admissions in favor of economic and social needs tests.[74] The Clinton Administration response was to threaten to cut off Federal monetary aid to the University of California system.[75]

73 *California Governor Repeals Orders Promoting Affirmative Action Policies*, 4 BNA EMPLOYMENT DISCRIMINATION REPORT 704, June 7, 1995.

74 *University of California Regents Vote to End Programs in Hiring, Contracting*, 33 GOVERNMENT RELATIONS REPORT (BNA), July 24, 1995 at 941.

75 Arleen Jacobius, *Affirmative Action on Way Out in California*, A.B.A.J., September 1995 at 22.

Maryland—Minority Scholarships

On May 22, 1995, the U.S. Supreme Court let stand a 4th Circuit Court of Appeals ruling that prohibits the University of Maryland from reserving some of its scholarships for black students only,[76] although the State has a history of racial discrimination.

Florida—Judicial Nomination Commission

On July 7, 1995, a U.S District Court Judge, Kenneth L. Ryskamp, of West Palm Beach, Florida, held that a Florida statute that reserves seats for women and racial and ethnic minorities is unconstitutional.[77] Judicial nominating commissions (JNC's) review and recommend applicants for judicial vacancies. Under the statute, the governor of Florida and the Florida Bar board of governors each appoint three members of each JNC. An additional three members are appointed by a majority of those six. In 1991, the law was amended to require that one-third of all JNC seats be held by either a racial or ethnic minority or a woman. In an order permanently enjoining the 1991 amendment, the judge said the amendment's language created a race- and gender-based quota. He held that there was no compelling state interest to justify the quota. The judge rejected the state's argument that the statute furthers a compelling state interest in a diverse judicial selection system. The judge found no direct evidence of racial bias in the judicial nomination process, or statistical evidence of gross underrepresentation of minorities on the bench. On the other hand, H.T. Smith of Miami, who represented the National Bar Association's Florida chapter, said the court did not give enough weight to a Florida court report showing women had a slight chance of being appointed to JNC's and blacks had not been appointed until recently.[78]

Japanese-Owned U.S. Companies as Federal Contractors

The author conducted a sample survey of Japanese-owned U.S.

76 Podberesky v. Kirwan, 38 F. 3d 147 (1995).
77 Mallory v. Harkness, CIV-95-8319 (1995).
78 THE NATIONAL L. J., August 7, 1995 at A6.

companies in Los Angeles, California that are Federal contractors. She submitted a list of companies found in a Japanese community telephone directory to the San Francisco-based office of the Office of Federal Contract Compliance Programs (OFCCP), and inquired under the Freedom of Information Act whether there had been any Executive Order 11246 compliance reviews conducted or other actions taken with respect to any of the listed firms or Japanese-owned companies in Los Angeles. It was found that four Japanese-owned companies had been reviewed by OFCCP.

Daihatsu America, Inc. was sent a Notice of Compliance on March 25, 1991.[79]

Pioneer Electronics (USA) and OFCCP entered into a conciliation agreement on August 1, 1995. The violations and remedies were:

1. Violation: Pioneer Electronics (USA) Inc. initially submitted a workforce analysis by listing individual names and titles of employees by department and not in the format required. The OFCCP regulations require the workforce analysis to list each job title ranked from the lowest paid within each department or other similar organizational unit including departmental or unit supervision. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents for Blacks, Spanish-surnamed Americans, Ameican Indians and Asians was required. The wage or salary range for each job title was required.

   Remedy: Pioneer Electronics (USA) submitted an acceptable workforce analysis for its affirmative action program on March 30, 1995, and agreed not to repeat the same violation.

2. Violation: Pioneer Electronics (USA) Inc. failed to contact the State of California Employment Development Department regarding all employment openings except executive and top management positions that will be filled

79 Letter from OFCCP to President, Daihatsu America, Inc., (March 25, 1991) (on file with author).

from within its organization and positions lasting three days or less.

Remedy: Pioneer Electronics (USA) Inc. agreed to ensure that the State of California Employment Development Department would be contacted regarding all job openings excluding those exceptions noted. It agreed to do so immediately, not to repeat the violation, and to submit a semi-annual report on its activity to resolve the violation. Progress reports will be due on January 15, 1996 and July 15, 1996.[80]

Epson America, Inc. entered into a letter of commitment with OFCCP concerning deficiencies identified in a 1991 compliance review. The letter of commitment remained in effect for one year after its submission. The listed violations and remedies were:

1. Violation: The workforce analysis contained in Epson America, Inc.'s 1991–1992 Affirmative Action Program (AAP) did not contain a listing of those positions which are not physically located at the corporate headquarters, but are filled by headquarters decision-makers.

Corrective action: Epson America, Inc. agreed to revise the workforce analysis, utilization analysis and goals to include those positions that are located at establishments other than the corporate headquarters but for which the selection decisions were made at the corporate headquarters. The revisions were to be included in the company's 1991–92 AAP.

2. Violation: Epson America, Inc. did not establish separate goals for blacks in the Assistant Managers job group or for Hispanics in the Managers, Technical Professionals, Administrative Professionals, Technicians, Senior Clericals and Operative job groups.

80 Conciliation Agreement between U.S. Department of Labor Office of Federal Contract Compliance Programs and Pioneer Electronics (USA) Inc., Long Beach, California, signed by OFCCP Director, Los Angeles, August 1, 1995. The conciliation agreement terms are summarized here as an example of compliance requirements for Federal contractors.

Corrective action: Epson America, Inc. agreed to supplement its existing goals for all minority groups by adding annual placement rate percentage goals equivalent to the availability estimates contained in its 1991–92 AAP for blacks in the Assistant Managers job group and Hispanics in the Managers, Technical Professionals, Administrative Professionals, Technicians, Senior Clericals and Operative job groups. The revisions were to have been included in the company's 1991–1992 AAP.

3. Violation: The Identification of Problem Areas section of the AAP does not separately address the underutilization of individual minority groups and does not address action-oriented programs designed to correct underutilization by individual minority group. Of 89 positions in the Officials and Managers groups, none is filled by a Hispanic and one is filled by a black. Of the 55 positions in the Administrative Professionals job group and 7 in the Technicians job group, none is filled by a Hispanic.

Corrective action: Epson America, Inc. agreed to supplement the Identification of Problem Areas section of its 1991–1992 AAP to include the underutilization of blacks, and Hispanics in the above-mentioned groups. The company also agreed to develop action-oriented programs designed to address underutilization and attain established goals and objectives. The revisions were to have been included in the company's 1991–92 AAP. It agreed to submit a progress report to OFCCP by May 1, 1992 for the period ending March 31, 1992. The report was to set forth the company's efforts to correct the underutilization of blacks and Hispanics in job groups where underutilization exists and the results of the efforts. The report was also to show the company's utilization at the end of the 1991–1992 AAP year, and statistical data on applicants, hires, transfers, promotions and terminations from October 1991

through March 1992 by race, sex and job group.[81]

In 1994, Canon Business Machines of Costa Mesa, California agreed to pay up to $633,735 in back wages to 32 qualified workers who were denied employment. The conciliation agreement was a result of an OFCCP audit which found a pattern of discrimination against 30 black applicants at the Canon facility, and found that two engineers, a white female and a Hispanic male, also had been denied jobs. OFCCP investigators said the review of the hiring practices at Canon's Orange County facility began March 2, 1993 and found that during 1992 there had been discrimination in the hiring of black workers as a class. During that year the company had 1,732 job applicants, of whom 100 were black, and hired 96 new employees, but none of the new workers were black. The agreement with OFCCP called for the payment of back wages to each of the applicants and employment offers to 14 of the black applicants. The two engineers each was to receive a job offer and a back pay award of $70,000. The $633,735 in back wages was to have been reduced by the amount of earnings the 32 applicants made after they applied to Canon. The individual back pay awards varied by job category, and ranged from a few hundred dollars to more than $30,000. As part of its agreement, Canon was to implement a formal training program to ensure that its management is aware of its equal opportunity responsibilities.[82]

On a positive note, on September 29, 1994, Union Bank, the fourth largest commercial bank in California, was honored by the U.S. Department of Labor for its innovative efforts to hire and promote minorities and women. The bank, which is based in San Francisco and has more than 200 branch offices in California, is 70% owned by the Bank of Tokyo. It was the first foreign-owned corporation to receive an equal opportunity award from the Labor Department. The EVE (Exemplary Volunteer Efforts) Award was given to

81 Letter of commitment dated September 23, 1991 from Epson America, Inc., Torrance, California, to OFCCP, Los Angeles District Director. The letter of commitment terms are summarized here as an example of compliance requirements for Federal contractors. It should also be noted that most of the contractors audited by OFCCP are found in some degree of non-compliance.

82 Press Release, U.S. Department of Labor Office of Information, August 10, 1994.

the bank for its recruitment, hiring, training and promotion of women, minorities and individuals with disabilities. The award citation said, "Its employment program, which emphasizes diversity, assures that its work force demographically represents the comunities it serves...Its training program for managerial and executive-level positions has resulted in increasing the number of minority and female managers throughout its organization..." The EVE awards were initiated by OFCCP in 1983 to publicly recognize federal contractors for programs that increase job opportunities.[83]

Other Instances Requiring Affirmative Action by Japanese-Owned U.S. Companies

Over the past twenty years, a number of Japanese-owned U.S. companies have been compelled to engage in Affirmative Action to hire and promote women and minorities, whether due to litigation brought under Title VII of Civil Rights Act of 1964 on behalf of individual employees or a class of employees, or as the result of compliance reviews brought by OFCCP because they were contractors of the Federal government, as discussed above.

One of the better-known cases is *Avagliano v. Sumitomo Shoji America, Inc.*, which became a United States Supreme Court case.[84] In *Avagliano*, initially twelve past and present female secretarial employees of Sumitomo Shoji America, a trading company, filed suit under Title VII of the Civil Rights Act of 1964 alleging that they had been restricted to clerical jobs and not trained for or promoted to executive, managerial or sales positons for which the company favored male Japanese citizens. They alleged discrimination on the bases of sex and national origin. In a related case, which was joined with the first, another female secretarial employee filed suit under Title VII and another statute, sec. 1981, adding an additional claim of discrimination against women "who are not of ...Japanese racial

83 Press Release, U.S. Department of Labor Office of Information, September 28, 1994.

84 20 Emp. Prac. Dec. 11, 623 (S.D.N.Y. 1979); 638 F. 2d 552 (2d Cir. 1981); 457 U.S. 176 (1982); 35 Emp. Prac. Dec. 35, 791 (S.D.N.Y. 1984); 614 F. Supp. 1397 (S.D.N.Y. 1985).

background."[85] A class was certified in the first case, consisting of all women employed by Sumitomo Shoji in the United States on or after December 24, 1975, and a second class was certified, based on the second case, of all women employed by Sumitomo Shoji America in the United States on or after the 300th day before Februry 12, 1982.[86]

The two class actions were settled in 1987. The settlement terms are not reported, however the attorney who represented the plaintiffs in both class actions stated in his testimony before the Employment and Housing Subcommittee of the U.S. House of Representatives that some of the provisions were:

1. a major outside consultant was employed to study the various jobs at the trading company, determine the most important functions of the jobs and develop job descriptions, job ladders and necessary qualifications for various jobs. Women were informed of what their new job titles were, and how they could advance;
2. $1 million was allocated for the training of female employees;
3. employment goals for women which the company was supposed to meet in good faith were set forth for the three-year life of the consent decree.[87]

Interviews conducted at Sumitomo Corporation of America (the new name of Sumitomo Shoji America) by a member of the Japan Institute of Labor team in September 1992 indicated that the Affirmative Action program had achieved the goal set by the consent decree

85 Incherchera v. Sumitomo Corporation of America, 35 Emp. Prac. Dec. 35, 791 (S.D.N.Y. 1984); Incherchera v. Sumitomo Corporation of America, 614 F. Supp. 1397 (S.D.N.Y. 1985).

86 Tadashi Hanami, Koichiro Yamaguchi, Hiroya Nakakubo, Ryuichi Yamakawa, Katsuhiko Takaike, Alison Wetherfield, Kiyoshi Takechi, *Case Analysis: Employment Discrimination Cases in Japanese Companies in the U.S.*, in Japan Institute of Labor Report, *supra* note 25, at 11–13.

87 *EMPLOYMENT DISCRIMINATION BY JAPANESE—OWNED COMPANIES IN THE UNITED STATES, Hearing before the Employment and Housing Subcommittee of the Committee on Government Operations, House of Representatives*, 102nd Congress, 1st Session, 163–164 (July 23, August 8 and September 24, 1991) (Statement of Lewis Steel)

for the employment of female exempt employees (23–25%). The goal for promotion was achieved, except for one position.[88]

In another instance, the U.S. Equal Employment Opportunity Commission initiated its own investigation of Honda of America Manufacturing, Inc. in 1984.[89] At that time, Honda employed 2,100 production associates, of whom 12.5% were female, 1.2% were black, and about 7.0% were over 40. 51.5% of the engineers were American. The Federal agency alleged race, sex and/or age discriminatiion in hiring and promotion by the employer. One of the allegedly discriminatory practices was the employer's limitation on hiring to a radius of twenty miles from its Ohio location, which excluded prospective employees living in a city with a substantial black population.

In 1988, Honda entered into a conciliation agreement with the Equal Employment Opportunity Commission, which put a halt to any subsequent litigation by the EEOC against Honda. The agreement required Honda to:

1. hire qualified employees without discrimination and to compensate those who would have been hired earlier for lost pay;
2. engage in an affirmative action program to increase the number of minority, female and over-40 employees to mirror the profile of applicants for positions with the company.[90]

As a result of the Affirmative Action program on which it embarked to resolve its compliance problems under Title VII, Honda's minority associates increased to 11.2% of the workforce, female associates to 32.2%, and over-40 associates to 20.9%. The American engineers increased to 67%. Honda also initiated an associate development plan to provide its employees with opportunities for promotion from within, established an Associate Development Center for technical and fundamental training, and formed a project in which

88 Japan Institute of Labor Report, *supra* note 25 at 40.
89 Japan Institute of Labor Report, *supra* note 25 at 15–16.
90 Japan Institute of Labor Report, *supra* note 25 at 16.

American team leaders are given opportunities for training in Japan. A growing number of production workers have been promoted to team leader and production staff positions. The hiring radius was expanded to 30 miles in 1986, independent of the conciliation agreement requirements. Honda later defined its hiring area as the county in which its plants are located and the neighboring counties.[91]

Implications for Japanese-Owned Companies in the United States after *Adarand*

After *Adarand*, small business enterprise programs will be subjected to a strict scrutiny standard before set-asides for minorities and women can be required to qualify them to do business or to receive federal contracts. Voluntary Affirmative Action programs will continue to be subject to the strict scrutiny stndard. Employers will need to show that their Affirmative Action efforts are due to the continuing effects of past discrimination, or present imbalances, rather than good faith efforts to grant preferences when they recruit, hire, promote and lay off members of minority groups and women. There will be a need to tailor programs to actual realities, not a presumption of the need for special treatment, which may not be necessary.

On the other hand, even if voluntary Affirmative Action requirements in advance of certification as a Federal contractor are changed or abandoned, the various Federal and state referenda and legislative initiatives now pending and the California Executive Order indicate a continued intent to enforce equal opportunity and non-discrimination law protecting individuals and classes of individuals from discrimination based on race, national origin, ethnicity, gender, disability and age. Such enforcement standards have been seen in the *Sumitomo* consent decree that settled the protracted litigation and the *Honda* conciliation agreement described above.

The new trend among employers and educational institutions is to avoid engaging in voluntary Affirmative Action when it provides preferential treatment for one group compared to another if both are equally qualified, unless there is proof of continuing discrimina-

91 *Id.*

tion and/or the present effects of historic discrimination. There will no doubt continue to be involuntary Affirmative Action in the form of court orders and consent decrees when discrimination is found. Federal, state and local agencies will continue to remediate findings of discrimination under statutes such as Title VII and the equivalent through conciliation and other non-litigious means when possible.

Japanese-owned U.S. companies should await further guidance from OFCCP and Congress concerning any future changes in standards, procedures and reporting requirements for Federal contractors. Japanese-owned U.S. companies should continue to review their employment practices in relation to Title VII and state and local employment laws to ensure that they will avoid costly lawsuits and ensuing negative publicity brought about by employees alleging illegal discrimination. It is still likely that OFCCP and EEOC will continue to require Affirmative Action, although on a more limited basis—OFCCP prospectively, EEOC after discrimination has been found. It is likely that the U.S. courts will continue to order Affirmative Action as relief in instances of historic discrimination continuing into the present, or egregious present discrimination, and to enforce existing consent decrees that are temporary in duration.

The Crucial Issue

The crucial issue in the great debate over Affirmative Action now erupting into a more active polarization in American legal thought, is how (or whether) a democracy should intentionally allocate or reallocate its benefits to some but not all groups and classes of its people.[92] Should there be a presumption of disadvantage among all members of certain minority groups and women, as seen in the Federal subcontractor provisions challenged in *Adarand v. Pena?* Should there be actual proof of disadvantage by an individual applicant, based not only on race or gender, but perhaps on economic disadvantage? Or, as is being proposed in the state and Federal legisla-

92 *See e.g.* Wojciech Sadurski, *The Morality of Preferential Treatment (The Competing Jurisprudential and Moral Arguments)*, 14 MELB. U. L.R. 572, 576 (December 1984); Paul Brest and Mirand Oshige, *Affirmative Action for Whom?* 47 STAN. L.R. 855, 867 (1995).

tion, should there be no Affirmative Action, but merely equal opportunity and non-discrimination as a policy?[93]

Governmental Balancing of Competing Interests

On the one hand, statistics show that, in the United States, women and minority group members on the whole have lower earnings and require more government benefits such as welfare payments. It is in the government's interest to lighten its economic burden by ensuring that such classes of persons have equal access to education and employment so that they are able to pay taxes to support the government, rather than drain already-depleted government resources.

On the other hand, Americans, based on the Fourteenth Amendment of the U.S. Constitution, demand equal protection of the laws, as well as equal representation, equal access to education and employment, fair treatment to all persons. Some argue that it is unfair to make some persons more equal than others, that all persons should receive individual consideration based on merit and achievement, not due to a perceived or actual disadvantage based on race or gender.

Michel Rosenfeld describes the utilitarian criterion of justice in which, once the individual is counted, he or she is ignored,[94] as in the "equal opportunity/non-discrimination model" currently being proposed in the backlash against Affirmative Action in the United States and Ontario, Canada. He describes a "justice of reversibility" in which three different types of competing claims each require a different kind of resolution. The first type is a group of fundamental claims, the denial of which leads to a "clear violation of the postulate of equality,"[95] for example, the moral right not to be treated as a slave. This claim would prevail over all conflicting claims.

The second type of claim arises when "denying any of the con-

93 As has been seen in the case of Northern Ireland, the mere opportunity has not resulted in the desired outcome, and the Catholics are calling for Affirmative Action to bring about more hiring. The Italian model is designed to achieve a desired outcome, as were the Sri Lankan and Indian models. *See* Michel Rosenfeld, *Affirmative Action, Justice and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 855–856, 882–883 (1985).

94 Rosenfeld, *supra* note 93 at 870.

95 *Id.*

flicting claims would not *prima facie* result in a violation of the postulate of equality."[96] For example, two mothers, each with a sick child, place conflicting claims to obtain scarce medicine. The government, as the agent of allocation, can provide only enough medicine to cure one child. One of the children is less ill and will recuperate fully, while the other is likely to die. In Rosenfeld's view, justice as reversibility requires that the claim of the mother whose child is likely to survive should be sacrificed or abandoned to the other mother's claim. He notes, however, "Such sacrifices, nonetheless, ought be assumed voluntarily, as the individual who is called upon to sacrifice his or her claim ought to be morally persuaded that such sacrifice is required to further the aims of the postulate of equality."[97]

Herein lies the dilemma of the United States Government and other entities engaged in the present debate over Affirmative Action. Due to the scarcity of resources such as jobs, university admissions and scholarships at prestigious universities, judicial appointments, etc. in the current U.S. economy, many Americans feel that they all have the same level of need for the desired scarce resources. They feel equally deserving of the benefit, as did the non-minority, non-certified subcontractor in *Adarand*. There is no acknowledgment by one side (non-minority, for example, or in some cases, other minorities) that the other is in greater need or more deserving of equality, i.e. one does not empathize with or switch places with the other by yielding his or her claim for the scarce resource.

In his examples, Rosenfeld describes a third set of conflicting claims requring resolution. In the third case, a reversal of perspectives does not lead to any one claim being considered clearly superior to any other claim. Rosenfeld cites the example of a municipality in which everyone agrees that a surplus should be used to build recreational facilities, but they are divided over whether to build a swimming pool or tennis courts. Since the citizens on one side are unable to agree that the preference of the other group is entitiled to any more deference than their own, justice as reversibility would be satisfied by the government taking a vote and following the wishes of the

96 *Id.*
97 *Id.* at 871.

majority of the voters. In the end, justice as reversiblity operates instead as a utilitarian criterion of justice.[98] This is similar to the current legislative proposals in the United States. When government cannot allocate scarce resources based on an agreed-upon consensus by all citizens regarding conflicting measures, it may resort to a utilitarian solution. The legal, legislative and policy developments discussed here reflect the refusal of individual Americans to voluntarily yield benefits because they feel equally entitled to them.

Other Legal Developments

In *Adarand*, in a reversal of its own prior decision, the U.S. Supreme Court held that all racial classifications imposed by any level of government must be analyzed under a strict scrutiny standard and narrowly tailored to further compelling government interests. The Court overruled *Metro Broadcasting* to the extent it is inconsistent with *Adarand*.[99]

The case of a Caucasian teacher with equal seniority to a Black teacher who was laid off solely on the basis of race under a school district's voluntary Affirmative Action plan may reach the U.S. Supreme Court in 1996.[100]

The Justice Department's argument in its appellate brief was that the school district should be allowed to consider preserving racial diversity in its workforce by retaining the only black teacher in the Business Education Department. In its appellate brief, the Justice Department cited the U.S. Supreme Court's ruling in *Metro Broadcasting Inc. v. FCC,*[101] which was a challenge under the Equal Protection Clause to race-conscious selection methods by the Federal

98 *Id.*

99 Adarand Constructors Inc. v. Pena No. 93–1841, slip op. at 25–26 (U.S., June 12, 1995).

100 U.S. v. Board of Education of Township of Piscataway, Nos. 94-5090 and 94-5112 (CA 3), Brief for the United States as Amicus Curiae at 28–29, available in Counsel Connect Library. *See also*, Stuart Taylor, Jr., *Court Faces Slew of Racial Quota Cases*, N.J.L.J. 20 (10/24/94). Available in Counsel Connect Library. *See also* U.S. v. Board of Education of Township of Piscataway, 832 F. Supp 836 (D.N.J. 1993) and Brief and Appendix of Intervenor-Appellee/Cross-Appellant, Sharon Taxman v. Board of Education of Township of Piscataway, Docket Nos. 94-5090, 94-5112, available in Counsel Connect Library and Brief of Defendant—Appellant Board of Education of Township of Piscataway, available in Counsel Connect Library.

101 497 U.S. 547.

Communications Commission to increase diversity in the ownership of broadcast licenses. In *Metro Broadcasting*, the Supreme Court permitted a lowered standard of review of the governmental action, i.e. "an important government interest," in the absence of a showing of past discrimination.[102] This is a lesser standard than the strict scrutiny standard usually applied to racial classifications.

The Justice Department, which originally brought the white teacher's layoff case during the Bush administration, attempted to change sides under the Clinton administration. It attempted to submit a brief in opposition to its former client, the white teacher, when the school district appealed the verdict to the Third Circuit. The Third Circuit U.S. Court of Appeals Chief Justice signed an order denying the Justice Department's request to change sides, treating the government's amicus motion as a request to withdraw from the case.[103]

In another rather unusual development in this case, the Third Circuit ordered a hearing of the case in front of the entire circuit, although the three-judge panel which had heard oral arguments in November 1995 and another circuit panel which heard the case in January 1995 had not yet issued their decisions. The argument before the fulll circuit was scheduled for May 14, 1996.[104] The full circuit review is a rare measure, prompted by the potentially precedential impact of the case.

In another pending legal action challenging a racial preference, by a governmental entity, the Justice Department filed suit against the Board of Regents of the State of Illinois concerning policies and practices that discriminate against white males on the bases of race, national origin and sex through an employment plan that excludes white males from being hired in Building Service Worker Learner positions at Illinois State University.[105] The university refused to

102 *Id.* at 564–565.

103 Russ Bleemer, *U.S. is Booted from Discrimination Case*, N.J.L.J. 16 (11/20/95); Russ Bleemer, *3rd Circuit to Hear Piscataway Case a 3rd Time*, N.J.L.J. 20 (3/4/96). Available in Counsel Connect Library.

104 Russ Bleemer, *3rd Circuit to Hear Piscataway Case a 3rd Time*, N.J.L.J. 20 (3/4/96). Available in Counsel Connect Library.

105 U.S. v. Board of Regents of Regency Universities of the State of Illinois, Civ. 95-3067, (C.D. Ill.) (filed 3/2/95). Available in Counsel Connect Library.

consider individuals who were neither minorities nor females for the program.[106]

In another case expected to reach the United States Supreme Court, *Hopwood v. Texas*,[107] the University of Texas Law School's admission policy was challenged by a class of White applicants. They alleged that the university's policy of seeking five per cent black and ten per cent Hispanic enrollment by admitting "several times as many minority students as would a color-blind process and passing over hundreds of whites with higher grades and test scores"[108] violates the rights of non-minorities.

On March 18, 1996, the Fifth U.S. Circuit Court of Appeals ruled that the admissions program of the University of Texas School of Law violated the Fourteenth Amendment of the U.S. Constitution by providing racial preferences, although they were for the "wholesome purpose of correcting perceived racial imbalance in the student body". The court concluded that achieving diversity in higher education could not be recognized as a compelling state interest.[109]

It is not only some Caucasians who are challenging preferential programs. The Asian-American community is divided over the issue of Affirmative Action, and some members are questioning policies and programs that exclude them or require them to be admitted or treated on a different basis than "preferred" minorities or Caucasians. As one law journal notes, "...Native American, Chicano, Puerto Rican, Chinese, Japanese, Southeast Asian and many other minority groups have also suffered debilitating forms of discrimination and subordination that demand consideration. In our increasingly multiracial and economically complex society, it will be hard to draw the precise *constitutional* line between descendents of former slaves, impoverished immigrants, refugees and third or fourth-generation immigrant Asians of color, even as we recognize clear

106 Department of Justice, Justice Department Sues Illinois State University for Engaging in Employment Discrimination, at 2 (March 3, 1995) (Press Release).

107 Cheryl J. Hopwood, et al. v. State of Texas, 861 F. Supp 551 (W.D. Tex. 1994), appeal docketed, No. 94-50664 (CA 5).

108 Cf., Taylor *supra,* note 99.

109 Hopwood v. State of Texas, Nos. 94-50569 and 94-50664, 1996 WL 120235 (5th Cir. 3/18/96). *See* M. Elaine Jacoby, *Affirmative Action: Here Today, Where Tomorrow?* N.J.L.J. Supp. 12 (4/15/96). Available in Counsel Connect Library.

historical and present-day differences between these groups."[110]

For an example of the division in the Asian-American community, a class action suit has been filed by a group of Asian-American students against San Francisco Unified School District because they wish to opt out of a desegregation consent deceree in which they were originally one of the plaintiff groups.[111] The Chinese-American plaintiffs now oppose the decree because they are required to have admission indices higher than both Caucasian and disadvantaged minority students in order to enter San Francisco's Lowell High School, a premier public school. To be admitted for the 1992–93 Academic Year, Chinese students had to score at least 66 of 69 possible points, Caucasian, Japanese, Korean, Filipino, American Indian and other "non-white" students 59, and black and Spanish-surnamed students, 56.[112]

Under the terms of the consent decree,[113] each school must enroll students from at least four of nine identified racial/ethnic groups, with no one group comprising more than 40–50% of the school's total enrollment.[114] Some Chinese-American leaders believe the caps on Chinese enrollment are necessary to achieve desegregation.[115] The Chinese-American Democratic Club disagrees. It says the caps discriminate against Chinese students, who must bear the heaviest burden of the decree because of their proportionately large population size in San Francisco. The Chinese American Democratic Club has proposed to have two applicant pools—one a "race-blind, merit based pool for all non-disadvantaged students," and another giving "special consideration of academic performance, socioeconomic and racial hardship for motivated disadvantaged students, particularly

110 Alexandra Natapoff, *Trouble in Paradise: Equal Protection and the Dllemma of Interminority Group Conflict*, 47 STAN. L.R. 1059, 1065 (May 1995).

111 Ho v. San Francisco Unified School District, Civ 94-2418 WHO—First Amended Class Action Complaint. Available in Counsel Connect Library.

112 Points were comprised of the applicant's grade point average from two semesters of junior high school with standardized test results. *See*, Selena Dong, *"Too Many Asions": The Challenge of Fighting Discrimination against Asian Americans and Preserving Affirmative Action*, 47 STAN. L.R. 1027, 1033 (May 1995).

113 NAACP v. San Francisco Unified School District, 576 F. Supp 34 (N.D. Cal. 1983).

114 *Id.* at 53.

115 Dong, *supra* note 100, at 1033.

Black and Spanish-surnamed students."[116] The Chinese-American complaints have been opposed by the original plaintiff, the National Association for the Advancement of Colored People (NAACP), which is resisting attempts to modify the consent decree to favor higher Chinese admission rates.[117]

Asian American students have recently questioned their non-inclusion in Stanford Law School's Affirmative Action admissions program. They are nine per cent of the student body, and the enrollment is growing. They have urged the law school not to treat all Asian-American students in the aggregate, but to consider underrepresentation and individual Asian-American group membership as a "positive factor in admission decisions." The underrepresented groups include Pacific Islanders, Filipinos and Southeast Asians.[118] They propose that the criteria for inclusion in law school Affirmative Action admission programs should include bringing diversity to the law school population; justice based on 1) "significant and intractible disadvantage"; 2) disadvantage due to discrimination against the group (some theorists), 3) if Affirmative Action would help ameliorate the group's disadvantaged status.[119]

Within the various Asian-American groups there are some who fall into the second example of Rosenfeld's justifice of reversibility (the Stanford Law School proposal), while others (Chinese American Democratic Club) fall under the third example of not viewing the claims of others as having a higher priority than their own when there are limited spaces in a competitive academic institution.

The question remains whether the second or third of Rosenfeld's models will prevail in American courts, legislatures and government agencies in the aftermath of *Adarand*.

---

116 *Id.*

117 *Id.* at 1034. See also SFNACCP Plaintiffs' Amicus Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss. They state that the Ho lawsuit "seeks to undermine hard fought desegregation relief to which the school children of San Francisco are entitled." Available in Counsel Connect Library.

118 Paul Brest and Miranda Oshige, *Affirmative Action for Whom?* 47 STAN. L.R. 855, 872–877 (May 1995).

119 *Id.* at 873–875.

APPENDIX

CALIFORNIA CIVIL RIGHTS INITIATIVE[120]

(a) Neither the State nor any of its political subdivisions or agents shall use race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education, or public contracting;

(b) This section shall apply only to state action taken after the effective date of this section.

(c) Allowable remedies for violation of this section shall include normal and customary attorney's fees.

(d) Nothing in this section shall be interpreted as prohibiting classifications based on sex that are reasonably necessary to the normal operation of the State's system of public employment or public education.

(e) Nothing in this section shall be interpreted as invalidating any court order or consent decree that is in force as of the effective date of this section.

(f) Nothing in this section shall be interpreted as prohibiting state action that is necessary to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(g) If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent permitted by federal law and the United States Constitution. Any provision held invalid shall be serverable from the remaining portions of this section.

120 Available in Counsel Connect Library.