## Chapter II --Employment Affirmative Action

**Affirmative-Action Definition; Affirmative-Action Motivations; Remedial and Non-Remedial Affirmative Action and Origins of Affirmative Action; Disparate Treatment and Impact**

 **Affirmative action seeks --through preferential treatment--to help and institutionally integrate protected racial, ethnic, gender, sexual-orientation, gender-identity, older-Americans, and disabled groups: a. to remedy intentional discrimination (called disparate treatment); or b. to correct the disproportionately-adverse effects of societal discrimination, irrespective of whether specific discriminatory intent can be proven. The latter is called disparate impact in the law.**

 **Affirmative action provides assistance in such areas as outreach, job acquisition and contracting, establishing business enterprises, student assignment and learning, criminal-justice reform, LGBT-protection, voting- rights acquisition, and residential help. The motivation for assistance varies, and includes the desires to correct disparate-impact discrimination; to demonstrate a willingness to meet government goals; to increase profit margins; or to advance political strength. The relative weight accorded to protected groups differs, depending on who is implementing affirmative action and why. Affirmative-action remedies also vary: from disseminating job information to preferential employment and university-admissions practices, classroom integration, student discipline, the creation of majority-minority legislative districts, accommodations for the disabled, help in creating business enterprises, and the removal of restrictions on homosexual participation in the military.**

 **Clearly, affirmative action has been undertaken, at times, merely to conform to government standards, and thus avoid governmental burdens. The diversity/inclusion mantra is often used by its adherents to insist that business/industrial efficiency and/or intellectuality are assisted by increasing the number of group members protected by affirmative action. The civil rights reformers who inaugurated affirmative action were not interested in bottom-line economic efficiency, or improved discussion in the classroom. Their goal was the remediation of the societal oppression.[[1]](#footnote-1) Since the late 1960’s, this kind of affirmative action (dubbed *remedial* in the law) has been a public and private weapon in our war against minority, ageist, and sexist discrimination in employment, education, immigration, political activity, criminal justice, and housing. Diversity and inclusion are often used to promote affirmative action. However, diversity/inclusion themes do not require the demonstration of a remedy for discrimination, although those notions are used for that purpose. Thus, the law calls diversity/inclusion efforts non-remedial.**

 **The U.S. Supreme Court has not been friendly in terms of determining whether disparate-impact affirmative action is compatible with the Constitution. The Court has told us that the Constitution requires that government affirmative action be supported by “strict scrutiny” which requires both a “compelling” governmental interest, and that the means used by affirmative action are “narrowly tailored” to the achievement of that compelling interest,[[2]](#footnote-2) but how “compelling” and “narrow tailoring” are to be defined are yet to be clearly delineated by the Supreme Court. However, the Supreme Court has determined that statute law (as opposed to Constitutional law) supports affirmative action. Further, diversity in college admissions policies has been found to be constitutionally acceptable.[[3]](#footnote-3)**

**Justice Holmes was fond of Henrik Ibsen’s assertion that “truths” had a lifespan of some twenty years.[[4]](#footnote-4) Gospel truth to the liberally trained in the 1940’s and 1950’s was that race, color, and ethnicity were to be disregarded in connection with individual evaluation. Of course, race/ethnic consciousness is of central consequence to affirmative action, and affirmative action has been advanced by the Obama Administration in the areas cited above. However, the President espoused the “old religion” in his Second Inaugural Address and on other occasions:**

**Each time we gather to inaugurate a President we bear witness to the enduring strength of our Constitution.  We affirm the promise of our democracy.  We recall that what binds this nation together is not the colors of our skin or the tenets of our faith or the origins of our names.  What makes us exceptional -- what makes us American -- is our allegiance to an idea articulated in a declaration made more than two centuries ago: “We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.” [[5]](#footnote-5)**

**According to the truths of the “old religion,” skin color and our origins of were not to be taken into account, particularly by Government. But new “truths” prevail. Taking race and ethnicity into account is very much acceptable now. This was true of President Obama and his Administration. Simply put, President Obama accepted the transformational policy of affirmative action. The Obama Administration was very much committed to race and ethnic consciousness, and its diversity orthodoxy. Shortly after gaining a second term, when asked about the diversity of his appointments at a press conference, the President said:**

**I’m very proud that in the first four years we had as diverse, if not more diverse, a White House and a Cabinet than any in history.  And I intend to continue that, because it turns out that when you look for the very best people, given the incredible diversity of this country, you’re going to end up with a diverse staff and a diverse team.  And that very diversity helps to create more effective policymaking and better decision-making for me, because it brings different perspectives to the table. …We’re not going backwards, we’re going forward.[[6]](#footnote-6)**

##  President Obama has not attempted to fully explain and support his diversity commitment to the public, or how diversity and remedial affirmative action square with his Second Inaugural theme on the equal nature of Americans. Is this political malpractice?

##  Likewise, President Trump allowed the Federal agencies concerned employment affirmative action to operate aggressively as in the past, and this too was transformational.[[7]](#footnote-7) This policy does not conform with the anti-affirmative action attitude of the White working class (without college degrees) which was critical to Trump’s 2016 presidential success. The attitude within the White working class was that some people were getting ahead without demonstrating needed merit. Nor does the policy conform with Trump’s insistence that America is one. As he said in his inaugural address:[[8]](#footnote-8)

**We, the citizens of America, are now joined in a great national effort to rebuild our country and to restore its promise for all of our people. Together, we will determine the course of America and the world for years to come. We will face challenges. We will confront hardships. But we will get the job done. …[S]tarting right here, and right now, because this moment is your moment: it belongs to you. It belongs to everyone gathered here today and everyone watching all across America. This is your day. This is your celebration. And this, the United States of America, is your country. …**

**Very late in his Administration, President Trump enunciated the “old religion” in the following Executive Order:**

  **Purpose. From the battlefield of Gettysburg to the bus boycott in Montgomery and the Selma-to-Montgomery marches, heroic Americans have valiantly risked their lives to ensure that their children would grow up in a Nation living out its creed, expressed in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal.” It was this belief in the inherent equality of every individual that inspired the Founding generation to risk their lives, their fortunes, and their sacred honor to establish a new Nation, unique among the countries of the world. President Abraham Lincoln understood that this belief is “the electric cord” that “links the hearts of patriotic and liberty-loving” people, no matter their race or country of origin. It is the belief that inspired the heroic black soldiers of the 54th Massachusetts Infantry Regiment to defend that same Union at great cost in the Civil War. And it is what inspired Dr. Martin Luther King, Jr., to dream that his children would one day “not be judged by the color of their skin but by the content of their character.”**

**Thanks to the courage and sacrifice of our forebears, America has made significant progress toward realization of our national creed, particularly in the 57 years since Dr. King shared his dream with the country.**

**Today, however, many people are pushing a different vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.**

**This destructive ideology is grounded in misrepresentations of our country’s history and its role in the world. Although presented as new and revolutionary, they resurrect the discredited notions of the nineteenth century’s apologists for slavery who, like President Lincoln’s rival Stephen A. Douglas, maintained that our government “was made on the white basis” “by white men, for the benefit of white men.” Our Founding documents rejected these racialized views of America, which were soundly defeated on the blood-stained battlefields of the Civil War. Yet they are now being repackaged and sold as cutting-edge insights. They are designed to divide us and to prevent us from uniting as one people in pursuit of one common destiny for our great country.**

**Unfortunately, this malign ideology is now migrating from the fringes of American society and threatens to infect core institutions of our country. Instructors and materials teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist are appearing in workplace diversity trainings across the country, even in components of the Federal Government and among Federal contractors. For example, the Department of the Treasury recently held a seminar that promoted arguments that “virtually all White people, regardless of how ‘woke’ they are, contribute to racism,” and that instructed small group leaders to encourage employees to avoid “narratives” that Americans should “be more color-blind” or “let people’s skills and personalities be what differentiates them.”**

**Training materials from Argonne National Laboratories, a Federal entity, stated that racism “is interwoven into every fabric of America” and described statements like “color blindness” and the “meritocracy” as “actions of bias.”**

**Materials from Sandia National Laboratories, also a Federal entity, for non-minority males stated that an emphasis on “rationality over emotionality” was a characteristic of “white male[s],” and asked those present to “acknowledge” their “privilege” to each other.**

**A Smithsonian Institution museum graphic recently claimed that concepts like “[o]bjective, rational linear thinking,” “[h]ard work” being “the key to success,” the “nuclear family,” and belief in a single god are not values that unite Americans of all races but are instead “aspects and assumptions of whiteness.” The museum also stated that “[f]acing your whiteness is hard and can result in feelings of guilt, sadness, confusion, defensiveness, or fear.”**

**All of this is contrary to the fundamental premises underpinning our Republic: that all individuals are created equal and should be allowed an equal opportunity under the law to pursue happiness and prosper based on individual merit.**

**Executive departments and agencies (agencies), our Uniformed Services, Federal contractors, and Federal grant recipients should, of course, continue to foster environments devoid of hostility grounded in race, sex, and other federally protected characteristics. Training employees to create an inclusive workplace is appropriate and beneficial. The Federal Government is, and must always be, committed to the fair and equal treatment of all individuals before the law.**

**But training like that discussed above perpetuates racial stereotypes and division and can use subtle coercive pressure to ensure conformity of viewpoint. Such ideas may be fashionable in the academy, but they have no place in programs and activities supported by Federal taxpayer dollars. Research also suggests that blame-focused diversity training reinforces biases and decreases opportunities for minorities.**

**Our Federal civil service system is based on merit principles. These principles, codified at 5 U.S.C. 2301, call for all employees to “receive fair and equitable treatment in all aspects of personnel management without regard to” race or sex “and with proper regard for their . . . constitutional rights.” Instructing Federal employees that treating individuals on the basis of individual merit is racist or sexist directly undermines our Merit System Principles and impairs the efficiency of the Federal service. Similarly, our Uniformed Services should not teach our heroic men and women in uniform the lie that the country for which they are willing to die is fundamentally racist. Such teachings could directly threaten the cohesion and effectiveness of our Uniformed Services.**

**Such activities also promote division and inefficiency when carried out by Federal contractors. The Federal Government has long prohibited Federal contractors from engaging in race or sex discrimination and required contractors to take affirmative action to ensure that such discrimination does not occur. The participation of contractors’ employees in training that promotes race or sex stereotyping or scapegoating similarly undermines efficiency in Federal contracting. Such requirements promote divisiveness in the workplace and distract from the pursuit of excellence and collaborative achievements in public administration.**

**Therefore, it shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes. In addition, Federal contractors will not be permitted to inculcate such views in their employees. … [From U.S. White House, *Executive Order on Combatting Race and Sex Stereotyping,* September 22, 2020 at** [**https://www.whitehouse.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/**](https://www.whitehouse.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/)**]**

 The 9th Circuit Court of Appeals upheld an injunction which banned applying Trump’s Executive Order on diversity training to Federal contractors and grant recipients. National Law Review, *The 9th Circuit and the Trump Ban on Diversity Training*  at <https://www.natlawreview.com/article/court-blocks-executive-order-banning-certain-forms-diversity-training-federal> Nevertheless, those who regard Trump as a racist should grapple with the above presidential words.

 It cannot be stressed too often that Federal officials seeking race/ethnic/gender employment opportunities emphasize goals rather than specific numbers. Employers may contest these goals, but this is expensive and brings bad publicity. Consequently, employers very often just meet the goals through legally forbidden race/ethnic/gender discrimination. See former Justice Scalia’s dissent at *Johnson v/ Transportation Agemcy,* 480 U.S. 616 (1987). <https://www.law.cornell.edu/supremecourt/text/480/616>

 **The reforms which culminated in affirmative action represent a revival of an earlier atrophied agenda. During the post-Civil War "Reconstruction," the nation adopted the 13th, 14th, and 15th Amendments to the Federal Constitution. These momentous enactments, and their auxiliary Statutes[[9]](#footnote-9), formally erased the stigma of slavery and were to be the platform for endowing the newly emancipated Black population with some measure of legal and political rights. But this “Reconstruction” was greatly negated because of the 19th century Supreme Court's hyper-technical reading of the Amendments, and remained largely dormant until the aftermath of World War II.[[10]](#footnote-10)**

 **The modern civil rights movement began in the late 1940's and early 1950's with the emergence of mass Black "resistance." This was a new phenomenon in our National experience. For the first time the African-American citizenry--the descendants of the Civil War's "Freedmen" --whose legal guarantees of freedom were so woefully attenuated-- organized itself to end Jim Crow and gain genuine equality. This was a "classic" 20th century mass-social movement, imbued with the messianic fervor of charismatic leaders, skilled in the vocabulary and the techniques of "civil disobedience" and "non-violent" protest: boycotts, sit-ins, vigils, freedom rides, voter registration drives, marches, demonstrations, hunger strikes, and, above all, appeals for political support. By the 1960's, when sporadic racial violence began to break out in our major cities, it had become obvious that a domestic crisis was in the making, and that Federal intervention was unavoidable. The result, after one of the longest domestic policy Congressional debates in our history, was the battery of Federal anti-discrimination law which embodies modern Statutory, civil rights reform.**

 **In several different formulations, customary scholarship portrays modern civil-rights reform as an incremental progression along a spectrum of goals. The goals range from abolition of discrimination to special privileges for discriminatees. A representative version of this standard conceptual scheme is found in Hugh Davis Graham's magisterial study, *The Civil Rights Era* . …[[11]](#footnote-11) : an initial period ("Phase I") during the 1950's and 1960's in which the relatively non-controversial goal of most reformers was to secure "equal *treatment*"; and the succeeding period ("Phase II"), which witnessed a shift to the indisputably revolutionary objective of "equal *results*."[[12]](#footnote-12) In political jargon, "equal treatment" programs are called "color-blind," or race/gender/ethnic/national origin-"neutral"; their "equal results" counterparts are dubbed race/gender/ethnic/national origin-"conscious," or affirmative action.**

 **Phase II ideology was judicially advanced by interpretation of the Civil Rights Act of 1964[[13]](#footnote-13) in the landmark case of *Griggs v. Duke Power Co*, (1971). [[14]](#footnote-14) But this was the result of *administrative* and *judicial*, rather than *legislative*, law-making.[[15]](#footnote-15) Further, later Supreme Court affirmative-action support was also much associated with administrative action.**

 **Before *Griggs v. Duke Power* (1971), the 1964 Civil Rights Act and a number of Presidential civil-rights initiatives arguably embodied color-blind, equal treatment doctrine. President Kennedy's 1961 Executive Order (EO) 10925, and President Johnson's 1965 Executive Order (EO) 11246, directed Federal contractors (1) not to "discriminate”, and (2) "to take affirmative action to ensure that applicants . . . and employees are *treated* . . . without regard to their race, creed, color, or national origin." [[16]](#footnote-16) In the same vein, Title VII [Section 703(a)] of the 1964 Civil Rights Act[[17]](#footnote-17) made it illegal to refuse to hire, fire, or "otherwise to discriminate" on account of race, color, sex, religion, or national origin. And, while the Statute empowered the courts to remedy "intentional" violations by "affirmative action,"[[18]](#footnote-18) it did not explicitly authorize affirmative-action preferences.[[19]](#footnote-19) Later Governmental action promoted the creation of the extensive affirmative action/diversity complex that exists today under Title VII.**

 **The impetus for conversion of civil rights programs into Phase II affirmative-action mechanisms came from the governmental agencies responsible for administering them. Initially, these administrators operated on the assumption that abolishing intentional, invidious discrimination would suffice to inaugurate equality of employment opportunity. By the late 1960’s, however, whether for ideological,[[20]](#footnote-20) and/or pragmatic[[21]](#footnote-21) reasons, they had determined that the goal was not attainable without active governmental promotion of minority employment.**

 **In 1969, the Office of Federal Contract Compliance Programs (OFCCP and responsible for implementing Executive Order11246 generally prohibiting race/ethnic discrimination by Federal contractors) persuaded President Nixon to approve the so-called "Philadelphia Plan," which required Federal contractors to make "good faith" efforts at proportional minority and female hiring.[[22]](#footnote-22) The penalty for an absence of "good faith" as determined by Federal administrators was the loss of Federal contracts. The Agency justified this "equal results" thrust by an audaciously expansive reading of Title VI of the 1964 Civil Rights Act which prohibited Federal funding of racially discriminatory programs. OFCCP has continued to broaden the coverage of the Philadelphia Plan. Although the original focus of the program was the plight of the Black community,[[23]](#footnote-23) in 1971 Hispanics and females of all ancestries were brought under the umbrella of the Plan. Since then, affirmative action benefits have been conferred on a miscellany of other groups, e.g., Asians, Aleuts, Eskimos, American Indians, Pacific Islanders, and females of all races. The expanding universe of the plan has become a source of controversy, raising the question whether Blacks suffer as a result, and require further remediation.**

 **The potential loss of Federal contracts prompted significant protected-group hiring to prevent contractor debarment.[[24]](#footnote-24) Indeed, in its extended version, the "Philadelphia Plan" has served as among the most potent of Federal affirmative action policies.[[25]](#footnote-25)**

 **Concurrently, the Equal Employment Opportunity Commission (EEOC) changed its mission under Title VII of the 1964 Civil Rights Act from processing complaints of statutory violation to aggressive promotion of proportional minority and female hiring, and other job opportunities. It was in this context of OFCCP and EEOC actions that the conceptual basis of contemporary affirmative action first became discernible. Antidiscrimination and diversity affirmative action became, in large measure, an exercise in *quantification* of *group disadvantage*. Thus, various statistical techniques were used to locate and measure the extent of female and minority employment under-representation in order to identify potential discriminators and diversity laggards, and focus on their job-opportunity practices.[[26]](#footnote-26) This approach maintains that the substantial absence of protected-group proportional representation, as well as intentional maltreatment of identifiable *individuals*, are both legitimate targets of anti-discrimination and diversity policy. In subsequent Supreme Court decisions, these contrasting notions of intentional and non-intentional under-representation of protected groups were formally articulated as "disparate impact" and "disparate treatment." During the Obama years, the EEOC came to prohibit LGBT discrimination in employment.[[27]](#footnote-27) The Trump Administration opposed interpreting Title VII’s prohibition of sex discrimination to apply to sexual orientation and gender identity. But the U.S. Supreme Court has ruled that the concept of sex in Title VII incorporates sexual orientation and gender identity.[[28]](#footnote-28) President Obama, by amending Executive Order 11246, has added sexual-orientation and gender-identity to the OFCCP list of contractor antidiscrimination prohibitions, but importantly that prohibition was rescinded during the Trump ears.[[29]](#footnote-29) President Trump was subject to considerable opposition from LGBT advocates, and his LGBT record is clearly mixed. He considered same-sex marriage a settled issue; he nominated gays for high-level positions; and he urged foreign nations to stop criminalizing gay activity. But he opposed transgenders in the military; and his Administration opposed transforming the concept of “sex” in Title VII of the 1964 Civil Rights Act to an anti-bias protection for the gay community, and transgenders.[[30]](#footnote-30)**

 **No statute explicitly authorized EEOC's or OFCCP's proportional representation actions. If, as some critics maintain,[[31]](#footnote-31) the Federal bureaucracies overstepped their bounds, this must be attributed to an unusual coincidence of Congressional avoidance and judicial tolerance. In effect, EEOC rewrote Title VII. At a time of serious social disorder, it was perhaps inevitable that the administrative bureaucracies would undertake to complete the work which Congress started but left unfinished, and that the courts would ratify their actions. A generation ago, the Federal judiciary enthusiastically endorsed the Philadelphia Plan[[32]](#footnote-32) and EEOC's administration of Title VII. Whether they would do so today is open to question. In any event, the entire episode vividly underscores the central role of administrative and judicial lawmaking in affirmative action and raises the question as to the merit of such an extraordinary delegation of legislative authority.**

 **As noted, there are two types of legally forbidden discrimination: disparate treatment and disparate impact. In this connection, the Supreme Court authorized this distinction in the employment realm. It has decided that there is room in Title VII of the 1964 Civil Rights Act for two mutually exclusive standards/theories of *forbidden* employment discrimination. The first is delineated in *Teamsters v. United States* (1977),[[33]](#footnote-33) and is called "disparate treatment." This "is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race [etc.] . . . .  *Proof of discriminatory motive is critical*, although it can in some situations be inferred from the mere fact of the differences in treatment."[[34]](#footnote-34) The conventional equitable remedy for such *intentional* discrimination is its elimination. This is said to secure "equal treatment," by enabling the discriminatee to compete against others on the basis of individual merit.**

 **The second major theory of illegal discrimination--"disparate impact"--stipulates that the 1964 Civil Rights Act can also be violated *without* proving discriminatory intent. The elements of this revolutionary doctrine were laid down in the keystone decision of *Griggs v. Duke Power Co* (1971).[[35]](#footnote-35) The Supreme Court unanimously held that the defendant-employer of a racially mixed labor force violated the Act by requiring all applicants for hire or promotion to hold a high school diploma and pass standardized intelligence tests. The evidence proved that Black applicants failed to meet these requirements at a "markedly disproportionate" rate compared to Whites. The Court attributed this statistical disparity directly to racism, because of the well-established fact that Blacks as a *group* received inferior education in the State's traditionally segregated schools. Accordingly, in the Court's view, Duke Power's requirements operated to exclude Blacks because of their race, thereby contravening Title VII's overriding remedial purpose "to achieve equality of employment opportunity and remove [racial] barriers. . . ."[[36]](#footnote-36) It was irrelevant, the Court ruled, that the tests themselves were lawful, or that there was no evidence of discriminatory intent. The test of liability is not "simply" the employer's motivation, but the *effects* or consequences of their practices. The Court therefore concluded that the Black plaintiff-employees, as members of a historically oppressed and disadvantaged group, were entitled to remedial relief against the illegal disparity, whether or not intended, and would prevail unless the employer could prove that the disputed disparateness was justified by *business necessity*.**

 **The dimensions of disparate-impact thinking as legitimated in *Griggs* have permeated the jurisprudence of Title VII (while concurrently guiding the affirmative-action endeavors of a number of Obama and Trump Administration agencies concerned with employment, including the OFCCP, and the EEOC : (1)"effects," not "intent" can govern; (2) the unintended, but disproportionately adverse impact of facially neutral employment practices, rooted in historical or societal bias against a protected minority, is unlawful unless the employer can prove *business necessity*; (3) the representation of minorities in the workplace would approximate the proportion of their qualified members in the relevant area; (4) any affected member of a protected group--even when not personally victimized--is entitled, as a group *member*, to claim relief under Title VII.**

 **It should be stressed that under *Griggs* the employer can defend against disparate-impact claims only by demonstrating a "job-related" "business necessity." The difficulties in establishing such a defense in racial/ethnic discrimination cases appears to have proven to be excessively burdensome to many employers, arguably leading them to adopt "voluntary" proportional representation schemes in order to avoid costly, risk-laden litigation.**

 **Not the least reason for this difficulty is the failure of both the courts and the Congress to define the elements of the "business necessity" defense. In a number of decisions involving Title VII, the Supreme Court relied on differing substantive elements of the defense, but did not articulate a comprehensive, unambiguous definition.[[37]](#footnote-37) In the 1991 Civil Rights Act,[[38]](#footnote-38) the concept of "business necessity" was expressly incorporated into Title VII; but the Congress did not define it under the new Act either. Once again the buck was passed for racial/ethnic discrimination in employment cases.**

 **The U.S. Constitution and Affirmative Action**

 ***Griggs* involved *statutory* interpretation. Does affirmative action conform with the dictates of the U.S. Constitution? At the Constitutional level, critical Constitutional disputes regarding affirmative action have involved the Equal Protection Clause of the Fourteenth Amendment (applicable to State Government), and its equal-protection “component” embedded[[39]](#footnote-39) by Supreme Court decree in the Fifth Amendment’s Due Process Clause, applicable to the National Government. The Equal Protection Clause prohibits any State Government from depriving “any person within its jurisdiction the equal protection of the laws.”[[40]](#footnote-40) What level of judicial scrutiny of Government action does the Equal Protection Clause and its Due Process Clause component require in connection with affirmative action? Should it be *mid-tier,* "*strict,*" or “*merely rational”*? To survive mid-tier review, an affirmative action program would have to serve an *important* government interest, and employ means that are *substantially* related to that governmental end. On the other hand, strict scrutiny requires a *compelling* governmental interest, and means which are *narrowly tailored* to achieve that compelling interest. A third standard--the merely rational standard permits authorized Government officials to regulate in a way which is not laughably *“off the wall.”* Starting in 1989, strict scrutiny was adopted by the High Court for racial/ethnic governmental classifications, first for State Government in *Richmond v. Croson* (1989),[[41]](#footnote-41) and later for the Federal Government in *Adarand v. Pena* (1995).[[42]](#footnote-42) Intermediate scrutiny was applied by the Court for gender classifications,[[43]](#footnote-43) but that distinction may have been annulled in 1996 when intermediate scrutiny was defined by the U.S. Supreme Court as requiring an “exceedingly persuasive” interest to support governmental gender discrimination.[[44]](#footnote-44) How “exceedingly persuasive” is to be distinguished from “compelling” is yet to be answered by the Supreme Court.[[45]](#footnote-45) In any event, the terms associated with strict scrutiny have not been clearly defined by a majority of the U.S. Supreme Court. The Court has yet to define such matters as the distinction between *important and compelling g*overnmental reasons, and whether disparate-impact theory is compatible with the Constitution. Strict scrutiny, moreover, was applicable for “racial classifications.”[[46]](#footnote-46) What racial classifications are remains debatable. In 2016, the Court restricted racial classifications in higher education admissions to actions which directly used race as a standard for admission.[[47]](#footnote-47) Was this too narrow a definition? Is it applicable to fields other than higher education?**

 **In *Grutter v. Bollinger* (2003),[[48]](#footnote-48) a Supreme Court majority accepted the need for a diverse student body at the University of Michigan’s Law School as a compelling governmental interest. Student-body diversity in K-12[[49]](#footnote-49) or workplace diversity have yet to be determined a compelling governmental interest in a Supreme Court majority opinion. Further in *Grutter v. Bollinger*, the Court accepted the University’s approach to the second prong of strict scrutiny, namely, *narrowly tailoring*. To the Law School, narrow tailoring was achieved by an admissions process which focused on achieving a *critical mass* of underrepresented minorities. A critical mass was not associated with a specific number. Rather, it required that number of minorities designed to reduce feelings of isolation and racial/ethnic stereotypes.[[50]](#footnote-50) Likewise, in 2016, the Court was content in leaving it to the University of Texas admission officials to determine the nature of narrow tailoring in its minority affirmative-action program.[[51]](#footnote-51) Was it appropriate to delegate judicial narrow-tailoring scrutiny to higher-education administrators?**

**The Diversity Insistence**

**The generally applicable “universalistic”(available to all groups) economic recovery efforts undertaken by the Obama Administration were cited by the Administration as being of considerable assistance to Blacks. These included subsidized health care insurance, aid to small business, tax relief for almost all Americans, subsidized jobs for low-income individuals, extensions of unemployment insurance, and food relief.[[52]](#footnote-52) Additionally, the existing employment affirmative-action programs were in full operation to assist minorities and females in their employment searches. Supporting these was the traditional affirmative-action remedial/disparate-impact rationale, aided and abetted by the diversity/inclusion mantra. Diversity/inclusion themes are used to support the remedying of systemic discrimination affecting protected groups. However, the diversity thesis --in arguing that different groups have different capacities and ideas--contradicts a central trope of the civil rights movement of the 1950s and 60s which urged the difference-blind notion that neither race nor ethnicity per se made for difference in intellectual or occupational capacity. What has impeded minorities was not racially or ethnically inherent, but the result of America’s racial and ethnic antagonisms which remedial affirmative action aimed to help cure. To be sure, while analytically different, diversity theory results in the hiring of more of the protected group members covered by affirmative action. But diversity themes also provide moral sustenance to those who seek merely to satisfy the proportionality statistical-standards of Government affirmative-action regulations. Diversity themes provide support to those who employ particular groups to satisfy presumed customer desire, or to reject Blacks on the stereotypical grounds that they are less dependable than immigrant Hispanics and Asians.[[53]](#footnote-53) To help cure this systemic-stereotypical pattern, Professor John D. Skrentny suggested taxing employers who hire immigrants.[[54]](#footnote-54)**

**Why the diversity insistence? For one, diversity theory does not require--as does remedial affirmative action--the demonstration of some kind of past or present forbidden discrimination. Thus, those who wish to remedy racial/ethnic/gender oppression do not have to demonstrate its existence. Diversity theory has it that the ideational and cultural differences are associated with different population groups, and these differences are required to spur productivity and intellectuality, irrespective of past or present discrimination. Alternatively, Harvard sociologist Frank Dobbin has it that diversity-badging supplementation was a self-preservation “cover” created by affirmative-action devotees in personnel departments casting about for a theory which could thwart the Reagan Administration’s efforts to reduce the undesired affirmative-action treatment afforded protected groups. Professor Dobbin did find a bridge between diversity and traditional, remedial affirmative-action thinking in American political ideology. To him, mainstream American thinking and remedial affirmative-action theory have both subscribed to fair and equal treatment of people. Fair and equal treatment, to the advocates of affirmative action, would lead naturally to diverse populations at work and in education.[[55]](#footnote-55)**

**Presidents Trump and Obama: Aspects of Employment Affirmative Action**

**While allowing Federal agencies to employ affirmative action, the focus of President Trump has been on building and strengthening the existing American economy so that it could provide jobs for Americans looking for work. Jobs for Americans have been central to President Trump’s thinking. And jobs grew during the Trump Presidency. The Wall Street Journal waxed effusively in an editorial[[56]](#footnote-56) stating that the first two years of the Trump Administration produced an abundance of jobs for the lesser-educated and lesser-skilled. Blacks obtained a million new jobs; Hispanics, two million. Critical to the blossoming economy were the decline in federal administrative regulations and tax reform which increased investment. And then came the coronavirus restrictions, which are negatively affecting minorities to a disproportionate degree. President Trump has insisted that that there will be a quick economic comeback so that minorities can once again flourish.[[57]](#footnote-57)**

**Disparate-impact theory was very much underscored in the affirmative-action undertakings of the Obama years. The President, himself, has publicly focused on the systemic racism--so crucial to disparate-impact theory. Speaking of Trayvon Martin’s death, he said:[[58]](#footnote-58)**

**There are very few African American men in this country who haven't had the experience of being followed when they were shopping in a department store.  That includes me.  There are very few African American men who haven't had the experience of walking across the street and hearing the locks click on the doors of cars.  That happens to me -- at least before I was a senator.  There are very few African Americans who haven't had the experience of getting on an elevator and a woman clutching her purse nervously and holding her breath until she had a chance to get off.  That happens often.**

**President Obama underscored his commitment to diversity theory in his Executive Order 13583 (August, 2011), titled,** [***Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce***](http://www.gpo.gov/fdsys/pkg/FR-2011-08-23/pdf/2011-21704.pdf)**.[[59]](#footnote-59) The Executive Order begins by trumpeting commonplace diversity theory themes:**

**Our Nation derives strength from the diversity of its population and from its commitment to equal opportunity for all. We are at our best when we draw on the talents of all parts of our society, and our greatest accomplishments are achieved when diverse perspectives are brought to bear to overcome our greatest challenges. A commitment to equal opportunity, diversity, and inclusion is critical for the Federal Government as an employer. …To realize more fully the goal of using the talents of all segments of society, the Federal Government must continue to challenge itself to enhance its ability to recruit, hire, promote, and retain a more diverse workforce. …**

 **A “strategic” plan was designed to implement Executive Order (EO) 13583 and was published by the U.S. Office of Personnel Management (OPM). It was forbiddingly complex, defining “diversity” as referring to race, color, ethnicity, disability, gender, sexual orientation, and gender identity.[[60]](#footnote-60) This “strategic plan” focused on the Management Directive 715 (MD-715)[[61]](#footnote-61) of the U.S. Equal Employment Opportunity Commission (EEOC). MD-715, operative since 2003, provides directives to Federal agencies on how to overcome the underrepresentation of minorities, females, and the disabled in the Federal workforce. This Directive solicits agencies to annually determine how the minorities and females are represented at various salary levels and work categories.[[62]](#footnote-62) “In conducting its self-assessment,” MD-715 continues, “agencies shall compare their internal participation rates with corresponding participation rates in the relevant civilian labor force (CLF). Geographic areas of recruitment and hiring are integral factors in determining ‘relevant’ civilian labor force participation rates. EEOC will provide appropriate civilian labor force data for use by agencies.”[[63]](#footnote-63) MD-715 went on by saying:**

**Where an agency's self-assessment indicates that a racial, national origin or gender group may have been, or may currently be, denied equal access to employment opportunity, the agency must take steps to identify the potential barrier. Workplace barriers can take various forms and sometimes involve a policy or practice that is neutral on its face. Identifying and evaluating potential barriers requires an agency to examine all relevant policies, practices, procedures and conditions in the workplace. The process further requires each agency to eliminate or modify, where appropriate, any policy, practice or procedure that creates a barrier to equality of opportunity….**

**Where it is determined that an identified barrier serves no legitimate purpose with respect to the operation of an agency, this Directive requires that agencies take immediate steps to eliminate the barrier. Even where a policy or practice that poses a barrier can be justified on grounds of business necessity, agencies must investigate whether less exclusionary policies or practices can be used that serve the same business purpose. . . .**

 **The U.S. Office of Personnel Management (OPM)--charged with implementing Obama’s diversity directive-- pointed out to the Washington Post that his priorities for the Federal workforce included the hiring of more women, the disabled, and people of color. [[64]](#footnote-64) "We're going to be very aggressive. We're going to dog this from every angle I can."[[65]](#footnote-65) The Director, in this newspaper account, as did the President in his EO, paid particular attention to the Government's woeful employment opportunity record for people with disabilities.[[66]](#footnote-66) The relative absence of Hispanics was also of concern to the Director.[[67]](#footnote-67) The Director’s Fiscal Year (FY ) 2011**[***Federal Equal Opportunity Recruiting Report***](http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reports/feorp2011.pdf)**outlined the percentage of targeted groups in the Federal workforce as compared to their percentages in the U.S. civilian labor force.**

**With respect to Hispanics, the Obama Administration has been assiduous in the courting of that community’s vote, as manifested by the President’s deportation reprieves for youthful illegals and the parents of those legally present in this country.[[68]](#footnote-68) Likewise, in 2011, OPM reestablished the Hispanic Council on Federal Employment consisting of leaders from the Hispanic community and Federal officials to advise the OPM Director on the hiring, advancement, and retention of Hispanics. The following FY 2011 figures were provided by the OPM Director in the Federal Equal Opportunity Recruiting Report.[[69]](#footnote-69) These are followed by OPM figures[[70]](#footnote-70) provided for Fiscal Years 2013 and 2014 as to racial/ethnic/gender proportions in the Federal workforce as a whole, and in the Senior Executive Service.70 & 71**

**FY 2011**

 **Federal Workforce Civilian Labor Force[[71]](#footnote-71)**

**Blacks 17.8% 10.1%**

**Hispanics 8.1 13.6**

**Asian/Pacific Islanders 5.6 4.4**

**Native Americans 1.7 0.7**

**Non-Hispanic /Multiracial 0.8 1.2**

**Whites 66 70**

**Minorities 34 30**

**Men 56.4 54**

**Women 43.6 46**

|  |  |  |
| --- | --- | --- |
|  | **Representation of the Federal Workforce** | **Representation in Senior Executive Service** |
| **FY 2013** | **FY 2014** | **FY 2013** | **FY 2014** |
| **Men** | **56.6** | **56.8** | **66.3** | **66.1** |
| **Women** | **43.4** | **43.2** | **33.7** | **33.9** |
| **Hispanic or Latino** | **8.3** | **8.4** | **4.1** | **4.4** |
| **White** | **65.1** | **64.7** | **80.1** | **79.3** |
| **Black or African American** | **18.0** | **18.1** | **10.8** | **11.1** |
| **Asian** | **5.5** | **5.6** | **3.0** | **3.2** |
| **Native Hawaiian / Pacific Islander** | **0.4** | **0.4** | **0.1** | **0.2** |
|  |  |  |  | **1.2** |

 **It appears that President Trump has not sought to diversify the Federal domestic bureaucracy.[[72]](#footnote-72) He has proclaimed the need to control the alleged “deep state” of Federal liberal workers who supposedly attempt to control government.[[73]](#footnote-73) To that end, President Trump issued a number of executive orders meant to ease the removal and punishment of federal bureaucrats; reduce the time spent by union representatives on union business using government time; and to prompt the renegotiation of collective-bargaining agreements with the unions.[[74]](#footnote-74) Trump has been unable to substantially reduce the size of a bureaucracy whose tenure is much protected by civil service rules. However, President Trump has attempted to reduce the regulations and rules which this giant bureaucracy has produced. He has claimed considerable success in this regarded, attributing the reduction as important to an improved national economy.[[75]](#footnote-75) One must wonder whether any President can control the Federal bureaucracy of some 2.6 million (plus some four million contract employees), and whether the Constitution (which calls for presidential supervision of the bureaucracy) is in need of change with respect to who is charged with supervising the bureaucracy.**

**Office of Federal Contract Compliance Programs (OFCCP) and Affirmative Action**

**Major Federal administrative units responsible for implementing affirmative action in private employment are the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP). Both have been particularly aggressive in advancing affirmative action during the Obama and Trump presidencies. The OFCCP is the first concern here.**

 **Every Federal contractor and subcontractor who supplies goods or services to the Federal Government of at least $50,000 and has 50 or more employees is required to have an affirmative action plan. Some 120,000 businesses have such a contractual relationship.[[76]](#footnote-76) The annual affirmative action plan[[77]](#footnote-77) requires an analysis of the percentage of minorities[[78]](#footnote-78) and women in each work group along with a comparison of the percentage of each minority group and females to “[t]he percentage of minorities or women with requisite skills in the reasonable recruitment area. The reasonable recruitment area is defined as the geographical area from which the contractor usually seeks or reasonably could seek workers to fill the positions in question.”[[79]](#footnote-79) Of course, determining the recruitment areas containing minorities or women with requisite skills can be most difficult. Yet the minority and female membership goals and adherence to these goals are critical to whether affirmative action is fulfilled. A similar affirmative-action plan is required for Federal *construction* contractors.[[80]](#footnote-80)**

 **Where minorities are underutilized relative to their availability, contractors are required--at the pain of losing their contractual relationship with the National Government and other penalties--to undertake *good faith* efforts to resolve this underrepresentation. Good faith efforts require the establishment of *goals*. “Placement goals serve as objectives or targets reasonably attainable by means of applying every good faith effort”[[81]](#footnote-81) to overcome the underutilization of minorities and women. In 2011, OFCCP cited more businesses for affirmative-action violations than at any time in the preceding nine years. More than half of the violations concerned the failure to engage in appropriate affirmative action for the disabled and veterans.[[82]](#footnote-82) While increasing its focus on disparate-impact affirmative action, OFCCP during the Obama years has acquired large conciliation settlements from businesses charged with violations, e.g., $3 million from FedEx; and $2 million from Baldor Electric. A 2011 memo of understanding between the EEOC and OFCCP was designed to increase the capacity of both agencies to investigate affirmative-action violations.[[83]](#footnote-83) OFCCP’s capacity alone has been augmented in that its full-time staff grew from some 585 to 755 between 2009 and 2011, and its funding increased about 25% during that same time period.[[84]](#footnote-84)**

 **To the human-resources, information-systems Director at St. Jude’s Medical Center in Nashville, conformity with OFCCP’s affirmative-action standards was becoming more difficult every year. Reporting to a U.S. House of Representatives subcommittee in April, 2012, the Director said that OFCCP’s affirmative-action “standards require that we have the perfect mix of gender and racial groups for every job category.”[[85]](#footnote-85) St. Jude’s enlisted the aid of lawyers, affirmative-action consultants, and special software (e.g., Peoplefluent) to conform with the rules. Still, a 2009 OFCCP audit of hiring practices at St. Jude’s lasted eight months at a cost of $37,000 and 400 employee hours.[[86]](#footnote-86)**

 **During the Trump years, the OFCCP has sought to improve its oversight of contractor compliance with the affirmative action program of the agency.[[87]](#footnote-87) Additionally, during the Trump years, OFCCP has been very active in antidiscrimination litigation. For example, it has pursued Goldman-Sachs, Bank of America, and Dell Technologies for deviating from appropriate affirmative-action commitments resulting in $21 million in back pay for minorities and females. Involved were one or more of such matters as improper hiring and equal pay for men and women. [[88]](#footnote-88) Early on the Trump Administration attempted to consolidate OFCCP and EEOC,[[89]](#footnote-89) but that effort failed, and the OFCCP remains at some 800 employees even though it was established and –questionably enough -- remains a creation of an Executive Order and not congressional statutory action. During the Covid-19 pandemic restraints, contractors can delay the performance of their affirmative-action responsibilities.[[90]](#footnote-90)**

**The Equal Employment Opportunity Commission (EEOC) and Employment Affirmative Action**

**The Equal Employment Opportunity Commission was created by the 1964 Civil Rights Act[[91]](#footnote-91) to implement that Statute’s prohibition against racial, ethnic, religious, and sexual discrimination in private-sector employment opportunity. The Commission, with 2539 employees, later acquired an antidiscrimination responsibility in connection with disabled persons and older workers, among other responsibilities which now include--according to a 2011 Commission interpretation--an extension of the prohibition against sex discrimination to cover the LGBT groupings,[[92]](#footnote-92) upheld by the U.S. Supreme Court, but opposed by the Trump Administration. Title 29 § 1608 *et seq* of the Code of Federal Regulations delineates the EEOC’s affirmative-action directives for minorities and women in the private arena.[[93]](#footnote-93) [And since 2003, EEOC Management Directive 715 has provided directives as to how Federal agencies are to engage in affirmative action in connection with their own workforces.] Private employers are encouraged to engage in a self-analysis to determine whether racial and ethnic minorities and women are statistically underrepresented relative to their availability in the appropriate labor market. If such underutilization is discovered, employers are urged to exercise *good faith* by**

 **initiat[ing] affirmative steps to remedy the situation” through the creation of long and short-term goals and timetables accompanied by, among other things: “[a] recruitment program designed to attract qualified members of the group in question; [and a]systematic effort to organize work and re-design jobs in ways that provide opportunity for persons lacking ‘journeyman’ level knowledge or skills to enter and, with appropriate training, to progress in a career field….[[94]](#footnote-94)**

 **Commentators have underscored the increased EEOC antidiscrimination zealotry in the Obama years. In 2012, the number of discrimination investigations has increased four-fold over 2007, and courtroom litigation on these matters was expected to increase significantly during the Obama second term.[[95]](#footnote-95) Under the EEOC’s 2012-2016 Strategic Enforcement Plan, moreover, disparate-impact discrimination affecting minorities, immigrants, and females, was to be emphasized.[[96]](#footnote-96) And near the end of the Obama Administration, the EEOC reported substantial increases in its successful antidiscrimination impact, and affirmative-action undertakings.[[97]](#footnote-97) The first table below concerns the impact of successful EEOC efforts at employer-employee conciliation; and the second concerns EEOC lawsuits which it won at trial or by mutual agreement.[[98]](#footnote-98)**

|  |
| --- |
| **Systemic Investigations Resolved** |
| **Fiscal Year** | **Systemic Investigations Resolved** | **Individuals ReceivingMonetary Relief** | **Monetary Relief** |
| **2006** | **8** | **0** | **0** |
| **2007** | **59** | **13** | **$1.65 million** |
| **2008** | **118** | **1,162** | **$17.47 million** |
| **2009** | **140** | **657** | **$13.84 million** |
| **2010** | **165** | **675** | **$12.21 million** |
| **2011** | **235** | **109** | **$9.76 million** |
| **2012** | **240** | **3,727** | **$35.42 million** |
| **2013** | **300** | **8,507** | **$39.84 million** |
| **2014** | **260** | **1,365** | **$13.38 million** |
| **2015** | **268** | **6,404** | **$34.51 million** |

|  |
| --- |
| **Systemic Lawsuit Resolutions** |
| **Fiscal Year** | **Number Resolved** | **Individuals  Benefited** | **Monetary****Relief** |
| **2006** | **7** | **271** | **$ 5.99 million** |
| **2007** | **24** | **1,212** | **$20.56 million** |
| **2008** | **19** | **12,406** | **$64.34 million** |
| **2009** | **22** | **2,676** | **$45.19 million** |
| **2010** | **28** | **8,987** | **$59.22 million** |
| **2011** | **30** | **4,280** | **$67 million** |
| **2012** | **23** | **713** | **$17.28 million** |
| **2013** | **30** | **7,717** | **$19.77 million** |
| **2014** | **17** | **876** | **$ 9.58 million** |
| **2015** | **28** | **9,599** | **$45.77 million** |

 **Save for its challenge regarding the meaning of sexual discrimination, and providing pay information, and the “but for” factor in Federal employee age discrimination (explained below), the Trump Administration has allowed both the EEOC and the OFCCP to operate as it had in the past.[[99]](#footnote-99)**

**Age Discrimination in Employment**

**In addition to its responsibilities under the Civil Rights Act of 1964 and in enforcing the Americans With Disabilities Act,[[100]](#footnote-100) the EEOC is charged with the implementation of the Age Discrimination in Employment Act of 1967 (ADEA)[[101]](#footnote-101) which bars age discrimination by employers for people 40 years or older. The EEOC reported that 14% of its successful conciliation investigations between 2011-2015 involved charges of age discrimination. Advocates of older workers, however, insisted that invidious discrimination against older workers is rampant, and that it remained a critical problem which the Obama Administration failed to care much about.[[102]](#footnote-102) During the Trump years, the EEOC said it would “focus on class-based recruitment and hiring practices that discriminate against … older worker. … in its litigation efforts.” [[103]](#footnote-103)**

 **The U.S. Supreme Court determined in 2009 that the ADEA incorporates disparate-impact theory. However, in the realm of age discrimination, plaintiff’s charges of disparate impact--even if age discrimination is shown to exist by disparate-impact analysis--can be defeated if the defendant-employer can show that their age-related discrimination can be supported reasonably by factors other than age.[[104]](#footnote-104) Such employer leeway is not available to employers where race/ethnic/gender discrimination is charged. Similar assistance in avoiding invidious discrimination has been granted to housing developers by the U.S. Supreme Court in its narrow interpretation of the Fair Housing Act of 1968.[[105]](#footnote-105)**

**For a plaintiff (in private employment) to prove an adverse employment action under the ADEA that plaintiff must prove that age was the “but for” factor behind the adverse action—that is, age alone was alone responsible for adverse action. Was the “but for” factor applicable to Federal employees? The answer by the U.S. Supreme Court was no.[[106]](#footnote-106) A statute governing Federal employees permitted them the protection of “mixed-motive analysis” (available in Title VII race, sex, religion and national origin discrimination cases) which is to say that Federal employees can challenge adverse action by arguing that age was one factor among others. If successful in proving that age was a factor, the Federal employee can prevail against the national government.[[107]](#footnote-107) The Trump Administration argued for applying the “but for” rule to Federal employees to prevent the creation of a dual system for age discrimination, one for private industry, and another for Federal employees.[[108]](#footnote-108)**

**Employment Affirmative Action for the Disabled**

**President Obama’s EO 13548 of July, 2010 concerned** [***Increasing Federal Employment for People With Disabilities***](http://www.gpo.gov/fdsys/pkg/FR-2010-07-30/pdf/2010-18988.pdf) **.[[109]](#footnote-109) Therein, the President noted that there were some 54 million disabled Americans, but that only some 5% of the millions of Federal employees were disabled persons. In the President’s view, the Federal Government has an important obligation to reduce the discrimination hampering the disabled. This discriminatory behavior has the effect of producing an unemployment rate among the disabled which was much higher than for the able-bodied.**

**To augment the number of disabled in the Federal workforce, EO 13548 committed the Obama Administration to achieve the year 2015 goal of increasing the disabled population in the Federal bureaucracy by 100,000.[[110]](#footnote-110) The Obama 100,000 goal for increasing the disabled number in the Federal bureaucracy was exceeded (by some 10,000[[111]](#footnote-111)) at the end of his second term. The number of disabled Federal Employees grew to by some 18,000 in the first year of Trump presidency, (but firings also increased by some 2600).[[112]](#footnote-112) The overall disability unemployment rate declined 4.6 % from 2014 to 8% in January 2019 when the overall unemployment rate was some 3.5%. [[113]](#footnote-113)**

 **Much of the movement of the disabled to jobs was a result of their removal from the Social Security disability rolls which grew enormously from 3 million in 1990 to some 10 million in 2014. The Trump Administration has sponsored experimental policies in 8 cities meant to encourage movement from the disability rolls to work, and there has been talk about toughening the eligibility requirements. Currently, Social Security Disability pays some $1,200 monthly on the average for those receiving disability. Many of the recipients claim mental illness or physical pain. Disability claims evaluations are much affected by the attitudes of the Social Security officer taking the claims.[[114]](#footnote-114)**

**Those who file disability claims wait between 3 and 50 months for answers. Disability procedures quite often involve Administrative Law Judges making decisions. To improve their efficiency (and perhaps toughen eligibility standards), President Trump has removed Administrative Law Judges (ALJ’s) from the competitive exam process requiring heads of agencies to choose from the top three scorers on the exams. Now agency heads (who are typically political appointees themselves) can choose those they want as Administrative Law Judges. The Trump policy has been attacked as an interference with the independence of the ALJ’s, but whether they should be made to conform with political dictates remains to be answered. [[115]](#footnote-115) Surely, one can expect from the democratic process that administrators conform with political dictates.**

 **The Code of Federal Regulations, Title 41§60-741 *et seq* [[116]](#footnote-116) governs the disability affirmative-action responsibilities of Federal contractors/subcontractors holding contracts of $50,000 or more with 50 employees. These contractors are to engage in extensive outreach to attract the disabled defined as those who suffer from physical or mental limitations which substantially interfere with a major life activity.[[117]](#footnote-117) Contractors are to reasonably accommodate the disabled when such accommodation is needed to qualify them to perform the required work.[[118]](#footnote-118) Unlike the requirements for minorities, and females, older OFCCP regulations did not require contractors to establish objectives or goals for the provision of employment opportunity for both veterans and the disabled. However, during the Obama Presidency, OFCCP established new regulations that require contractors to create goals for hiring vets, and the disabled, including a 7% utilization objective for the latter in all job categories for contractors with 100 or more employees.[[119]](#footnote-119) Goals and targets have also been imposed by OFCCP for the construction industry which had been exempt from that requirement.[[120]](#footnote-120) The extent to which these goals—still maintained by the Trump Administration which has been much criticized for sabotaging Obama disability policies[[121]](#footnote-121)-- is yet to be determined, but they have prompted strong protests from Federal contractor representatives. For example, the head of an organization representing human resources specialists wrote a senior Obama official responsible for regulatory-rule reform as follows:**

**The] H[uman]R[esources] Policy Association is writing to express its strong concern regarding the economic analysis conducted b [y Office of Federal Contract Compliance Programs (OFCCP) for the Notice of Proposed Rulemaking (NPRM) that was published on December 9, 2011, revising the regulations implementing the non-discrimination and affirmative action regulations of Section 503 of the Rehabilitation Act of 1973 (RIN 1250-AA05). Specifically, we would like to bring to your attention a new report from Applied Economic Strategies (AES) that estimates the first year cost of the NPRM [calling for a 7% hiring goal for the disabled] to be at least $5.9 billion, significantly higher than the $81.1 million estimated by OFCCP, and well in excess of the $100 million threshold that triggers a more detailed review of the regulatory burdens and potential alternatives…. [W]e would ask that the enclosed study be considered …and that OMB [Office of Management and Budget] ensure that OFCCP has considered a range of alternatives that would minimize or avoid the substantial costs that would otherwise be incurred by Federal contractors.[[122]](#footnote-122)**

**The Rehabilitation Act referred to in the above quote was a 1973 Statute[[123]](#footnote-123) that prohibited discrimination against the disabled in undertakings financed by the Federal Government. A more comprehensive prohibition was the 1990 Americans with Disabilities Act[[124]](#footnote-124) (ADA) which barred discrimination against the disabled in private and public employment, and in the provision of public and private services. As in the Rehabilitation Act, a disabled person by the ADA is one whose mental or physical impairment substantially interferes with one or more of life’s major activities. Employers (of 25 or more) are required to reasonably accommodate the disabled unless the accommodation is unduly burdensome. A major reason for the ADA was to increase employment for the disabled. But The Office of Disability Employment Policy in the U.S. Department of Labor reported that as of 2010-2012 “[e]mployment levels of people with disabilities are low, and those who are employed tend to be in low-paying occupations. Only one-third (32%) of working-age people with disabilities were employed on average in the 2010-2012 period, compared to over two-thirds (72.7% of people without disabilities.”[[125]](#footnote-125)**

**The disabled employment problem, to Richard Epstein and Mario Loyola, is not discrimination but the unfortunate existence of disability. To them, the ADA compounds the problem of disability by imposing such high affirmative-action/“reasonable accommodation” costs on employers that they attempt to skirt the hiring of the disabled. Facing Government-imposed liability costs, employers keep the disabled who are already working, but seek ways to avoid new disabled hires. Consequently, the ADA--rather than increasing job opportunity--operates to bar employment. These writers urge leaving market forces alone. Since the incidence of animosity against the disabled is low—Epstein and Loyola argue-- employers will assume the accommodations unless the costs are too high. Where costs are too high, they should be borne by the public which can democratically choose whether to pay increased taxes. As things stand now, the ADA imposes a hidden subsidy for the disabled to be covered by lower profits or increased costs. And the increased costs for “reasonable accommodation” tend to be extraordinarily burdensome, because Federal officials involve themselves in undertakings they are not trained to handle, namely workplace architecture.[[126]](#footnote-126)**

**To Samuel Bagenstos,[[127]](#footnote-127) the expansion of publicly subsidized social-welfare services-- particularly in connection with health-care assistance-- could help in mitigating the low employment of the disabled. The ability for the disabled to acquire assistance-technology and medical insurance without expenditure caps or limits on eligibility would be appropriate public-subsidy policies. Also of great employment value would be public support for home health assistance as opposed to institutionalization for the disabled. The Obama Administration maintains that its Affordable Care Act (ACA) promotes the aforementioned considerably.[[128]](#footnote-128) Whether the ACA reforms promised by the Trump Administration do so remains to be seen.**

**The Gender Pay Gap and Discrimination Against Women**

**Defeating the gender pay gap was of considerable concern to the Obama Administration. The angst associated with this area was expressed in a publication presented by the Presidentially created Task Force on Equal Pay. It consisted of representatives from the EEOC, the OPM, OFCCP, and the Department of Justice.[[129]](#footnote-129) This Task Force quoted[[130]](#footnote-130) the President to accentuate its pay-gap concern:**

 **Right now, women are a growing number of breadwinners in the household. But they’re still earning just 77 cents for every dollar a man does—even less if you’re an African American or Latina woman. Overall, a woman with a college degree doing the same work as a man will earn hundreds of thousands of dollars less over the course of her career. So closing this pay gap— ending pay discrimination—is about far more than simple fairness. When more women are bringing home the bacon, but bringing home less of it than men who are doing the same work, that weakens families, it weakens communities, it’s tough on our kids, it weakens our entire economy.**

**Critics argue that lower earnings for women result from such personal choices as the commitment to raise and care for children; the acceptance of non-technical and non-scientific jobs which pay less; and limited participation in “blue-collar” trades like construction and plumbing which garner high salaries.[[131]](#footnote-131) Such criticism was nonsense to Obama’s Task Force which wrote[[132]](#footnote-132) that:**

**Decades of research shows that no matter how you evaluate the data, there remains a pay gap—even after factoring in the kind of work people do, or qualifications such as education and experience. Those same studies consistently conclude that discrimination is the best explanation for the difference. In other words, pay discrimina­tion is a real and persistent problem that continues to shortchange American women and their families.**

**It is argued that, in part, the pay gap between men and women is attributable to structural/systemic disparate-impact factors. For example, it is contended that women have been excluded from high-paying jobs such as police and prison corrections, and the Department of Justice (DOJ) has focused on cases designed to overcome this systemic barrier. Illustrative is a 2012 case where the DOJ agreed to a settlement with a State corrections department. The DOJ suit argued that the physical test the state used to hire jailers discriminated against females. The settlement compelled the payment of $765,000 to women who were denied employment because of the physical test. Additionally, 30 qualified female corrections officers were to be hired as a priority, and the State was committed to create a new, non-discriminatory, physical-endurance requirement for corrections jobs.[[133]](#footnote-133)**

 **Another focus on the pay-gap, disparate-impact discrimination affecting females has been the effort by President Obama to acquire a “pay-band” wage reporting system, requiring employers to list the percentages of males and females at particular pay levels (bands) for particular jobs like manager, clerical, and editing so that comparisons (leading to gender pay equity) might be had.[[134]](#footnote-134) This effort was preceded by an Obama inspired OFCCP regulation --unaffected by the Trump Administration--prohibiting Federal contractors from discriminating against applicants or employees because of their discussions or comments about salaries--their own or others.[[135]](#footnote-135) Further, Federal contractors must take affirmative action to avoid negatively affecting employees because of their gender.[[136]](#footnote-136)**

 **Efforts by President Obama and his Administration to cater to women prompted the scorn of Diana Furchgott-Roth.[[137]](#footnote-137) Section 342 of The Dodd-Frank Wall Street Reform and Consumer Protection Act[[138]](#footnote-138) required the creation of some 30 different minority and female inclusion offices in Federal financial operations such as the regional banks of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Securities Exchange Commission, and the Controller of the Currency. To Furchgott-Roth, these new affirmative-action offices were needless bureaucratic additions, totally unnecessary because they would duplicate the efforts of the EEOC, OFCCP and the other existing affirmative-action offices in all the major Federal Departments and Agencies. All these new affirmative-action offices, she felt, would serve to encourage quotas. President Obama extolled the virtues of Dodd-Frank, but he did not publicly mention that the Act required the establishment of offices of minority and female inclusion in all the U.S. financial agencies, charged with the responsibility of promoting to the “maximum extent possible” minorities and female participation in Federal financial contracting, and in the Federal agency workforce. Minorities, by the Act, are defined as Black, Hispanic, Native, and Asian Americans.[[139]](#footnote-139) At the House hearings on this matter, the primary reference was to a Government Accountability Office study on the number of minorities and females in banks and other financial units relative to the number of White males. No data on minority and female work-abilities or availability was provided.[[140]](#footnote-140) As another example of affirmative-action overkill to Fruchgott-Roth, the Affordable Care Act created seven offices and coordinating committees especially for female ailments. The word “breast’’ is used 42 times in the Statute, while there was not one mention of male prostate difficulties.[[141]](#footnote-141)**

**And the Dodd-Frank emphasis on minority and female affirmative-action protection was not gutted during the Trump years,[[142]](#footnote-142) but President Trump has frequently called for the elimination of the Affordable Care Act which Congress has failed to do. President Trump did revoke the Obama pay-gap requirement that employers provide pay information on the basis of gender. Also revoked was the abolition of compulsory sex harassment arbitration.[[143]](#footnote-143) Trump was overruled judicially in the pay-report regard. As a consequence, gender pay-data was to be provided until the beginning of 2020. But it is unclear whether such information will help remedy the gender pay-gap.[[144]](#footnote-144)**

**Arguably, Trump harmed females in the following additional ways: 1. At the start of his Administration, the Attorney General (citing the President’s wishes) ended free birth-control coverage in ACA insurance by employers who religiously or morally rejected birth-control. [[145]](#footnote-145) The U.S. Supreme Court has supported this policy.[[146]](#footnote-146) 2. President Trump issued a rule prohibiting the promotion of abortion by Federally-financed organizations. This prohibition was upheld by the 9th Circuit.[[147]](#footnote-147) 3. The Health and Human Services Department has allowed medical-care personnel to refuse to assist transsexuals and abortion recipients without being accused of discrimination under Federal law.[[148]](#footnote-148)**

**President Trump was much criticized by women for his own alleged sex harassment, and his immigration policies, among other things. Tens of thousands have marched protesting his presidency.[[149]](#footnote-149) This animosity appears to have encouraged more females to run for public office, thus reducing the gender gap in that area. Additionally, Trump himself has insisted that his presidency has been good for women in that female unemployment was reduced as a consequence of deregulation and tax reform policies. He also maintained that he promoted female business enterprise and paid medical-leave furloughs.[[150]](#footnote-150) Trump has also declared that he is a strong pro-life person, allowing abortion in cases of rape, incest, or where a woman’s life is in danger.[[151]](#footnote-151)**

**Employing Ex Cons**

 **Given the large number of minorities with criminal records, the Obama Administration’s EEOC has insisted that employers assume the difficult task of demonstrating that past criminal activity would clearly interfere with work ability before applicants are rejected on criminal convictions alone. By law, ex- criminal-offenders may face limits or be excluded from public services such as social welfare benefits, student loans, housing, and occupational licenses, limiting their capacity at social integration. The greatest barrier, for those convicted of crimes, is obtaining living-wage employment. A one-year (2000) study has it that some 60% of those who have served time do not obtain employment within a year after being released from prison. Several states prohibit ex-felons from all public employment. Further, employers tend to be biased against hiring past criminal offenders who often have less education, lower cognitive skills, and more mental and physical ailments than the population at large. Surely, employers are understandably concerned about workplace safety, and future criminal behavior. Surely too, unemployment of ex-offenders could lead to recidivism, but there are studies which maintain that employed ex-offenders are no more likely to commit criminal acts than non-offenders.[[152]](#footnote-152)**

 **Title VII of the 1964 Civil Rights Act does not directly protect ex-offenders against discrimination. However, discrimination against ex-offenders in employment disparately impacts minorities since close to half of ex-offenders are African Americans, and one-fifth are Hispanic.[[153]](#footnote-153) Discrimination against this minority under-class of ex-offenders, has been an issue of major concern before and during the Obama Administration, and the EEOC --in 2012--issued an affirmative-action “Guidance”[[154]](#footnote-154)document (of some 60 pages!) to covered employers designed to augment the protection given the ex-offender underclass against discrimination. To this end, the guidance document advised individualized assessment. Employers were urged, as a defense against EEOC suit, to weigh the nature of ex-offender criminality-- when it occurred, and whether the offender had been rehabilitated--in relation to the job and its requirements. Excluded ex-cons were to be given an opportunity to explain why employment exclusion had been in error. According to the guidance document, to justify a criminal-record policy of exclusion, an employer had to demonstrate that such a policy “operates to effectively link specific criminal conduct and its dangers with the risks inherent in the duties of a particular position.”[[155]](#footnote-155)**

 **This 2012 Obama-era, affirmative-action effort to relieve minority unemployment was met with considerable protest. Nine state attorneys-general insisted that the Guidance was a stellar example of Federal Government overreach.[[156]](#footnote-156) A provocative essay argues that the 2012 Guidance imposes an unfair subjectivity burden on employers. How are employers to determine what impact previous criminal behavior will have? And this guessing could potentially open the floodgates of negligence liability.[[157]](#footnote-157) Still one can sympathize with the 2012 Guidance, given the grave employment burden faced by ex-offenders and the social need to reintegrate this underclass into society.**

 **It should be noted that “guidance” is not a “regulation.” The latter is “law,” and before it is imposed its draft is to be published (in the Federal Register) and be subject to lengthy public and lobbyist review and commentary. Because of the absence of public review, “guidance”--which is extensively practiced by Federal administrators, particularly by the Obama Administration--is considered by critics to be objectionable. When finalized, regulations are mandates which must be adhered to. Guidance documents are advice-opinions from administrators based on what they say is their understanding of the law. Nonetheless, nonconformance with guidance documents is fraught with peril as it could spur a very costly negative administrative response. Consequently, it is argued that “guidance” largely compels particular behavior. If accepted judicially, guidance becomes law. How then –one is compelled to ask--has the 2012 criminal-record guidance affected employer behavior?**

 **President Trump advocated the employment of ex-cons, and the First Step Act[[158]](#footnote-158) was designed not only to release Federal prisoners, but to train offenders so that they could undertake useful employment once released. The tight economy of the Trump years prompted the hiring of ex-cons, but aside from positive economic conditions, President Trump seemed quite pleased with former imprisoned people who worked or planned to work. As he said to a class of ex cons which was scheduled to work:[[159]](#footnote-159)**

**We are here to reaffirm that America is a nation that believes in redemption.  And that’s what it’s about: redemption.  We believe in second chances.  And we want to bring returning citizens, great people — great people — in many cases, great people, and not in all cases.**

**I’m not going to be too politically correct, fellas — (laughter) — right?  Not in all cases, but in many cases.  We want to rebuild their lives; they want to rebuild their lives.  They want to help us and rebuild our country.  …**

**But to the 29 graduates: You’re returning to your families.  You have paid your debt to society and shown a commitment to change.  You’ve overcome many challenges: broken free of addiction, learned new skills, and replaced old habits with fresh resolve. …**

**And now you have a chance to begin a new chapter that you are proud to call your own.  And I have little doubt you’re going to be very, very successful.  Your future does not have to be defined by the mistakes of the past.**

**Today we declare that you are made by God for a great and noble purpose, and you understand that.  (Applause.)  I mean, it’s a great and noble purpose.  And you’re valued members of our American family, and we are determined to help you succeed and we’re going to work with you.  And you’re going to work with Jon and everybody else in this really incredible place that you’ve all put together, Jon.**

**And you’re going to be so successful.  You’re going to say, “I’m going to be more successful than Trump.”  (Laughter.) Going to be more — and I’ll be happy if you do it, I’ll tell you what.  (Applause.)  I’ll be very happy about it.**

**But as long as you work hard and follow the law and do your part to contribute to your communities, your best days are just beginning.  The best part of your life is beginning.  I really believe that.  And your greatest years are just ahead.**

**And to all of the family members and loved ones — who have been through so much — of the graduates who joined us today, we know your journey has not been an easy one, but your love and support make all of the difference.  And we are tremendously grateful for the families, the loved ones.  And I know they’re even more grateful, because without them, you wouldn’t be here.  You wouldn’t be here.  (Applause.)  So I want to thank you.**

**Minority and Women Business Enterprises**

**Affirmative action encourages the development of minority and female business enterprises—a policy embraced by President Obama and his Administration. During the First Obama Administration --between FY 2009 and FY2012--Federal contract spending for certified small disadvantaged enterprises contractual services totaled some $133 billion or about 8% of total expenditures for Federal procurement of goods and services for those years.[[160]](#footnote-160) The 8% exceeded the 5% goal assigned by Statute for all Federal agencies.**

 **Indeed, Federal procurement expenditures for certified, small disadvantaged business enterprises (DBEs) represent a significant national affirmative-action effort to assist minority and female-owned businesses. President Trump has observed that, “when everybody is participating and given a shot, there’s nothing we cannot do. … Because when we’ve got everybody on the field, that’s when you win games.”[[161]](#footnote-161) President Trump also advocated minority business enterprise. He said: “Minority-owned businesses are helping to power the engine of American capitalism.  The ambition of minority entrepreneurs secures a better future for their families, their communities, and the Nation.  …”[[162]](#footnote-162)**

 **Among other ways, minority and female owned business are assisted in lucrative ways through Federal procurement policies. In addition to Federal loans and training, benefits available to minority and women businesses in governmental contracting include:[[163]](#footnote-163)**

**-- Establishment of Governmental goals for the hiring of minority and female DBE businesses to perform Governmental contracting.**

**--Monetary incentives for prime Governmental contractors to subcontract to DBEs as in *Adarand v. Pena* (1995).[[164]](#footnote-164)**

**--Sheltered markets offering set-asides (which restrict Government-contract bidding to DBEs) and sole-source contracting where Government-contract negotiation is restricted to particular firms.**

**--Requirements that good faith efforts be undertaken by Government prime contractors to seek out potential minority and female subcontractors.**

**Federal procurement expenditures for certified, small business enterprises represent significant national affirmative-action efforts to assist minority and female-owned business through a variety of preferential treatments. There are some thirty-five thousand small disadvantaged minority and female businesses[[165]](#footnote-165) recognized by the Federal Government. States and localities have created many others, but there is no accurate count of their numbers.[[166]](#footnote-166)**

 **African-American businesses were the initial beneficiaries, and their advantages prompted a stampede by other groups insisting on their disadvantaged status. This fanning of the flames of racial/ethnic/gender grievance successfully garnered further governmental appeasement. According to the Small Business Administration (SBA—which, among other agencies, administers to small minority and female businesses) businesses owned and operated by U.S. citizens whose net worth is below $750,000[[167]](#footnote-167) (not counting the value of one’s home and business) can be certified for Federal and state/local affirmative action programs if the owner/operator is a female, or is a member of one of the following presumptively[[168]](#footnote-168) (by Federal standards) disadvantaged/discriminated against groups:**

**Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal). [[169]](#footnote-169)**

 **Ironically, African-American businesses--for whom affirmative action was originally created[[170]](#footnote-170) may receive less from disadvantaged business programs than others. For example, a study of 2004 disadvantaged contracts issued by the Federal Aviation Administration noted that African-American firms received 23.5% of the disadvantaged business contracts (31% of the dollars), while white females obtained 48.3% of those contracts (36.5% of the dollars).[[171]](#footnote-171)**

**LGBT Matters**

 **President Trump seems to have accepted the notion that the concept of sex in Title VII of the 1964 Civil Rights Act incorporates sexual orientation and gender identity as ruled by the U.S. Supreme Court.[[172]](#footnote-172) This ruling could be very helpful to the employment objectives of LGBT community. As noted, however, the Trump Administration opposed transgender freedom in the use of K-12 facilities, their full acceptance by the military, and the refusal of health care personnel from participating in transgender surgery for religious or moral reasons. On the other hand, President Trump recognizes same-sex marriage. He has chosen gays for high-level positions. He has urged foreign nations to end the criminalization of gay sexuality.**

 **There is no such mixed record for President Obama and his Administrations. Among other things, the Obama Administration supported the ending of “Don’t Ask, Don’t Tell” in the military; it supported the end of the Defense of the Marriage Act; it recognized the acceptance of transgenders in the military; and it supported the use of K-12 facilities by transgender youngsters.**

 **The military is a haven for minority employment opportunity, and the Obama effort to promote rights in the military warrant attention. During the 2008 campaign and thereafter, President Obama expressed his opposition to both the Don’t Ask, Don’t Tell Statute (DADT) and the Defense of Marriage Act. The birth of DADT was the result of a congressional “compromise” crafted to quiet the hubbub provoked by President Clinton’s proposed executive order banishing sexual-orientation discrimination in the military.[[173]](#footnote-173) In general, DADT was supposed to hold gays and lesbians militarily harmless so long as their sexuality was kept in the “dark,” which “darkness” was not to be probed by superiors. Article II of the Constitution tells us that the President is to faithfully execute the laws. Typically, this obligation has been regarded as requiring the President’s officers to defend statute when they are challenged in court. Exceptions to this obligation exist such as where the President regards a statute as undercutting his Article II executive powers. However, in the case of DADT, the Obama Administration said that it would defend the Statute. According to law Professor Antony Barone Kolenc’s persuasive research, this defense was pretense and not full-fledged.[[174]](#footnote-174)**

**Professor Kolenc details how Justice Department (DOJ) officials vetted their DADT briefs to LGBT-advocacy group leaders, and promised to keep DOJ advocacy in defense of DADT free of matters offensive to homosexuals. DOJ briefs in this connection engaged in the legerdermain of defending the DADT Statute while making it clear that the Obama Administration viewed it as unconstitutional! Nor did the Obama Administration argumentation present the strong constitutional and other positions advanced by the previous Bush Administration. And when an appellate court ruled against the Obama DOJ’s “defense,” the Administration did not seek Supreme Court review.[[175]](#footnote-175)**

**Pretend to defend postures by Presidents, Kolenc reasonably asserts, seriously frustrate the following Constitutional obligations: the President’s duty to faithfully execute the laws; the ability of Congress to investigate and correct executive branch undertakings; judicial capacity to weigh and balance arguments presented to it; the lawyerly duty to present their best arguments; and the need to correctly inform the public about Governmental activities. Pretense can have benefits though in that it may facilitate the achievement of the President’s political objectives and lubricate the President’s political flexibility.**

**Is Affirmative Action Black Enough?**

 **Affirmative action was extended to non-Black groups essentially by policy elites (especially in the bureaucracy) prodded by advocates (who were often bureaucrats themselves) because non-Black groups of color, the disabled, and females of all races and ethnicities were analogized as being comparable to African Americans in the degree to which they suffer from systemic discrimination. Writing in 2002, Professor Skrentny found no justification for this extension, and he called for the creation of a National commission to study the question of which groups are entitled to affirmative action. He argued that generally the grass-roots mass uprisings of the Black civil-rights social movement was not associated with the extension of affirmative action to females, the disabled, and non-Black groups. Rather the extension was far more anticipatory than participatory in that it was led by White policy elites who compared the newly covered groups as being like Blacks in their suffering, and who wanted to satisfy females and minorities, get their votes, and quash potential uprisings. No such comparability was made for ethnic White groups.[[176]](#footnote-176)**

**The startling list of presumptive DBE-discriminatees listed above, and the expansion of affirmative action to non-Blacks and females throughout the affirmative-action universe prompts the question of which groups should be covered by affirmative action, and whether it is Black enough. Why, for example, are Tongans and Pakistanis covered? Clearly, the African-American community is still gravely crippled by social and economic ills. Is one of the problems the need for Blacks to compete with so many other groups for affirmative action? Is a National commission, advocated by Professor Skrentny, created to determine who is entitled to affirmative action appropriate? Are not the affirmative-action recipients so entrenched that they would politically paralyze such a commission? Would it not be wise to establish affirmative action programs as reparations solely for African Americans? [[177]](#footnote-177)**

1. See John David Skrentny*, The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (The University of Chicago Press, 1996), 7. [↑](#footnote-ref-1)
2. See *Richmond v. Croson,* 488 U.S. 469 (1989) and *Adarand v. Pena,*515U.S. 200 (1995) [↑](#footnote-ref-2)
3. *Grutter v. Bollinger,* 539 U.S. 306 (2003). [↑](#footnote-ref-3)
4. C. Vann Woodward, *Thinking Back: The Perils of Writing History* (Louisiana State University Press, 1986), 3. [↑](#footnote-ref-4)
5. U.S., The White House, *Inaugural Address by President Barack Obama*, January 21, 2013 at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama> [↑](#footnote-ref-5)
6. U.S., The White House, *News Conference by the President*, January 14, 2013 at <https://obamawhitehouse.archives.gov/the-press-office/2013/01/14/news-conference-president> [↑](#footnote-ref-6)
7. For examples, see Gerald L. Maatman, Christopher J. DeGroff, and Matthew J. Gagnon, *EEOC-Initiated Litigation 2oo18* (Seyfarth Shaw, 2019) at <https://images.law.com/contrib/content/uploads/documents/390/28858/2019-EEOC-Book-PDF-Preview-1.pdf> ; and Roy Maurer, *Trump’s OFCCP Collects Millions in Back Wages,* Human Resources Report, October 11, 2019 at <https://humanresources.report/news/trumps-ofccp-collects-record-millions-in-back-wages/6502> [↑](#footnote-ref-7)
8. U.S. The White House, *Trump’s Inaugural Address*,January 20, 2017 at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-weekly-address-24/> [↑](#footnote-ref-8)
9. See 42 U.S.C. §§ 1981, 1982, and 1983 at <https://www.law.cornell.edu/uscode/text/42/1981>; <https://www.law.cornell.edu/uscode/text/42/1982>; <https://www.law.cornell.edu/uscode/text/42/1983> (2016) [↑](#footnote-ref-9)
10. Readers are urged to familiarize themselves with contemporary revisionist accounts of this altogether remarkable "Reconstruction" period, namely: Kenneth M. Stampp, *The Era of Reconstruction, 1865-1877* (Alfred A. Knopf, 1964); John Hope Franklin, *Reconstruction: After The Civil War* (The University of Chicago Press, 1995); and Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* ( Harper & Row, 1988). [↑](#footnote-ref-10)
11. Oxford University Press, 1990. [↑](#footnote-ref-11)
12. Hugh Davis Graham, *Civil Rights Era* (Oxford University Press, 1990), 456-458. [↑](#footnote-ref-12)
13. Public Law 88-352. At <http://www.senate.gov/artandhistory/history/resources/pdf/CivilRightsActOf1964.pdf> [↑](#footnote-ref-13)
14. 401 U.S. 424 at <https://www.law.cornell.edu/supremecourt/text/401/424> [↑](#footnote-ref-14)
15. To better familiarize oneself with the transition from Phase I to Phase II, the following perspectives are recommended: Graham, *The Civil Rights Era*, passim. Skrentny, *The Ironies of Affirmative Action*, chps. 5, 6 (cited in 24). Herman Belz, *Equality Transformed: A Quarter-Century of Affirmative Action* (New Brunswick, N.J.: Transaction Publisher, 1991), chps. 1-4. Alfred Blumrosen, *Modern Law : The Law Transmission System and Equal Employment Opportunity* (Madison, Wisconsin: University of Wisconsin Press, 1993), ch. 8. Paul Burstein, ed., *Equal Employment Opportunity* (New York: Walter de Gruyter, Inc., 1994), parts I-V, VII. [↑](#footnote-ref-15)
16. Emphasis supplied. [↑](#footnote-ref-16)
17. Pub. L. 88-352; 78 Stat. 241 at <https://www.govinfo.gov/content/pkg/STATUTE-78/pdf/STATUTE-78-Pg241.pdf#page=1> [↑](#footnote-ref-17)
18. Section 703(g) of Public Law 88-352 at <http://www.senate.gov/artandhistory/history/resources/pdf/CivilRightsActOf1964.pdf> [↑](#footnote-ref-18)
19. Section 703 (j) of Public Law 88-352 (hyperlinked above) precluded any interpretation of the Act which would require "preferential treatment" to remedy racial "imbalance." This can be read as a prohibition of Phase II remedies. [↑](#footnote-ref-19)
20. See Herman Belz, *Equality Transformed: A Quarter-Century of Affirmative Action* (New Brunswick, N.J.: Transaction Publisher, 1991) chps. 2-4, 10 . [↑](#footnote-ref-20)
21. See John David Skrentny*, The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (The University of Chicago Press, 1996)*,* 125-139. [↑](#footnote-ref-21)
22. The Philadelphia Plan envisioned and encouraged the practical equivalent of quota hiring and must be deemed a classic instance of overt race-consciousness. The circumstances of its adoption by a fiercely partisan Republican President represent a case study in the institutional logic of Presidential politics. According to one Academic, Nixon's action was dictated by the imperative that informs every presidency during troubled times: the beleaguered incumbent's need to ensure his "place in history" by bold, risk-taking, creative assertion of his leadership role, including pre-emption of his political opponents if necessary. Skrentny, *Ironies of Affirmative Action*, 67-68, 101, 178-190 (cited above). Here, Skrentny relied on the "institutionalism" theory of Stephen Skowronek, *The Politics Presidents Make*, 2d ed., (Harvard University Press, 1997). [↑](#footnote-ref-22)
23. John David Skrentny, *The Minority Rights Revolution* (The Belknap Press of Harvard University, 2002), 12, 14.-15, 86-87. [↑](#footnote-ref-23)
24. Alfred Blumrosen, *Modern Law : The Law Transmission System and Equal Employment Opportunity* (University of Wisconsin Press, 1993),132. [↑](#footnote-ref-24)
25. Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in Bernard Grofman & Chandler Davidson, eds., *Controversies in Minority Voting: The Voting Rights Act in Perspective* (The Brookings Institution, 1992), 185. [↑](#footnote-ref-25)
26. Alfred Blumrosen, *Modern Law : The Law Transmission System and Equal Employment Opportunity* (University of Wisconsin Press, 1993) 131-132; and John David Skrentny*, The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (The University of Chicago Press, 1996)*,* 10-122, 143-144. [↑](#footnote-ref-26)
27. U.S. Equal Employment Opportunity Commission, *Facts About Discrimination in Federal Government Employment.*  Accessible at [http://www.eeoc.gov/Federal /otherprotections.cfm](http://www.eeoc.gov/federal/otherprotections.cfm); and *Mia Macy v. Eric Holder*, Equal Employment Opportunity Commission Opinion, ATF 2011-00751 at <https://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>; Crystal Proxmire, *EEOC Seeks Solid LGBT Discrimination Cases*, Between the Lines, January 17, 2013.<http://www.pridesource.com/article.html?article=57954> [↑](#footnote-ref-27)
28. *Bostock v. Clayton, no, 17-1618* (2020) at <https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf> [↑](#footnote-ref-28)
29. Julie Hirschfeld Davis, *Obama to Issue Order Barring Anti-Gay Bias by Contractors,* The New York Times, July 18, 2014 at <https://www.nytimes.com/2014/07/19/us/politics/obama-to-extend-protections-for-gay-workers-with-no-religious-exemption.html> [↑](#footnote-ref-29)
30. *Social Policy of Donald Trump,* Wikipedia at <https://en.wikipedia.org/wiki/Social_policy_of_Donald_Trump> [↑](#footnote-ref-30)
31. See, e.g., Herman Belz, *Equality Transformed: A Quarter-Century of Affirmative Action* (New Brunswick, N.J.: Transaction Publisher, 1991), chps. 3, 4 [↑](#footnote-ref-31)
32. See e.g., *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir 1971) at <http://openjurist.org/442/f2d/159/contractors-association-of-eastern-pennsylvania-v-secretary-of-labor-p-a-m-d-and-and-d-and> *cert*. denied sub nom. *Contractors Association of Eastern Pennsylvania v. Hodgson,* 404 U.S. 854 (1971). [↑](#footnote-ref-32)
33. 431 U.S. 324 at <https://supreme.justia.com/cases/federal/us/431/324/case.html> [↑](#footnote-ref-33)
34. Id. at 335, n. 15 (emphasis supplied). [↑](#footnote-ref-34)
35. 401 U.S. 424 at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=515&page=200> [↑](#footnote-ref-35)
36. Id. at 429-430. [↑](#footnote-ref-36)
37. See *Griggs v. Duke Power Co*., 401 U.S. 424 (1971) at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=515&page=200>*Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) at <https://supreme.justia.com/cases/federal/us/422/405/case.html> *Dothard v. Rawlinson*, 433 U.S. 321 (1977). At <https://supreme.justia.com/cases/federal/us/433/321/case.html>*New York Transit Authority v. Beazer*, 440 U.S. 568 (1979) at <https://supreme.justia.com/cases/federal/us/440/568/> [↑](#footnote-ref-37)
38. Public Law 102-166. Accessible at <http://www.gpo.gov/fdsys/pkg/STATUTE-105/pdf/STATUTE-105-Pg1071.pdf> [↑](#footnote-ref-38)
39. See *Bolling v. Sharpe*, 347 U.S. 497 (1954) at <https://supreme.justia.com/cases/federal/us/347/497/case.html>. [↑](#footnote-ref-39)
40. At <http://www.archives.gov/exhibits/charters/constitution_transcript.html> [↑](#footnote-ref-40)
41. 488 U.S. 469 at <https://supreme.justia.com/cases/federal/us/488/469/case.html> [↑](#footnote-ref-41)
42. 515 U.S. 200 at <https://supreme.justia.com/cases/federal/us/515/200/case.html> [↑](#footnote-ref-42)
43. *Craig v.Boren*, 429 U.S. 190 (1976) at <https://supreme.justia.com/cases/federal/us/429/190/case.html> [↑](#footnote-ref-43)
44. *U.S. v. Virginia,* 518 U.S. 518 .. 515, 535-546 at <https://supreme.justia.com/cases/federal/us/518/515/case.html> [↑](#footnote-ref-44)
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162. U.S. The White House, *Presidential proclamation on Minority Enterprise Development Week,2019,* December 9, 2019 *at* [*https://www.whitehouse.gov/presidential-actions/presidential-proclamation-minority-enterprise-development-week-2019/#:~:text=NOW%2C%20THEREFORE%2C%20I%2C%20DONALD,National%20Minority%20Enterprise%20Development%20Week.*](https://www.whitehouse.gov/presidential-actions/presidential-proclamation-minority-enterprise-development-week-2019/#:~:text=NOW%2C%20THEREFORE%2C%20I%2C%20DONALD,National%20Minority%20Enterprise%20Development%20Week.) [↑](#footnote-ref-162)
163. U.S. Civil Rights Commission, *Federal Procurement After Adarand*, September, 2005, 138-152. Accessible at <http://www.usccr.gov/pubs/080505_fedprocadarand.pdf> [↑](#footnote-ref-163)
164. 515 U.S. 2000 at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=515&page=200> [↑](#footnote-ref-164)
165. George R. La Noue, *Defining Social And Economic Disadvantage: Are Government Preferential Business Certification Programs Narrowly Tailored?*  12 U Maryland L J of Race, Religion, Gender, and Class, 274, 277-278 (Fall, 2012). Available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1210&context=rrgc> [↑](#footnote-ref-165)
166. Id. [↑](#footnote-ref-166)
167. Id. at 295. Initial certification permitted a net worth of less than $250,000. U.S. Congressional Research Service, *The 8(a) Program. …* October 12, 2012, Summary. Accessible at [http://digital.library.unt.edu/ark:/67531/metadc227649/m1/1/high\_res\_d/R40744\_2012Oct12.pdf](http://digital.library.unt.edu/ark%3A/67531/metadc227649/m1/1/high_res_d/R40744_2012Oct12.pdf) Women-owned DBEs need demonstrate economic “disadvantage” if their businesses are substantially underutilized in the marketplace. U.S. Congressional Research Service, *Small Business Set Aside Programs….*June 15, 2012, 10. See <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/R41945_06152012.pdf> [↑](#footnote-ref-167)
168. The law permits the rebutting of presumptive disadvantaged status, but this involves written complaints and hearings and is seldom accomplished. For example, no challenges were made to DBE certification at the Small Business Administration and the Department of Transportation between 2003 and 2011. La Noue, 12 U Maryland LJ of Race, Religion, and Gender , 299 at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1210&context=rrgc> See [http://digital.library.unt.edu/ark:/67531/metadc227649/m1/1/high\_res\_d/R40744\_2012Oct12.pdf](http://digital.library.unt.edu/ark%3A/67531/metadc227649/m1/1/high_res_d/R40744_2012Oct12.pdf) [↑](#footnote-ref-168)
169. List of groups quoted from George R. La Noue, *Defining Social And Economic Disadvantage: Are Government Preferential Business Certification Programs Narrowly Tailored?*  12 U Maryland L J of Race, Religion, Gender, and Class, 274, 282 (Fall, 2012) at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1210&context=rrgc> [↑](#footnote-ref-169)
170. Jonathan Bean, *Big Government and Affirmative Action* (University Press of Kentucky, 2001) *,* 46-93. [↑](#footnote-ref-170)
171. George R. La Noue, *Follow the Money: Who Benefits from the Federal Aviation Administration’s DBE Program,* 38 The American Review of Public Administration, 480, 494 8, 2008). [↑](#footnote-ref-171)
172. *Bostock v. Clayton, No. 17-1618*(2020)slip opinion at <https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf> [↑](#footnote-ref-172)
173. Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford, 2012), 43-44, 46-47. [↑](#footnote-ref-173)
174. Antony Barone Kolenc, *Pretend to Defend: Executive Duty and the Demise of ‘Don’t Ask, Don’t Tell,*  48 Gonz. L. Rev. 107-161(2012/2013). [↑](#footnote-ref-174)
175. Id. at 138-140. [↑](#footnote-ref-175)
176. John David Skrentny, *The Minority Rights Revolution* (The Belknap Press of Harvard University, 2002), v-vi, 5,12, 14-15, 86-87, 90, 100, 94, 102-103, 110-111, 141-144, 264, 321-322, 328. [↑](#footnote-ref-176)
177. [↑](#footnote-ref-177)