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"Is Affirmative Action Valid?"

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"Affirmative action" is not a single, coherent or comprehensive programme designed to act as a panacea for America's racial ills. Rather, it has developed piecemeal since the 1960s as the result of executive orders, the actions of governmental departments, Supreme Court decisions, and the consequent "knock-on" effect within the corporate sector, with companies fearing lawsuits under antidiscrimination legislation, and so developing their own affirmative action programmes. So what exactly is affirmative action? The concept has been defined, by the Affirmative Action Review (published in 1995), as "...any effort taken to expand opportunity for women or racial, ethnic and national origin minorities by using membership in those groups that have been subject to discrimination as a consideration" (1). In practice, however, this concept has involved, not just expansion of opportunity for those facing discriminated, but preferential treatment in hiring for employment, in university admissions, and in the awarding of government contracts and licenses. It has also involved the use of race and gender quotas, so that a "balance" may be achieved between the number of women and minorities available in the labour force, and those employed in certain industries, admitted to universities, and awarded government contracts. But why should specific groups in society be discriminated against in favour of others? This seems to go against the meritocratic basis of American society, and also subordinates the rights of the individual to those of the group. Does past discrimination against women and racial minorities now justify discrimination against (basically) white males? And, do preference-quotas counter discrimination, or benefit those they are intended to? But affirmative action may also be justified as necessary to promote diversity against institutionalised racism and sexism that, despite best intentions, is still present, or even justified as a symbolic denunciation of racism. What, then, is the purpose of affirmative action? Is it to promote equality, or to discourage discrimination? Yet whatever the morality of affirmative action programmes, this "positive discrimination" may be illegal under United States law. Court actions are constantly arising challenging the constitutionality of affirmative action, and also its legality under Title VII of the 1964 Civil Rights Act. Legal or not, affirmative action programmes have been present for over 30 years now, so what effect have they had, and are they necessary in today's multicultural, more gender-balanced society?

Modern affirmative action programmes were largely promoted by the federal government, in the form of executive orders and legislation. The first antidiscrimination law was issued in 1941 by President Roosevelt; Executive Order 8802 forbade discrimination on the basis of race in the federal government and the war industries, but this order was not issued to promote racial harmony, rather it was a measure to forestall a march on Washington D.C. by the Brotherhood of Sleeping Car Porters. This order created the first Fair Employment Practices Committee, but it was understaffed, underfunded and lacked any real authority. However, as Manning Marable affirms, it did expand the political idea that government could not just take a passive role in dismantling institutional racism (2). Yet there were few gains for minorities as, after the war, returning (white) GIs displaced women and minorities from the work place. Thus in 1961, spurred on by the increasing civil rights movement, President Kennedy

issued EO 10925, which first used the term "affirmative action" in reference to measures to achieve non-discrimination. At this time, antidiscrimination measures were deemed an urgent necessity; a Labor Department review of June 1963 reported that unemployment was three times higher for black male breadwinners then for whites, and that average black income had remained almost static since 1945, while average white income had continued to rise (and was still 55% greater than that of blacks in 1962) (3).

Most important, however, was the passage in 1964 of the Civil Rights Act (see Appendix, Part 2). Although implemented by Johnson, it had first been proposed by his predecessor. In a Radio and Television Report to the American People on Civil Rights of June 11th, 1963, President Kennedy stated:

> It ought to be possible...for every American to enjoy the privileges of being an American without regard to his race or his color...Next week I shall ask the Congress of the United States to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law (4)

This major piece of legislation forbade discrimination in hiring, promotion, firing, transfer, training and pay, among all employers, employment agencies, and labour unions engaged in industry affecting commerce (5). It was further extended in 1972 to include any business with more then 15 employees, and to employees of educational institutions and state and local governments. Although this act came to play a significant part in reinforcing affirmative action programmes, it was never intended to support "reverse discrimination" or preference-quotas. There was no requirement in Title VII of the act to maintain a racial balance in the work force. Indeed, the authors of the act were demonstrably opposed to racial quotas. In response to a question regarding such quotas, Senator Hubert Humphrey (one of the main supporters of the bill) stated that, "If the Senator can find in Title VII...any language which provides that an employer will have to hire on the basis of percentage or quota related to color...I will start eating the pages one after another, because it is not in there" (6).

Thus up to, and including, the Civil Rights Act in 1964, "affirmative action" had been viewed as positive measures to end discrimination, mainly against blacks. That women had also been given protection against discrimination was largely an accident, "sex" having been added to the bill by congressmen believing this would make it unable to pass. Yet in the following years, the conception of affirmative action changed from being non-discriminatory, to a discriminatory measure in favour of non-whites and women. President Johnson issued EO 11246 in 1965, which directed government contractors to take "affirmative action" in order to ensure equality of employment opportunity, without regard to race, religion or national origin (gender was added in 1968). Yet this order did say what or how "affirmative action" should be taken. The Johnson Administration also set up the Office of Federal Contract Compliance (OFCC), within the Department of Labor in May 1968. This required a written affirmative action compliance programme from every major contractor, and of contracts

over $50,000. More significantly, President Nixon and Labor Secretary Shultz's "Philadelphia Plan" of 1969 set out "goals and timetables" to achieve equality. Assistant Secretary Fletcher said at the time that:

> Equal employment opportunity in these [construction] trades in the Philadelphia area is still far from a reality. The unions in these trades still have only about 1.6 percent minority group membership and they continue to engage in practices, including the granting of priorities to union members and to persons who have work experience under union contracts, which result in few negroes being referred for employment. We find, therefore, that special measures are required to provide equal employment opportunity in these...trades (7).

These "special measures" were denied to be preference-quotas, but Order No.4, issued in 1970, extended the plan to non-construction federal contractors, while stating that "The rate of minority applicants should approximate or equal the rate of minorities to the applicant population in each location" (8). Thus quotas based on race were introduced into requirements for federal contractors, fundamentally changing the nature of affirmative action programmes, from a vaguely-expressed desire to see equality, to an explicit assertion that equality should be mandated.

Yet these executive orders did not exist in a vacuum, as they were both responses to, and responded to, a series of federal court decisions on the constitutionality of affirmative action. Setting the overall framework for the constitutional debate was the dissenting opinion of Justice Marshall Harlan in Plessy v. Ferguson (1896) which attributed a racial meaning to the "equal protection" guaranteed by the 14th Amendment to the Constitution (see Appendix, Part 1). As Andrew Kull has pointed out, the true meaning of Plessy is not "separate but equal" but the Supreme Court's refusal to deny to the state the option of treating citizens differently according to race (9). This is the crux of the constitutionality of affirmative action: is the Constitution, as Justice Harlan famously described it in his dissent, "color-blind"? But this is only one reading of the 14th Amendment, and not binding; consequently the constitutionality of affirmative action was still in question. The ruling in the 1964 case of Anderson v. Martin, however, appeared to confirm that the Constitution is in fact "color-blind". This decision struck down a Louisiana law, requiring that nomination and ballot papers should specify the race of a candidate, which had been intended to provide the electorate with an informed choice. This statute was found unconstitutional on the basis that racial distinctions were not relevant to how a citizen voted, and thereby implied the Constitution could not allow for one citizen to be treated differently to another because of his or her race. Yet the ruling in Anderson, as in Hamm v. Virginia State Board of Elections (1964), was not the unconstitutionality of "distinction in treatment" between races, which had already been struck down in Brown v. Board of Education of Topeka (1954), but unnecessary race consciousness on the part of the government (10). This would seem to preclude the constitutionality of affirmative action programmes, but nevertheless many were implemented.

Despite these rulings in favour of a "color-blind" reading of the 14th Amendment, the Supreme Court began to move towards adopting a more race and gender-conscious attitude. In Griggs v. Duke Power (1971), the defendant had imposed a minimum level of education (a High School diploma) in order for applicants to gain employment. In the ruling, this was declared illegal unless the need for minimum credentials could be directly related to the job. The Court accepted the position of the Equal Employment Opportunities Commission, which had filed an amicus curiae, that this imposition of minimum credentials must be discarded if they had an adverse affect on minority groups, that is, if they screened out a disproportionately large share of minorities as compared to whites (11). This was ruled to be prohibited by Title VII of the Civil Rights Act. Consequently, whites faced "reverse discrimination" because they, as a group, had a greater percentage with High School diplomas. Further to this, in 1975 a federal district court found that Local 28 of the Sheet Metal Workers' International Association had discriminated against non-white workers in recruitment, training and admission to the union. Consequently, the court established a 29 percent membership goal, reflecting the percentage of minorities in the relevant labour pool (12), which was affirmed by the Supreme Court. Thus quotas had been accepted by the Court as a justifiable means of achieving equality through affirmative action.

A major challenge to affirmative action programmes soon arose, however, in the form of Regents of the University of California v. Bakke (1978). Having applied for admission to the University of California-Davis medical school in 1973 and 1974, and being turned down on both occasions, Allan Bakke sued. Of 100 places in the entering class each year, 16 were reserved for minority groups, classified at Davis as "Blacks", "Chicanos", "Asians" and "American Indians". Bakke was turned down despite having a higher grade point average and higher test scores than the average applicant. He claimed he was discriminated against because of his race, and that his 14th Amendment guarantees had been violated. The Court ruled 5-4 in favour of Bakke, but the ruling was by no means convincing. In a dissenting opinion, four justices wrote that the Davis programme was a constitutional effort to redress the "effects of past societal discrimination", and that Title VI of the Civil Rights Act "prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies" (13). Four other justices held the programme to be illegal, as Title VI requires a "color-blind" admission process in which "race" does not provide a "basis of excluding anyone from participation in a federally-funded programme" (13). The deciding vote was cast by Justice Lewis Powell, whose opinion was somewhat indefinite. According to Robert Post, Powell's opinion has come to stand for four propositions. He argued that Title VI applies constitutional standards, and that the Constitution requires that all explicit uses of racial criteria, whether or not for benign purposes, be subject to strict judicial scrutiny to determine whether they are narrowly tailored to serve compelling state interests. The state's interest in remedying the effects of societal discrimination, Powell argued, was not compelling and hence could not justify an affirmative action programme, but, the University of California's objective of attaining a diverse student body was compelling and justified the use of racial and ethnic criteria for admissions (13). Justice Powell stated that:

> ...In arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas", [the University of California] invokes a countervailing constitutional interest, that of the First Amendment. In this light, [the University] must be viewed as seeking to achieve a goal that is of paramount importance in the fulfilment of its mission (14).

Thus while finding the Davis programme unconstitutional, Powell provided the constitutional justification for universities to continue their affirmative action programmes, in order to support "diversity". The Davis programme was unconstitutional because it recognised the diversity of racial and ethnic groups, rather than the diversity of individuals. But Powell also appended the affirmative action plan of Harvard College (see Appendix, Part 3), which he said he would find constitutional. This programme celebrated the diversity of individuals, while ensuring the representations of distinct racial groups. However, as no other Justice joined with Powell in his opinion, it is questionable whether this is binding precedent.

The Supreme Court had thus created, in Frederick Lynch's words, a "fragile, contradictory consensus" on affirmative action (15). The situation was further confused by the case of Richmond v. Croson (1989), which held that, without prior findings of intentional discrimination, state and local minority set-asides had violated the 14th Amendment. Writing for the majority, Justice Sandra Day O'Connor stated, "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility" (16). This protection of non-minorities against discrimination was also extended under Title VII in Martin v. Wilks (1989). The Wall Street Journal commented that, "For the first time, a majority of justices said that all affirmative action programs alleged to discriminate against whites should be analyzed by the same tough constitutional standard that has been applied to strike down laws that minorities say discriminate against them" (17).

The most recent case questioning affirmative action has been Hopwood v. State of Texas, which was denied certiorari by the Supreme Court in July 1996, thereby allowing the decision of the Fifth Circuit Court of Appeals to stand. This court had ruled in favour of Cheryl Hopwood, who filed a reverse discrimination suit against the University of Texas Law School in 1992, in case very reminiscent of Bakke. As in Bakke, Hopwood had a higher GPA and test scores than African-American and Hispanic students admitted under an affirmative action programme, but had been denied admission. The Hopwood ruling stated, "...any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment" (18), and also repudiated Justice Powell's decision concerning Bakke. Thus, for the moment, the unconstitutionality of the diversity rationale has been affirmed, vindicating Justice O'Connor, who had written in dissent in Metro Broadcasting, Inc. v. Federal Communications Commission (1990), that, "The interest in increasing...diversity...is clearly not a compelling

interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications" (18). Thus the only compelling state interest on which affirmative action programmes are currently based is that of remedying the effects of racial discrimination.

Whatever the legal status of affirmative action, however, such programmes have nevertheless been in existence since the 1960s. Have they raised the employment status of minorities and women, or lessened discrimination? According to Manning Marable, the average median income for African-American families has risen from $28,700 in 1967 to $40,000 in 1990, an increase of 40 percent (19). He states that affirmative action has allowed the growth of a black middle-class, with thousands of African-Americans gaining employment as white-collar professionals. That this growth has taken place is borne out by the table below:

Changes in Ratio of White/Non-white Employment by Gender in Managerial-Professional Occupations, 1964-1982

	1964	1982	Change	
White men	1.00	1.00	-	
Black or non-white men	0.32	0.62	0.30	
White women	0.68	0.80	0.12	
Black or non-white women	0.35	0.60	0.25	(20)

The table above shows that non-white men have made the clearest proportional gains in the managerial-professional occupations, followed by non-white women, and then white women. Also, according to the 1990 census women held 40% of all middle-management positions (21). In terms of the male/female wage gap, the ratio of earnings of full-time, year-round workers was roughly stable from the turn of the century until the mid-1970s at about 60%, but by 1993 this had has risen to 72% (22). More specifically, within the Department of Labor's OFCC programme the employment share of black males in contractor firms increased modestly from 5.8% in 1974 to 6.7% in 1980 (22). In terms of education, enrolment of blacks in colleges and universities has risen steadily, if slowly, from 7.8% in 1970 to 11.3% in 1990 (23), and women now constitute a majority of college students. But can these gains be attributed to affirmative action? The relative roles of antidiscrimination legislation and affirmative action, in education and in employment, are unclear. The major equal opportunity laws covering women were passed in the 1960s, coincidental with which was a growth in the number of female graduates, but the most rapid growth in women's earnings and occupational status did not begin for another decade. The lag between the change in law and the increase in earnings may have been owing to the time it took for women to acquire education and training for traditionally male-dominated occupations. Wage, employment and educational disparities for minority males have also decreased, but this may have been due (as also in the case of women) to changes in societal and individual attitudes. There is no clear qualitative evidence to show that affirmative action has "worked" in terms of increasing minority and female proportions; what can be said is since affirmative

action programmes have been enacted, there has been a concurrent fall in the level of disparity between white male and non-white male and female employment and educational levels, but it is extremely difficult to find a constructive link between the two. However, this is not to say that such a link does not exist.

There is evidence that some affirmative action programmes do not target those for whom they were intended. For example, when asked "Do most of the 'underrepresented minorities' who benefit from...preferences come from economically disadvantaged backgrounds?", the American Medical College Application Service answered "no". It replied that the average affirmative action medical school applicant has both parents employed in professional/managerial occupations and average parental income of $51,300 (24). Thus certain affirmative action programmes may be targeting members of the minority middle-class who do not really need such assistance. Affirmative action may or may not have "worked" so far, or may not even be effective at the moment, but this is not to say that the concept itself is invalid, in an age when institutionalised racism and sexism still exist. This was emphatically demonstrated by the recent Texaco affair, in which (white) senior executives were caught on tape deriding minorities in racist terms, and plotting to destroy documents subpoenaed in a federal discrimination case. Also, in 1994 there were 154,000 complaints of discrimination, at local, state and federal level. The Glass Ceiling Commission reported in 1995 that, at senior management level, only 0.6% were African-American, 0.3% were Asian and 0.4% were Hispanic. Women held only 3 to 5 percent of these positions (25). The discrimination that affirmative action was implemented to tackle is thus still present, and a majority of the population still support it in practice, as shown by a USA Today/CNN/Gallup poll of March 1995 (26). The respondents were asked the question, "Do you favor or oppose affirmative action programs?". Of the white respondents, 56% favoured affirmative action, while 36% were against. Of the African-American respondents, 72% were in favour, and 21% were against.

Attitudes to affirmative action may be changing, however, perhaps shown by the passage in California of Proposition 209, on November 5th, 1996 (see Appendix, Part 4). This proposition, known as the "California Civil Rights Initiative", prohibits the state from discriminating against or granting preferential treatment to any individual or group on the basis of race, sex or ethnicity in public employment, public education or public contracting. The CCRI prohibits local and state (not federal) preferences while leaving intact outreach and other nonpreferential forms of affirmative action, such as those used in recruitment and training. The reason for the necessity of this initiative, the authors state, is that

> the...Civil Rights Act has been amended by judicial interpretation to permit preferential treatment for certain groups on the basis of race, sex and ethnicity. But as a matter of simple logic, one cannot prefer on the basis of these criteria without discriminating against someone else. Such preferences, therefore, violate the nation's and the Congress' original understanding of civil rights (27).

Referring back to the remarks of President Kennedy and Senator Humphrey that I mentioned earlier (references 4 and 6), it is not hard to see how the authors of the CCRI could come to this conclusion. An attempt to replicate the CCRI at national level, in the form of the Dole-Canady bill in Congress, failed to pass into law. It was unlikely to pass anyway, as the Clinton Justice Department (in the person of Associate Attorney-General Schmitt) had stated that "Race can be taken into account as a preference", thereby further confusing the issue. Perhaps President Clinton and the majority of Americans outside California are not yet ready to accept the implications of abandoning 30 years of affirmative action. It should be unsurprising, however, that such an initiative should pass in such an ethnically diverse state as California. Preferences are increasingly unworkable in the state, where the population eligible for affirmative action continues to grow several times faster than those ineligible. Also, where African-Americans once constituted the majority of those eligible, Hispanics and Asians have become more numerous, mostly due to immigration (both legal and illegal) since 1965. There has been increasing tension between the preference-eligible groups; for example, in Los Angeles Hispanics have claimed that blacks are "over-represented" in terms of employment by the county. This is not only confined to California, however, as in Ohio African-Americans have gone to court in order to deny eligibility for affirmative action programmes to Asian and Indian-Americans. This perhaps highlights one problem on modern affirmative action: it was designed to recompense African-Americans for past and contemporary discrimination, but America is now recognised to be much more racially and ethnically diverse. To paraphrase Marable, the scope of affirmative action has moved beyond simply black and white. A "minority" may be definable it terms of percentage of population, but there are always individuals who move away from the racial and ethnic stereotypes. Certain minority groups may also not be in need of affirmative action; Japanese-Americans, for example, have higher average annual incomes than whites. The Hmong, however, have an average annual income significantly lower than either Japanese-Americans or whites, yet both the Japanese and Hmong are classified as an "Asian" minority (28). So are racial and ethnic classifications in need of reform, or abolition?

Notwithstanding the pronouncements of various administrations, the law within states, or Supreme Court rulings on its constitutionality, there is a more basic moral question raised by the concept of affirmative action. As Ralph Rossum has asked (29), is it socially desirable to discriminate against someone who is not a member of a disadvantaged racial minority in order to give preference to others on the basis of race alone? Not only is there the question of the effect on society, but what message does this give to the nation, being that it is composed of individuals? The use of affirmative action, when based on righting the harm of past discrimination against minority groups, imposes an unjust burden (that of "reverse discrimination") upon non-minority white individuals. But there is plainly no such thing as "reverse" discrimination (as a positive concept), as this implies that only those groups historically discriminated against faced "true" discrimination; the current injustice against whites, especially white males, is thereby relegated to a lower degree on the index of inequity. Thus can affirmative action be justified in terms of a remedy for general societal discrimination against race or gender? When affirmative action is

based on such a remedy, it renders the concept of discrimination rather vague. It is legally less controversial when a programme seeks to compensate specific discrimination against a specific individual. At the basis of antidiscrimination legislation and affirmative action programmes is the desire to eradicate the deeply imbedded institutional and systemic dimensions of inequality. Yet the primary objective of equality rights campaigners was to ensure that individuals were treated as individuals rather than as members of a group. So how are these two views reconcilable? Perhaps affirmative action programmes should be understood as integral to, and consistent with, legal guarantees of equality for the historically disadvantaged, thereby rejecting the view that it is a source of discrimination. In doing so, affirmative action can be presented as an expression of equality rather than an exception to it, as it is difficult to reconcile such programmes with nondiscrimination.

Iris Young suggests that affirmative action should not be seen as compensation for past discrimination, nor to make up for supposed deficiencies of formerly excluded groups (30). Rather it should be seen as a positive measure, designed to mitigate the influence of current biases and blindness of institutions and decision-makers, who she characterises as primarily white, anglo-saxon, heterosexual males (she mentions sexuality in this context, but there are no affirmative action programmes relating to homosexuals. Perhaps there should be). In this light, affirmative action can be seen as compensation for past oppression, rather than discrimination, thereby combating contemporary inequalities in a pro-active manner. Also exploring the "oppression" aspect, Colleen Sheppard posits a "critical mass" of historically disadvantaged which, when reached, will be sufficient to balance the past oppression (31). This would eliminate the problem of "tokenism" within preferences, and allows for a continuing self-correction of the problem. She cites as an example the Action travail des femmes v. Canadian National Railway Co. (1987), a case ruled on by the Canadian Supreme Court. In this case, the Court decided that one in four employees hired by the National Railway Company should be women, until they reached 18% of the workforce. There appears, however, to be no real distinction between the "critical mass" and the preference-quota. Sheppard also suggests a different approach, positing the introduction of "equity measures", rather than traditional affirmative action, to include policy statements stating an institution's commitment to human rights, sexual and racial harassment policies, and special workshops to raise individual awareness and sensitivity in problems of discrimination (32). This policy, however, implies a certain amount of "good faith" on the part of employers, which is unlikely to be forthcoming from those determined to maintain racism and sexism.

Not only is affirmative action morally questionable in terms of subordinating the group to the individual, but there is also the discussion over "minority pride", especially in relation to racial quotas. This is the feeling among minorities that they are perceived of as gaining employment or admissions purely on the basis of their race, not on merit. Of course, this is felt by some minority individuals to be a blow to their self-image and self-esteem. This also damages white attitudes by the perception that minorities have taken "their" jobs, which they would have had if not for "unfair" affirmative action programmes.

Thomas Sorrell has commented in relation to African-Americans, but which is applicable to all minorities, that "What all the arguments and campaigns for quotas are really saying, loud and clear, is that black people just don't have it, and that they will have to be given something in order to have something" (his underlining) (33). In this respect, affirmative action may foster a feeling of disempowerment rather than being a positive experience.

One thing is definite about affirmative action programmes: their validity is uncertain. The constitutionality of these programmes seems to be in perpetual limbo, with their status ever-changing, owing to either "color-blind" or race and gender conscious readings of the Constitution, and of the 1964 Civil Rights Act. The problem of deciding the legality of affirmative action probably stems from difficulty in deciding its moral foundation. Basing affirmative action on compensation for past discrimination, or even as a symbolic denunciation of racism would seem, however, to be morally dubious. The argument that affirmative action should be based on promoting "diversity" is also questionable, as the extent of racial and ethnic diversity should not and cannot be dictated in a democracy. The use of race and gender preference-quotas is no longer workable in such an increasingly diverse country as America; they perpetuate modern injustice, only shifting the discrimination to non-white males. Being that affirmative action is are based on aiding groups of people, it is not justifiably defensible in a nation whose history is so grounded in individualism. After all, is it not self-evident that all men are created equal? Also, quotas are seen by many minorities as akin to a hand-out, as people generally want to be judged on their merit, not their racial or ethnic group. The only way in which affirmative action can continue to work, as a coherent theory, is if quotas are discarded as the discriminatory racial anachronism that they are, and race and gender are considered only as a "plus" factor in applications, after all other criteria have been weighed. A working model for this is Harvard's admission plan. Only where affirmative action attempts to end contemporary discrimination without the use of quotas may it be considered a valid measure.

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APPENDIX - PART 1

Amendment XIV of the United States Constitution
(the Equal Protection Clause)

Section 1. All persons born or naturalized within the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

(Source: Amendments to the Constitution, reprinted in G.Tindall & D.Shi, America, (W.W.Norton & Co, New York NY, 1989), p.A24)

APPENDIX - PART 2

The Civil Rights Act of 1964 (relevant exerpts)

Title VI, Section 601
No person in the United States shall, on the grounds ot race, color, or national origin, be excluded from participation in, be denied benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.

Title VII, Section 703
(a) It shall be an unlawful employment practice for an employed (1) to fail or refuse to hire or discriminate against any individual with respect to his compensation, terms, conditions, ot privileges of employment, because of such individual's color, religion, sex, or national origin; or (2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employmeny agency or labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Title VII, Section 704
(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

(Source: *Available at:* http://www.publicaffairsweb.com/ccri/cract.htm/)

APPENDIX - PART 3

The Harvard Admissions Programme

Race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending on the "mix" both of the student body and the applicants for the incoming class.

(Source: Quoted in R.Rossum, Reverse Discrimination, (Marcel Dekker, Inc, New York NY, 1980), p.14)

APPENDIX - PART 4

AUTHORS AND PRINCIPALS
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THE CALIFORNIA CIVIL RIGHTS INITIATIVE

A proposed statewide constitutional amendment by initiative

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

(b) This section shall apply only to action taken after this section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

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

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

(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district , or any other political subdivision or governmental instrumentality of or within the state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section shall be self-executing. If any parts of this ection are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States

Consitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

(Source: *Available at:* http://www.publicaffairsweb.com/ccri/)