2. AFFIRMATIVE ACTION: HISTORY AND RATIONALE

Neither this review nor the current debate over affirmative action occur in a historical vacuum. This and the following two sections provide the context for this review, and, indeed, for federal affirmative action programs. First, we examine the history of the creation of modern affirmative action programs. Then, in section 3, we review the general evidence on the effectiveness of affirmative action. Finally, section 4 examines the extent to which discrimination and exclusion persist today.

2.1 Background

The current scope of affirmative action programs is best understood as an outgrowth and continuation of our national effort to remedy subjugation of racial and ethnic minorities and of women--subjugation in place at our nation's founding and still the law of the land within the lifetime of "baby-boomers." Some affirmative action efforts began before the great burst of civil rights statutes in the 1950s and 1960s. But affirmative efforts did not truly take hold until it became clear that anti-discrimination statutes alone were not enough to break longstanding patterns of discrimination.

For much of this century, racial and ethnic minorities and women have confronted legal and social exclusion. African Americans and Hispanic Americans were segregated into low wage jobs, usually agricultural. Asian Americans, who were forbidden by law from owning land, worked fields to which they could not hold title. Women were barred by laws in many states from entering entire occupations, such as mining, fire fighting, bartending, law, and medicine.

The first significant wave of progress in enhancing employment opportunities for African Americans and women came during the labor shortages of World War II and immediately afterwards, before the use of affirmative action. Nonetheless, racial separation continued, and African Americans were still segregated for the most part into low wage jobs into the 1960s. For Hispanic Americans, employment opportunity remained seriously restricted into the 1970s. Whole industries and categories of employment were, in effect, all-white, all-male. In thousands of towns and cities, police departments and fire departments remained all white and male; Women and minorities were forbidden to even apply. In grocery and department stores, clerks were white and janitors and elevator operators were black. Generations of African Americans swept the floors in factories while denied the opportunity to become higher paid operatives on the machines. In businesses such as the canning industry, Asian Americans were not only precluded from becoming managers, but were housed in physically segregated living quarters. Stereotypical assumptions that women would be only parttime or temporary workers resulted in their exclusion from a full range of job opportunities. Newspaper job listings were segregated by gender. Women also confronted other barriers to full inclusion: lower pay and fewer benefits than men, even when performing similar jobs; losing their jobs if they married or became pregnant; and sexual harassment on the job.

African Americans, even if they were college-educated, worked as bellboys, porters and domestics, unless they could manage to get a scarce teaching position in the all-black school -- which was usually the only alternative to preaching, or perhaps working in the post office. In higher education most African Americans attended predominantly black colleges, many established by states as segregated institutions. Most concentrated on teacher training to the exclusion of professional education. Students who were interested in business had to take business education instead of administration. A few went to predominantly white institutions, in which by 1954, about one percent of entering freshman were black.

Asian Americans and Hispanic Americans, were legally barred from attending some public schools. And women were systematically excluded from some private and state funded colleges, universities, and professional schools well into the 1970s. In general, it is clear that separation of the races and relegation of women to the sidelines remained the norm for most of this century.

The civil rights movement had its dramatic victories -- Brown v. Board of Education and the other cases striking down segregation, the Civil Rights Act of 1964, the Voting Rights Act of 1965 -- which helped advance the Constitution's promise of equal opportunity to all minorities and women. Even after passage of the civil rights laws beginning in the 1960s, however, the road to equal opportunity for minorities and women was difficult, and programs often very slow.

These judicial and legislative victories were not enough to overcome long-entrenched discrimination, for several reasons. In part, these measures frequently focused only on issues of formal rights (such as the right to vote) that were particularly susceptible to judicial or statutory resolution. In part, the difficulty was that formal litigation-related strategies are inevitably resource-intensive and often dependent upon clear "smoking gun" evidence of overt bias or bigotry, whereas prejudice can take on myriad subtle, yet effective,
forms. Thus, private and public institutions alike too often seemed impervious to the winds of change, remaining all-white or all-male long after court decisions or statutes formally ended discrimination.

As a result, both the courts and Republican and Democratic administrations turned to race- and gender-conscious remedies as a way to end entrenched discrimination. These remedies were developed after periods of experimentation had shown that other means too often failed to correct the problems. Here are some typical examples:

- In July 1970, a federal district court enjoined the State of Alabama from continuing to discriminate against blacks in the hiring of state troopers. The court found that "in the thirty-seven year history of the patrol there has never been a black trooper." The order included detailed, non-numerical provisions for assuring an end to discrimination, such as stringent controls on the civil service certification procedure and an extensive program of recruitment of minority job applicants. Eighteen months later, not a single black had been hired as a state trooper or into a civilian position connected with the troopers. The district court then entered a further order requiring the hiring of one qualified black trooper or support person applicant for each white hired until 25 percent of the force was comprised of blacks. By the time the case reached the Court of Appeals in 1974, 25 black troopers and 80 black support personnel had been hired. (4) The U.S. Supreme Court ultimately affirmed the orders.

- In 1979, women represented only 4 percent of the entry-level officers in the San Francisco police department. By 1985, under an affirmative action plan ordered in a case in which the DOJ sued the City for discrimination, the number of women in the entry class had risen to 175, or 14.5 percent.

- Similarly, a federal district court review of the San Francisco Fire Department in 1987 led to a consent decree which increased the number of blacks in officer positions from 7 to 31, Hispanics from 12 to 55, and Asians from 0 to 10; women were admitted as firefighters for the very first time.

- 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. The court found that the union had (1) adopted discriminatory admission criteria, (2) restricted the size of its membership to deny access to minorities, (3) selectively organized shops with few minority workers and (4) discriminated in favor of white applicants seeking to transfer from sister locals. The court found that the record was replete with instances of bad faith efforts to prevent or delay the admission of minorities. The court established a 29 percent membership goal, reflecting the percentage of minorities in the relevant labor pool. The Supreme Court affirmed the relief.

- Prior to 1974, Kaiser Aluminum hired only persons with prior craft experience as craft workers at its Gramercy, Louisiana plant. Because blacks traditionally had been excluded from the craft unions, only 5 of 273 skilled craft workers at the plant were black. In response, Kaiser together with the union, established its own training program to fill craft jobs with the proviso that 50 percent of new trainees were to be black until the percentage of black craft workers in the plant matched the percentage of blacks in the local labor pool. The Supreme Court held this program to be lawful.

- On March 23, 1973, the Nixon administration's Department of Justice, Department of Labor, Equal Employment Opportunity Commission and the Civil Service Commission issued a joint memorandum titled "State and Local Employment Practices Guide." The guide points out that the Nixon Administration... since September of 1969, recognized that goals and timetables... are a proper means for helping to implement the nation's commitment to equal employment opportunity." The memorandum stressed that strict quotas are unacceptable but that goals and timetables' are entirely different and reasonable tools. (Attorney General John Mitchell led the legal defense of the distinction between goals and quotas.) In July of 1986, Justice O'Connor referred to this document, and the merits of fair and effective affirmative action goals, in the concurring portion of her opinion in Local 28, Sheet Metal Workers v. EEOC. In doing so, she joined the Court majority's support for numerical guidelines in affirmative action programs.

### 2.2 Fair Employment -- The Executive Order

The longest-standing federal affirmative action program has its roots in World War II. The Executive Order barring discrimination in the federal government and by war industries was issued by President Franklin Roosevelt. The action was taken to forestall a planned march on Washington organized by A. Philip Randolph, the President of the Brotherhood of Sleeping Car Porters. Roosevelt's order barred discrimination against blacks by defense contractors, and established the first Fair Employment Practices Committee. However, federal compliance programs were routinely understaffed, underfunded and lacked enforcement authority.

After World War II, gains that had been made by women and blacks receded as returning GIs reclaimed their jobs. By 1960, the 10 million workers on the payrolls of the 100 largest defense contractors included few blacks. The $7.5 billion in federal grants-in-aid to the states and cities for highway, school, airport, school and public housing construction went almost exclusively to whites. The U.S. Employment Service, which provided funds for state-operated employment bureaus, encouraged skilled blacks to register for unskilled jobs, accepted requests from white employers and made no efforts to get employers to accept African American workers. The President's Committee on Government Contracts, chaired by Vice-President Nixon in 1959, blamed "the indifference of employers to establishing a positive policy of nondiscrimination," stated that such indifference was more prevalent than over discrimination, and called for remedial steps.
In response to the civil rights movement, President John F. Kennedy created a Committee on Equal Employment Opportunity in 1961 and issued Executive Order 10925, which used the term "affirmative action" to refer to measures designed to achieve non-discrimination. In 1965, President Johnson issued Executive Order 11246 requiring federal contractors to take affirmative action to ensure equality of employment opportunity without regard to race, religion and national origin. In 1968, gender was added to the protected categories.

In the Johnson Administration, the Labor Department Office of Federal Contract Compliance (OFCCP) started pre-award compliance for federal contracts over $1 million. The Office began with construction contractors, who were required to set goals and timetables under a regulation issued to implement the Order in 1968. However, under pressure from unions and the General Accounting Office, which found the process too vague, OFCCP discontinued the effort.

But in the most far-reaching federal expansion of affirmative action, the "goals and timetables" plan was revived by President Nixon and Labor Secretary George Shultz in 1969. In issuing the so-called "Philadelphia Order," Assistant Secretary Arthur Fletcher said:

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 referral 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 seven trades. (5)

President Nixon later remembered, "A good job is as basic and important a civil right as a good education . . . I felt that the plan Shultz devised, which would require such [affirmative] action by law, was both necessary and right. We would not impose quotas, but would require federal contractors to show affirmative action' to meet the goals of increasing minority employment." (6)

Order No. 4 in 1970 extended the plan to non-construction federal contractors.

2.3 Fair Employment -- Enforcement of Title VII

In July, 1963, in the midst of the civil rights campaign in Birmingham, Alabama, President John F. Kennedy appeared on national television to propose a civil rights bill. The measure proposed outlawing discrimination in public accommodations, permitting a cut-off of federal funds from discriminating institutions, and expanding the equal employment opportunity committee he had established. After President Kennedy's assassination, Title VII was enacted as part of the Civil Rights Act of 1964, seeking to end discrimination by large private employers whether or not they had government contracts. The Equal Employment Opportunity Commission, established by the Act, is charged with enforcing the anti-discrimination laws through prevention of employment discrimination and resolution of complaints. The Act is designed to make employees whole for illegal discrimination and to encourage employers to end discrimination. Title VII was substantially strengthened in 1972 amendments, signed by President Nixon. As Supreme Court holdings concluded, the legislative history to the 1972 amendments made clear that Congress approved of race- and gender-conscious remedies that had been developed by the courts in enforcing the 1964 Act.

Court-ordered affirmative action to remedy violations of Title VII developed on a parallel track with the Executive Order program, as another remedial effort to stop existing discrimination and prevent its recurrence. The Supreme Court's most comprehensive review of affirmative action has occurred in the employment area.

2.4 Education

Discrimination in education was the target of the original breakthrough civil rights cases. Indeed, because education is the gateway to opportunity, education has consistently been a central focus of civil rights efforts. But for nearly two decades following the original court decisions, educational institutions -- particularly colleges and graduate schools -- remained predominantly white and male. In 1955, only 4.9 percent of college students ages 18-24 were black. This figure rose to 6.5 percent during the next five years, but by 1965 had slumped back to 4.9 percent. Only in the wake of affirmative action measures in the late 1960s and early 1970s did the percentage of black college students begin to climb steadily (in 1970, 7.8 percent of college students were black; in 1980, 9.1 percent; and in 1990, 11.3 percent).

The 1978 Bakke case set the parameters of educational affirmative action. (7) The University of California at Davis medical school had reserved 16 available places for qualified minorities. In a splintered decision, with Justice Powell casting the deciding vote, the Supreme Court essentially decided that setting aside a specific number of places in the absence of proof of past discrimination was illegal, but that minority status could be used as a factor in admissions. The desire to obtain a "diverse" student body was found to be a compelling goal in the educational context in Justice Powell's controlling opinion.
Increased educational opportunity has, in fact, revolutionized education, although some gaps persist. While the enrollment of women in higher education has risen steadily, with women now earning nearly fifty percent of all bachelor's and masters degrees, they earn only one third of doctorate and first professional degrees, and continue to lag in math, engineering, and the physical sciences at both the undergraduate and the doctoral levels.

Through the availability of student aid programs and aggressive recruitment and retention programs, the college-going rate for blacks and whites who graduated from high school was about equal by 1977. Since 1977, however, the proportion of black 18-24 year old high school graduates enrolled in college has not kept pace with that of white students. While the percentage of black students who have graduated from high school has increased approximately 20 percent in the past 25 years, the portion of black high school student graduates attending college is now 25 percent less than that of white students. (8)

The story is similar for the Hispanic enrollment rate. In 1976, the college-going rate for 16-24 year old Hispanics who had recently graduated from high school (53 percent) actually exceeded the white rate (49 percent). Since then, the Hispanic college-going rate has stagnated while the white rate has increased significantly. By 1994, the white college-going rate had risen to 64 percent, whereas the Hispanic rate had fallen to 49 percent. (9)

Section 2 – FOOT NOTES

5 DOL memo from Arthur Fletcher to All Agency Heads discussing the revised Philadelphia Plan, 6/27/69.