One Anglo-Irish American’s Observations on Affirmative Action

Stephen R. McAllister

This essay is adapted from the debate series “Controversial Decisions of the 1994-95 Supreme Court Term: Adarand Constructors, Inc. v. Pena”

I. Introduction

It is impossible to deny the vast scope and effects of both legally-sanctioned and societally entrenched racial discrimination in this country.

Introduction

It is difficult to discuss affirmative action constructively. Race issues generate strong emotions in this country. Given America’s long and sordid history of racial discrimination, and a recent penchant for politically correct discourse, it may be risky to express opinions critical of affirmative action programs, or even to question their propriety. Even general expressions of doubt or even mild criticisms of affirmative action plans garner one the ignoble label of “racist” or, at the least, “insensitive” or “ignorant.” Questioning such programs when one is a member of an institution practicing affirmative action logically can lead to loss of opportunities or rewards such as promotions or tenure. Affirmative action often appears to be one of America’s “sacred cows” or “taboo” subjects.

On the other hand, it is impossible to deny the vast scope and effects of both legally-sanctioned and societally entrenched racial discrimination in this country. Opponents of affirmative action realistically cannot deny history, nor the specter of racism in modern American society. The continuing racial divide has been made all too apparent by recent events such as the Rodney King case and the O.J. Simpson trial. Similarly, however, the proponents of affirmative action cannot deny the zero sum tendencies of at least some affirmative action measures, and the hostility and resentment such measures generate in those who perceive themselves as the losers in the competition for jobs or educational opportunities.

This essay approaches affirmative action from three perspectives. First, it briefly reviews the evolution of the Supreme Court’s affirmative action jurisprudence, which appears reflective of the changing attitudes of American society. Second, the essay provides a cursory survey of a few of the multitude of federal anti-discrimination statutes and considers their importance and effectiveness as remedies for and deterrents to racial discrimination. Third, the essay identifies some of the costs and benefits typically associated with affirmative action measures. Ultimately, the essay offers a few tentative observations regarding the propriety of affirmative action and some of the considerations that shape the debate surrounding the American race problem as we enter the twenty-first century.

I. The Constitutionality of Affirmative Action

A. Initial Reception in the Supreme Court

Because Fourteenth Amendment equal protection principles only apply to state action, and Fifth Amendment principles only to the federal government, private affirmative action plans do not

Stephen R. McAllister is an Associate Professor of Law at the University of Kansas School of Law in Lawrence, Kansas.
implicate the Constitution, although they may implicate federal and state anti-discrimination statutes. For that reason, this essay focuses on the Supreme Court’s affirmative action jurisprudence with respect to government-sponsored affirmative action measures. Thus, the following discussion considers only the Court’s treatment of affirmative action from a constitutional perspective and ignores, for the moment, statutory considerations.

For all its controversy, affirmative action has a relatively short history. Not until after the passage of the civil rights acts of the mid-1960s did formalized affirmative action take hold in the United States. Although opinions differ as to the precise dates of the origin of affirmative action, two dates generally are regarded as critical. The first is 1965, the year in which President Johnson signed Executive Order 11,246, which required federal contractors to take affirmative action to ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. One commentator refers to this order as “the fountain for affirmative action,” because federal administrative agencies used it as authority for requiring race-based measures. The other important date is June 27, 1969, on which the Department of Labor issued the “Philadelphia Plan” requiring building contractors to hire certain numbers of minorities.

Following the adoption of formal affirmative action measures, it took some years for constitutional challenges to such measures to reach the Supreme Court. The history of the Supreme Court’s affirmative action jurisprudence begins with Regents of University of California v. Bakke. In Bakke, the Court, through several separate opinions, invalidated the affirmative action admissions process used by University of California medical schools to the extent the measures at issue effectively imposed racial quotas. Although no opinion in that case commanded a majority of the Court, Bakke stands for the proposition that the Equal Protection Clause of the Fourteenth Amendment forbids relying solely on race in determining admissions. Bakke also stands for the proposition, however, that race (in the sense of having certain outwardly apparent physical characteristics or descent from persons who had such characteristics) may be considered as a factor.

In Fullilove v. Klutznick, the Supreme Court rejected a constitutional challenge to a congressionally mandated 10% set-aside for minority subcontractors for public works projects that received federal funding. A plurality of the Court held that (1) the objective of remedying past discrimination may justify an affirmative action program pursuant to Congress’s enforcement powers under section five of the Fourteenth Amendment, and (2) the 10% congressional set-aside program was constitutional. In particular, the plurality found the program in Fullilove constitutional because it (1) was flexible due to provisions that provided for waiver of the set-aside requirements in some circumstances and (2) Congress’s authority under section five of the Fourteenth Amendment is very broad. Justice Marshall, in a concurrence, argued for an approach to affirmative action measures that the Court later would adopt when evaluating federal measures but most recently has rejected. He suggested that such measures should be held constitutional so long as the program (1) serves important governmental objectives and (2) is substantially related to the achievement of those objectives.

B. From Tolerance to Hostility
After Bakke and Fullilove, the Supreme Court’s jurisprudence, with one notable exception, became markedly less tolerant, perhaps ultimately even hostile, to affirmative action measures. In Wygant v. Jackson Board of Education, the Court invalidated an affirmative action plan that gave minority teachers preferred status in the event of layoffs. The plan relied on the notion that minority teachers provided essential role models for minority students; the plan was not justified as an attempt to remedy past discrimination and there was no evidence of past discrimination. In its opinion, the Court held that societal, as opposed to entity-specific, discrimination could not justify an affirmative action measure, that no such evidence had been offered with respect to the plan at issue, and that, in any event, the layoff plan was unconstitutional because it imposed an excessive burden on nonminority teachers.

The Court’s next decision left no doubt that its attitude toward affirmative action was changing. In City of Richmond v. J.A. Croson Co., the Court struck down a Richmond, Virginia 30% set-aside program for minority subcontractors. The Court held that strict scrutiny analysis—the most rigorous form of equal protection analysis—applies to any state or local government sponsored (as opposed to federally sponsored) affirmative action program. Applying the twin prongs of strict scrutiny—that the program (1) serve compelling governmental interests and (2) be narrowly tailored to achieve those interests, the Court concluded that the Richmond measure failed to pass constitutional muster. In particular, the Court held that Richmond had failed to establish a compelling government interest because it offered only evidence of nationwide discrimination, not evidence of past discrimination in Richmond, and that the set-aside measure was not narrowly tailored because the city had failed to explore race neutral options.
such as giving smaller businesses in general some type of special consideration.24

After Croson, the Court appeared poised to restrict federal affirmative action programs as well. To the surprise of many, however, Justice Brennan forestalled that result in one of his final cases, Metro Broadcasting, Inc. v. FCC.25 In Metro Broadcasting, the Court reviewed two affirmative action measures adopted by the Federal Communications Commission: (1) a measure that awarded an enhancement for applicants with minority ownership in proceedings to obtain new broadcast licenses and (2) a program providing preferences for minority owners seeking broadcast licenses in distress sale situations. Finding that the "FCC’s minority ownership programs have been specifically approved—indeed, mandated—by Congress,”26 (through appropriations measures), the Court distinguished between federally and state sponsored affirmative actions measures and adopted a lower standard of equal protection review for federal measures. In particular, the Court adopted the two-pronged test Justice Marshall set forth in his Fullilove concurrence: An affirmative action measure is constitutional if (1) it serves important governmental objectives and (2) the means chosen are substantially related to achieving those interests.27 In a departure from its previous cases, the Court held that “important governmental objectives” were not limited to remedying past discrimination and, instead, could include considerations such as broadcast diversity.28 Applying the Fullilove standards, the Court concluded that the FCC programs were constitutional.

The Metro Broadcasting standard was short-lived. With the replacement of Justice Marshall by Justice Thomas—the other replacements, Souter for Brennan, Ginsburg for White and Breyer for Blackmun, did not alter the balance on this issue—it was not a great surprise that the Court recently overruled Metro Broadcasting in Adarand Constructors, Inc. v. Pena.29 In Adarand the Court considered a federal Small Business Association program which gave prime contractors on federally funded projects significant financial incentives to hire socially and economically disadvantaged subcontractors. In particular, the SBA program required general contractors to “presume that socially and economically disadvantaged individuals shall include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities . . . .”30 In evaluating the constitutional challenge brought by a nonminority subcontractor, the Court articulated the following three general propositions which, in the majority’s view, the Court’s prior cases had established:

(1) Skepticism—Any racial preference should be subject to strict scrutiny;31
(2) Consistency—The nature or purpose of racial distinction are irrelevant to the scrutiny such distinctions receive (rejecting the benign versus malevolent notion sometimes offered in support of affirmative action);32 and
(3) Congruency—The federal and state governments should be held to the same constitutional standard with respect to matters of race, i.e., strict scrutiny.33

The Court overruled Metro Broadcasting to the extent it required an intermediate level of scrutiny for congressionally mandated or approved affirmative action measures.34 The Court opined, however, that the application of strict scrutiny review does not necessarily mean the end to all affirmative action.35 Rather, in the majority’s view, strict scrutiny requires a government to (1) utilize affirmative action only to address compelling interests—the only compelling interest the Court has thus far recognized is to remedy past discrimination, and that requires proof of particularized, not generalized, societal discrimination, (2) consider all other feasible alternatives, and (3) resort to affirmative action only when there are no feasible alternatives. Ultimately, the Court remanded the case to the lower courts to apply strict scrutiny review in the first instance.

Justice Scalia wrote a concurring opinion in which he forcefully articulated his view of a “colorblind” Constitution. He declared that remedying past discrimination is not a compelling governmental interest because there is no such thing under the Constitution as a creditor or debtor race.36 “To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred.”37 In Justice Scalia’s view, the Constitution simply does not permit government to draw distinctions on the basis of race, irrespective of purpose, because for constitutional purposes, there essentially is no such thing as the concept of race.38 “In the eyes of government, we are just one race here. It is American.”39

Justice Thomas also concurred separately. He emphatically declared his view that race preferences represent an offensive form of paternalism. “There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.”40 In Justice Thomas’s opinion, race preferences undermine the very goals they purport to serve:

---

One Anglo-Irish American’s Observations
So-called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government’s use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.41

Justice Stevens wrote perhaps the primary dissenting opinion. In his view, there is a constitutionally “significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority.”42 Justice Stevens disagreed with all three of the majority’s equal protection principles—skepticism, consistency, and congruency—and argued that the Court was ignoring its own prior decisions, especially *Fullilove v. Klutznick* and *Metro Broadcasting*:

My skeptical scrutiny of the Court’s opinion leaves me in dissent. The majority’s concept of ‘consistency’ ignores a difference, fundamental to the idea of equal protection, between oppression and assistance. The majority’s concept of ‘congruency’ ignores a difference, fundamental to our constitutional system, between the Federal Government and the States. And the majority’s concept of *stare decisis* ignores the force of binding precedent.43

II. Statutory Anti-Discrimination Measures

Often ignored in debates about affirmative action are federal and state anti-discrimination statutes which prohibit and punish racially discriminatory conduct. Such statutes, if effective and efficient, arguably reduce the need for affirmative action by helping to ensure a level playing field. Obviously, there is room for debate with respect to both the protection the statutes offer against racial discrimination and the costs of pursuing the remedies they provide. Although a detailed consideration of the anti-discrimination statutes is beyond the scope of this essay, it is worth identifying at least a few of the major federal provisions to get a sense of whether these statutes should have any bearing on the affirmative action debate.

Perhaps the most famous and most litigated federal anti-discrimination statute is Title VII of the Civil Rights Act of 1964, which prohibits racial discrimination in employment matters. Remedies provided by the statute (following passage of the Civil Rights Act of 1991) include compensatory damages, punitive damages, reinstatement, and attorney’s fees.44 Thus, Title VII, which has been interpreted to reach both intentional and possibly unintentional discrimination (under disparate impact theory), is a potent weapon in the employment context. Indeed, the thousands of reported cases involving Title VII litigation strongly suggest that aggrieved employees view the statute as a plausible remedy. Frequent resort to Title VII does not alone establish that the statute is an effective or efficient means to address discrimination issues in the workplace, but it may suggest that racial discrimination in employment can be addressed in meaningful ways besides affirmative action measures.

Two Reconstruction era statutes provide the same sorts of remedies as Title VII with respect to racial discrimination affecting contract or property rights.45 Although restrictive Supreme Court interpretations of these statutes were in part the impetus for the enactment of the Civil Rights Act of 1991, that legislation has overridden most of those decisions. Moreover, sections 1981 and 1982, like Title VII, protect rights from private infringement; no state action or government involvement in the deprivation is required.46

In the education context, Title VI of the Civil Rights Act of 1964 prohibits racial discrimination by institutions receiving federal funds.47 To make Title VI more effective, Congress abrogated the States’ Eleventh Amendment immunity from suits in federal court for violations of Title VI.48 Moreover, all the usual legal remedies such as compensatory damages, punitive damages, and injunctive relief appear to be available to redress violations of Title VI, at least when the discrimination is intentional.49

Two other federal provisions merit brief mention. First, Title II of the Civil Rights Act of 1964 prohibits racial discrimination in the provision and use of public accommodations.50 Unlike the preceding statutes, however, Title II authorizes only injunctive, not damages, relief, although a court may appoint counsel and waive costs.51 Second is Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act.52 The Fair Housing Act (including significant amendments enacted in 1988) prohibits various forms of discriminatory conduct with respect to housing matters and provides a full panoply of legal remedies, including the possibility of compensatory damages, punitive damages, injunctive relief, appointment of counsel, and waiver of court costs.53 The Department of Housing and Urban Development also has detailed administrative procedures for enforcing the Act’s provisions.54

It is perhaps ironic that some of these very statutes have formed the bases for legal challenges to privately implemented
affirmative action measures. For example, in *United Steelworkers of America v. Weber*, the Supreme Court held that a private affirmative action plan of preferentially hiring certain minorities, but not displacing whites, does not violate Title VII’s prohibition on unlawful employment practices. On the other hand, and assuming the educational institution at issue receives federal funds, several Justices of the terribly fractured *Bakke* Court declared that preferential, race-based admissions could run afoul of Title VI.

To the extent affirmative action measures most frequently are adopted and implemented in the employment and education contexts, federal anti-discrimination statutes such as Title VII, section 1981 and Title VI may ameliorate the need for affirmative action. The extent of that amelioration, however, will depend upon the effectiveness of those statutes both in terms of the remedies they provide and the costs of pursuing those remedies. For if the statutes are difficult or costly to invoke, they lose much of their deterrent force and cease to be a realistic alternative for those aggrieved by racially discriminatory conduct.

Moreover, anti-discrimination statutes alone do not necessarily address the problem of the minority applicant who has not had the same educational opportunities as other applicants. For even if a school or employer operates without discriminatory intent, relying solely on objective criteria such as test scores or grades in making admissions and employment decisions, the playing field may not be level.

Adherents of the economic approach to law have suggested that the federal anti-discrimination statutes are inefficient. They argue that such laws impose substantial costs on employers and nonminority employees who desire not to associate with minority employees or who are displaced by efforts to hire, promote, and retain minorities. The economic analysis assumes, of course, that employers act rationally to maximize profits and will not engage in racial discrimination when it is profitable not to do so. Moreover, the economic analysis assumes that employers’ and employees’ tastes for discrimination are valid components of their utility functions. The major problem with this analysis is that it has nothing to say about the morality of racism and, indeed, would result in the tolerance of irrational (in the sense that the fear or dislike of minorities has no reasoned basis) and unnecessary racial discrimination. Why should society respect or even consider the “costs” of workplace or educational integration that are imposed on employers, employees, or students who would prefer not to associate with minorities? The next section considers some of the costs and benefits typically associated with affirmative action.

### III. Costs and Benefits

#### A. Introduction

Actual data on the operation and effectiveness of affirmative action measures is sparse. “The difficulty of designing studies and obtaining data that exclude alternative explanations for increased wages or employment of minorities has hampered investigation of the [affirmative action] question,” and “[e]ven the studies most favorable to affirmative action in employment have found that its effects are difficult to detect and, even when detected, relatively small.” As a result of this empirical deficit, anecdotal evidence and emotion rule the day in the affirmative action debate.

Perhaps resort to anecdotes and emotional appeals is inevitable given the nature of the dilemma, because the dearth of statistical evidence almost guarantees controversy.

*Perhaps resort to anecdotes and emotional appeals is inevitable given the nature of the dilemma, because the dearth of statistical evidence almost guarantees controversy.*

#### B. Benefits

The “primary and original purpose” of affirmative action was to remedy the effects of past discrimination. This justification obviously has a basis in American history but it rarely, if ever, has been “means-tested, and it is not quite clear just what ‘effects’ are being rectified.” Another primary justification is diversity, which is viewed as a desirable end in itself. A third justification is that affirmative action *levels the playing field*. Affirmative action also has been touted as giving minorities a voice in institutions, in which there often is an “entrenched racial hierarchy.” Another justification is that affirmative action provides role models for other minorities, especially children. Supporters also contend that affirmative action provides economic and educational benefits to minorities, creates “self-perpetuating benefits” (such as accumulation of experience, expansion of a minority professional class, eradication of debilitating stereotypes, and self governance), and may reduce social unrest by instilling greater confidence in public institutions and authorities.

---

*One Anglo-Irish American’s Observations*
C. Costs

Opponents of affirmative action frequently argue that the costs of such measures far outweigh any benefits. Asserted costs include stigmatization and adverse effects on minorities’ self-esteem, although some have suggested that stigma is most likely to occur when the affirmative action measure is associated with a quota or based upon a rationale other than economic need or as a remedy for actual past harm. Another suggested cost is racial tension, hostility, and divisiveness. Obviously, to the extent nonminorities view affirmative action measures as depriving them of opportunities solely on account of their race, they may well be hostile to and resentful of such measures. To the extent, however, that the integration of schools and workplaces reduces, in the words of economists, the utility function of those who desire not to associate with minorities, racial tension is the appropriate and perhaps inevitable price of overcoming irrational stereotypes and preferences. Opponents also contend that affirmative action measures harm the very people they are designed to assist by placing them in situations where their lack of educational background, for example, sets them up for a higher than average failure rate at prestigious schools. Similar to the stigma and self-esteem concerns, opponents sometimes contend that affirmative action dehumanizes its beneficiaries in the eyes of nonminorities, who may tend to view minorities as commodities which must make up a certain percentage of their students or employees. Also, it is undisputed that there are certain, often substantial resource costs associated with administering and supporting affirmative action measures and their beneficiaries. Interestingly, the costs of implementation appear to be generally lower for the public and nonprofit sectors than the private sector. Finally, among other costs asserted, are the opportunity costs incurred by those who are denied admission or employment although in some ways more qualified than those admitted or hired.

IV. Observations

A. The Debate is not Based on Data or Empirical Evidence

Due to the difficulty of empirically testing the effectiveness of affirmative action programs, the debate over their propriety and usefulness necessarily revolves around individual notions of justice and anecdotal evidence. Indeed, data can and has been found or manipulated to support almost any position in the debate. Unfortunately, it also appears virtually impossible to provide an empirical answer to the question whether affirmative action is necessary or cost-effective, particularly in light of federal and state anti-discrimination statutes that prohibit many forms of racial discrimination and provide for various types of relief.

B. Do We Need Affirmative Action?

It is clear that the elimination of affirmative action probably would not produce a colorblind meritocracy. Nothing in this country’s history remotely suggests that such a result is attainable in the absence of strong medicine, if at all. Moreover, the facts that very few minorities hold high elective offices or positions of power in corporate America strongly suggest that there is a very real glass ceiling for minorities (as well as women). It is at least arguable that until all persons, irrespective of race, are treated as serious candidates for such positions, we have a significant racial discrimination problem. And although there are anti-discrimination statutes which provide some measure of protection, it appears that they are at least sometimes ineffective and often extremely expensive to invoke.

It is difficult to accept Justice Scalia’s insistence that the Constitution is absolutely colorblind, that the Constitution simply does not permit government to draw distinctions on the basis of race, irrespective of purpose, because constitutionally there is no such thing as “race.” For an originalist such as Justice Scalia to make such an assertion is especially surprising. It is impossible to deny that the Constitution as originally ratified tolerated slavery (some of the Framers owned slaves) and protected slave owners in at least four ways. It further is indisputable that it took a civil war and three constitutional amendments to banish slavery effectively from this country.

All that history does not mean that African Americans, in particular, now are somehow a “creditor” race, to which nonminorities owe some special obligation, and in that respect Justice Scalia may have a point. Nonetheless, American history certainly suggests that any reasonable judicial consideration of the constitutionality of affirmative action—as well as political consideration of the propriety of such measures—must recognize and honestly grapple with our past. Ignoring that history or pretending that it does not exist—nor to mention the continuing reality that minorities sometimes face obstacles that nonminorities do not—is nothing more than an attempt to short circuit the affirmative action debate altogether, and avoid the truly difficult issues. The real question probably is not whether we must engage in race-conscious or race-sensitive measures to equalize opportunities, but rather how to define, implement, and ultimately terminate such efforts.

C. There Probably Is No Such Thing As Benevolent Racial Discrimination

Justice Thomas probably is correct that there is no such thing as “benevolent” racial discrimination, at least if that term is intended to mean that affirmative action imposes no significant costs on innocent parties, including the beneficiaries of such measures. Discrimination in favor of select minorities necessarily
operates to the detriment of nonminorities and even minorities not included as one of the favored groups. The point is not that affirmative action results in the hiring or admission of unqualified minorities—the author believes in fact that it does not—but that often there is a limited pool of jobs, class slots, etc., and discrimination on the basis of immutable physical characteristics such as skin color necessarily has consequences for those who do not have the desired characteristic. From a group perspective, perhaps that result is not too objectionable because many nonminorities still get hired or admitted to schools, but from the perspective of those individuals who might otherwise qualify for the desired benefit the effect is very real and palpable. That alone does not mean that all affirmative action measures are inherently undesirable or unacceptable, but, at a minimum, we must honestly acknowledge the competing interests and recognize that any fair and acceptable solution should consider those interests.

Moreover, the potential for invidious discrimination resulting from the pursuit of affirmative action goals transcends a “white versus black” context. Indeed, affirmative action frequently results in discrimination against non-favored or unprotected minority groups, not just whites. One might well question why affirmative action measures, as they frequently do, only operate in favor of blacks, hispanics, asians, Native Americans, eskimos, aleuts, or pacific islanders (or sometimes only subsets of even this list), but not Catholics, Jews, Irish, Germans, Italians and other distinct groups that have suffered discrimination in this country. Indeed, some affirmative action measures appear to be based on the very sorts of simplistic racial stereotyping and assumptions that personify the discrimination which arguably justifies affirmative action. Some groups that affirmative action measures typically assist may not need that assistance, while others not on the list would seem equally meritorious candidates for inclusion. Much of the public opposition to affirmative action measures undoubtedly can be traced to perceptions that they are in a real sense quite arbitrary, both in theory and in practice.

D. Some Questions Regarding the Definition and Implementation of Affirmative Action

My purpose here is not to offer solutions, but rather to identify some of the major questions that I perceive to be associated with affirmative action measures. These questions fall into three broad categories, although the issues are not necessarily distinct: definitional problems, purpose dilemmas, and implementation difficulties.

First, definitional problems. One problem is defining affirmative action as a concept. Does it mean a rigid quota to admit, hire, or promote members of select minority groups at the expense of others? Or does it mean extending preferential, but not necessarily determinative, consideration to members of such groups? Are quotas, on the one hand, and preferences or goals, on the other, actually different in operation and effect? Or are they only a reassessment of standards, practices, and evaluation criteria to ensure that they are race-neutral or, at the least, that those making decisions recognize the opportunities for race bias and attempt to counteract it.

It is also fair to inquire what race or race-caused disadvantages affirmative action is to rectify. Although proponents of affirmative action and the cases addressing the constitutionality of affirmative action frequently focus on the notion that affirmative action is a remedy for past discrimination, it is not at all clear exactly what handicaps or deficiencies suffered by those in the protected classes affirmative action is to address.

Moreover, there are substantial questions regarding who should benefit from affirmative action measures. These questions take at least two forms: (1) What groups, if any, should receive the benefits and (2) which individual members of such groups, if any distinctions are to be made, should be the particular beneficiaries? Perhaps it is time to reconsider who affirmative action benefits and why.

Some minority students, for example, really could use scholarships but do not receive them because they are not members of a qualifying minority group. Similarly, some nonminority students also suffer from educational deficiencies and lack of a privileged background but do not qualify for such benefits. On the other hand, some minority students receive scholarships solely because they are members of the qualifying group when they do not need them at all (either because they do not lack financial resources or they have not come from an underprivileged background). Often, the result of relying on physical characteristics alone to attain a goal of diversity may be “to confer capricious benefits” on certain members of select minority groups, irrespective of whether they actually have the
characteristic—such as a background of deprivation—that the measure purportedly is designed to recognize and rectify.

Second, the purposes of affirmative action also are subject to much debate. What are the purposes of affirmative action—equalizing opportunities, remedying past wrongs, creating role models? Is the purpose of a measure to sensitize people in positions of authority to their own conscious or subconscious biases, to establish targets or goals, or effectively to impose a quota? Is it to enlighten and sensitize those who may consciously or unconsciously discriminate in the workplace, in school, or in other contexts? Is affirmative action about paying a societal "debt"? I do not have any sure answers to these questions but affirmative action measures have been proposed, adopted, implemented, and criticized on all of these bases.

Take Kansas as an example of the difficulty of identifying the purposes of affirmative action. Kansas contains the following significant minority populations in the percentages indicated in parenthesis: black (6%); hispanic (4%); asian (1%); Native American (1%). Should the University of Kansas and other state universities structure their admissions policies and efforts so as to attain a student body which mirrors those figures? In fact, the KU student population does not reflect the state’s demographics. Rather certain minorities are “overrepresented”—asians make up 3% of the student body—while most are in a sense “underrepresented”—for example, black (3%), and hispanics (2%). Native americans are represented in rough proportion to the state population (1%).

A third area of concern is implementation. One implementation issue is timing. When does affirmative action make a difference? Is it too late to engage in affirmative action at the point of hiring someone to fill a professional position or to serve as a member of a university faculty? Certainly, it can be argued that it is never too late to engage in race-conscious measures if the decision to be made typically is influenced by racial considerations. On the other hand, will there be more “bang for the buck” if affirmative measures are implemented early in a child's educational journey, through programs such as Head Start and at the elementary school level? A minority student seeking admission to a medical or law school but lacking a solid educational background may never catch up to more privileged peers, even if admitted to such schools by virtue of affirmative action measures. I am not suggesting that higher education or employment-related affirmative action measures be abandoned, but that to level the playing field in any real sense may require a substantial commitment to early intervention in the lives of underprivileged members of society—minority or nonminority.

Termination is another complex problem. When is it time to end affirmative action? What is the measure of success? Obviously, a substantial portion of society believes the time has come to dismantle affirmative action while others believe that there is much progress yet to be made. In this respect, it is perhaps worth noting that state-sanctioned racial discrimination existed in this country for at least two hundred years, while affirmative action is approximately thirty years old. Must affirmative action exist for several hundred years in order to offset all of the effects of history? If not, how long is long enough? Realistically, can we expect thirty years to compensate for centuries of discrimination? The difficulties here are compounded by the lack of empirical evidence regarding the effectiveness of affirmative action measures.

Conclusion

Ultimately, affirmative action—perhaps like abortion—probably is an intractable and irresolvable legal and societal issue. Serious questions of defining affirmative action, identifying its goals and purposes, and deciding when such purposes have been served sufficiently to justify termination of this strong medicine, undoubtedly will persist. The difficulties are magnified and exacerbated by the dearth of empirical evidence regarding the operation and effect of affirmative action, and the near impossibility of obtaining such information.

A simple legal solution would be to declare affirmative action unconstitutional under the Equal Protection Clause and leave protection against racial discrimination to the various federal and state statutes which prohibit such discrimination. Alternatively, the Supreme Court could adopt a deferential level of review that would leave the issue largely to the political process. Either solution, however, probably would do little to resolve the racial discrimination problems in this country. Given American history, and the reality of continuing racism, some forms of affirmative action may be necessary and inevitable to overcome ignorance and insensitivity. The difficulty, of course, is deciding what those will be, and how much freedom the courts will give the political process to address the problem.

Notes

4. Glazer, supra note 2, at 12; see also Jones, supra note 3, at

6. Id. at 320.
7. Id.
9. Id. at 476-78.
10. Id. at 481-82, 487.
11. Id. at 483-84.
15. See Metro Broadcasting, 497 U.S. at 547.
17. Id. at 276.
18. Id. at 278.
19. Id. at 278, 282-83.
21. Id. at 493.
22. See id. at 493, 496, 506.
23. Id. at 500, 504.
24. Id. at 507.
26. Id. at 563.
27. 497 U.S. at 566.
28. Id. at 566-68.
30. Id. at 2102 (quoting 15 U.S.C. §§ 637(d)(2), (3)).
31. Id. at 2111-12.
32. Id. at 2111.
33. Id.
34. Id. at 2114.
35. Id. at 2117.
36. Id. at 2118 (Scalia, J., concurring).
37. Id. at 2119.
38. Id.
39. Id.
40. Id. at 2119 (Thomas, J., concurring).
41. Id.
42. Id. at 2120 (Stevens, J., dissenting).
43. Id. at 2131.
48. Id. § 2000d-7(a)(2); see Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582 (1983) (holding that all relief is available for intentional violations of Title VI but that only declaratory and injunctive relief is available when a plaintiff shows that a decision or policy has a discriminatory effect).
50. Id. § 2000a-3.
52. Id. § 3613.
53. Id. §§ 3610-3611.
55. See id. at 208-09. Similarly, in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the Court held that a private affirmative action plan which preferentially promoted women does not violate Title VII.
56. 438 U.S. 265 (1978); see id. at 418-19 (Stevens, J., joined by Burger, C.J., Stewart, Rehnquist, JJ.).
58. Judge Posner himself recognizes that “[s]heer malevolence and irrationality are factors in many cases,” id. at 661, of racial discrimination, and he also recognizes that “[t]he fact that some racial discrimination is efficient [from an economist’s perspective] does not mean that it is or should be lawful.” Id. at 661-62.
61. Id. at 363.
62. Id.
64. Russell Nieli, Ethnic Tribalism and Human Personhood, in RACIAL PREFERENCE, supra note 2, at 61, 88; see also SOWELL, supra note 60, at 149.
66. See, e.g., SOWELL, supra note 60, at 155.
67. Randall Kennedy, Persuasion and Distrust, in RACIAL PREFERENCE, supra note 2, at 42, 48.
68. See DANIEL C. MAGUIRE, A NEW AMERICAN JUSTICE 175 (1980); Carlos J. Nan, Comment, Adding Salt to the Wound: *Affirmative Action* and Critical Race Theory, 12 LAW & INEQ. J. 553, 554 (1994).
69. See Maguire, supra note 68, at 185.
70. See Kennedy, supra note 67, at 48.
71. Id. at 48-49.
72. See, e.g., Sowell, supra note 60, at 15, 111, 125; Morris B. Abram, Fair Shakers and Social Engineers, in RACIAL PREFERENCE, supra note 2, at 29, 41.
74. See Abram, supra note 72, at 40.
75. See, e.g., Thomas Sowell, Are Quotas Good for Blacks?, in RACIAL PREFERENCE, supra note 2, at 415, 422-23.
76. See Charles Murray, Affirmative Racism, in RACIAL PREFERENCE, supra note 2, at 393, 396.
77. See generally Knaplund & Sander, supra note 65, at 157; Glenn C. Loury, Beyond Civil Rights, in RACIAL PREFERENCE, supra note 2, at 435.
78. See Sowell, supra note 60, at 36.
79. See Loury, supra note 77, at 445-46.
81. See U.S. Const. art. I, § 2, cl. 3 (three-fifths compromise); Art. I, § 9, cl. 1 (1808 compromise); Art. IV, § 2, cl. 3 (fugitive slaves do not become free by escaping to a free state); Art. V (no constitutional amendment shall alter the original slavery provisions).
82. Posner, supra note 58, at 662.
83. See Institute for Public Policy and Business Research, Kansas Statistical Abstract 1993-94 22 (1993-94) (citing 1990 Census data). The titles for each category are those used in the source, not the author’s. Furthermore, in this data, hispanics and other minorities are not mutually exclusive. Lastly, as used here, the term “Native American” includes “American Indian[s],” “eskimo[s],” and “aleut[s].” See id.
84. Office of Institutional Research and Planning, University of Kansas Profiles 4-113 (Feb. 1996). The figures are for U.S. citizens attending the main campuses of the University of Kansas.