

The Small Business Administration's 8(a) Program: An Historical Perspective on Affirmative Action

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The term affirmative action refers to a wide variety of government policies, adopted mainly in the 1960s, that attempt to redress the historical exclusion of minorities from schools, housing, elections, and employment. Affirmative action policies are rooted in the largeness of spirit of the Johnson administration and the Great Society programs, which held that government initiatives, designed and administered by right-thinking people, could correct the historic imbalance between the races.

In recent months, the principles behind affirmative action have been examined by, or face fundamental challenges from, all three branches of the federal government and the nation's most populous state, California. Senate Majority Leader Robert Dole (R-Kansas), a self-described friend of equal opportunity, has recently opined that the United States should be thought of as a "colorblind" society.¹ Senator Dole has thus helped placed affirmative action reform at the top of the newly elected Republican Congress' legislative agenda. As a first step toward modifying policy, Senator Dole requested copies from the Congressional Research Service of all federal legislation that fostered affirmative action.² When a thirty-two page report was delivered, Senator Dole appointed a task force to review the federal government's affirmative action initiatives.³ More recently, Dole has called on the chairmen of committees with jurisdiction over affirmative action programs to hold hearings on those programs to find more equitable ways to expand opportunities for minorities.⁴

In response to Senator Dole's actions, President Clinton has organized his own review of the federal government's affirmative action programs and has recently expressed his preference for affirmative action programs based on economic need.⁵ At the same time, the president is repeatedly warning Democrats not to allow Congressional Republicans to use the issue of affirmative action to drive a

wedge through the ranks of the Democratic party. The president has stated that while the purpose of the review is to protect those affirmative action programs that work, Democrats must critically evaluate and be willing to eliminate programs that do not work and are not fair.⁶

Perhaps the most far-reaching and potentially comprehensive review of affirmative action plans is taking place in the courts. In late June, for example, the Supreme Court is expected to deliver a decision in the case of *Adarand Contractors v. Pena* which examines whether Congress can, in the spirit of affirmative action, give a special benefit to small businesses owned and operated by minorities on the theory that these businesses are disadvantaged and in need of special government supports. The case challenges a 1978 law, Public Law 95-507, that forms the statutory basis for a business development program commonly known as the Small Business Administration's Section 8(a) program.⁷

Adarand presents the issue of a Transportation Department policy that encourages prime contractors to hire minority firms as subcontractors on federal highway construction projects. The policy provides bonuses to those contractors that subcontract at least 10 percent of their work to disadvantaged firms by offering the contractors financial compensation for any additional expenses incurred in employing the minority subcontracting firms. This policy is used by the Transportation Department as one means to fulfill its statutory guidelines under Public Law 95-507, which established a 5 percent government-wide minimum goal for participation by minority firms in government contracting.⁸

The facts of the *Adarand* case are straightforward. In 1990, Randy Pech, a white male, submitted a low bid but still lost a subcontract on a federal project in the San Juan

National Forest in southern Colorado to a company that is owned and operated by an Hispanic. By hiring the minority firm, the prime contractor was entitled to an extra \$10,000 from the Department of Transportation. Among other issues, the case examines whether affirmative action policies, such as the policy enforced by the Department of Transportation, breach the Constitution's Fourteenth Amendment guarantee of equal protection under the law. *Adarand* is the first affirmative action case the Supreme Court has reviewed since 1990, when it last upheld racial preferences for a federal program by only one vote.⁹

The current examination of affirmative action policies at the federal and state levels results from serious doubts among government officials and the American public about the usefulness of these policies for dealing with racial inequality.

Along with the three branches of the federal government, state governments are also currently examining the principles of affirmative action. In California, for example, the tenets of affirmative action are likely to be put to a test in 1996. The California Civil Rights Initiative will allow California voters to express their opinions on affirmative action by voting for or against a state constitutional amendment. If the initiative passes, the state of California will no longer be allowed to use "race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the state's system of public employment, public education or public contracting."¹⁰ The organizers of the initiative are optimistic about its chances for passage.

The current examination of affirmative action policies at the federal and state levels results from serious doubts among government officials and the American public about the usefulness of these policies for dealing with racial inequality. The fact that these laws are under review thirty years after their passage suggests that the popularity of different strategies for combating inequality ebbs and flows with the nation's changing political and economic climate. Thus, even if the federal government dismantles the current set of affirmative action initiatives to satisfy the demands of a disgruntled populace, the unsolved issue of racial inequality will eventually resurface, in the form of an

entirely new set of initiatives, as political ideology and economic conditions continue to change.

To begin illustrating how support for affirmative action policy has directly paralleled relevant changes in political and economic philosophies, the ideological origins of affirmative action must be explained in the context of the time period in which the thinking emerged. The easiest way to do this is to look first at the social and economic conditions of the time period that spawned the current set of affirmative action programs and then to examine the origins of a specific affirmative action program: the Small Business Administration's 8(a) program, which is at the heart of the *Adarand* case.

Evaluating affirmative action programs in the context of the era that gave rise to them provides a particular understanding of the intention behind these strategies. The general goal of affirmative action and the general goal of 8(a), a business development program that provides program participants a wide array of services, were identical: to give help to those firms most in need. Despite these similarities, the mission of 8(a)—although distorted over time—was never abandoned. Even during the mid-1980s, when the affirmative action mission of 8(a) was clouded by corruption and abuse, the economic and political underpinnings of public opinion kept 8(a) and other affirmative action programs from being repealed. Only now, as political and economic conditions are changing, does the national mood portend the dismantling of affirmative action, and with it 8(a).

The Birth of Affirmative Action

Assuring equality for all American citizens has been a stated objective of lawmakers since the end of the Civil War. The Fourteenth Amendment to the Constitution, which was ratified in 1868, was originally designed to create fairness by providing blacks with legal equality. Unfortunately, the Fourteenth Amendment's guarantees did not result in the affirmation of civil rights for black Americans.¹¹ Nearly one hundred years after slavery was abolished, black Americans began to forcefully demand the equal treatment to which they were entitled under the law. The Civil Rights Movement of the 1950s and early 1960s, driven by charismatic leaders like the Reverend Dr. Martin Luther King, Jr., finally enabled black Americans to realize a modicum of genuine freedom. In 1954, the Civil Rights Movement reached a milestone when the Supreme Court rejected the conflicted idea that public schools for black Americans could be both separate and equal at the same time.¹²

During the mid-1960s, both political and civil rights leaders began to understand that a partial grant of freedom would not be sufficient to redress the discrimination that had been leveled against black Americans since this country was founded. Instead, these leaders held that equality of opportunity, in the form of initiatives aimed at assisting in the development of human ability, had to be the next stage if the battle for human dignity was ever to be won. This vision of equality of opportunity forms the underpinning of affirmative action.¹³

The introduction of affirmative action policy was first publicly announced by President Lyndon Baines Johnson in an address at Howard University on 4 June 1965. In the speech, Johnson explained the principles, the purpose, and the need for the remedial policies espoused by affirmative action. Johnson attempted to explain, by way of an extended analogy, the huge gulf that lay between merely granting freedom to blacks and ensuring equality of opportunity. The president aptly compared the plight of the black American with that of an injured runner. Johnson pointed out that while an injured runner, like racially oppressed black America, may begin the race at the starting line, the runner cannot be expected to keep pace with others in the race. Unless that injured runner is given proper treatment for his injury, he can never have a chance at winning the race. Johnson saw black America's success as affirmative action's equality of opportunity. According to Johnson, affirmative action aspired not to guarantee an outcome at the finish line, but to give every American an equal chance out of the starting block.¹⁴

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The decade of the 1960s in America is often thought of as a social breakthrough period. While the acceptance of the Civil Rights Movement and the principles of affirmative action were, in part, a testimony to the American people's belief in fairness and justice, this readiness to support affirmative action may well have been facilitated by the prosperous economic conditions. Following World War II, the

American economy expanded more rapidly than it had since the turn of the century. As a result, most white Americans participated in an economy with historically low levels of unemployment and increasing levels of median household incomes. These promising conditions may have, in turn, allowed the average American to think less about his or her own needs and more about the needs of the country as a whole. Affirmative action found a home in the 1960s, therefore, because the economic conditions of the 1960s created that home. The average American could now allow himself to address pressing social problems that had been ignored for decades, because individual economic prosperity would not have to be sacrificed to support the common good.¹⁵

The Birth of the Small Business Administration's 8(a) Program

The early development of what eventually became the Small Business Administration's 8(a) program closely parallels the development of the general principles of affirmative action policy. Interest by the Federal Government in the state of minority small business can be traced to 1941 when Emmet Lancaster, Advisor on Negro Affairs to the Commerce Department, convened a conference of the National Business League.¹⁶ The conference endeavored to make federal officials aware of the problems of black businessmen and to help black businessmen learn of government services available to all U.S. businesses.¹⁷

Unfortunately, the conferences of the National Business League did little to encourage federal support for minority-owned businesses. Such action was not taken until 1964 when the Area Redevelopment Administration (ARA) in the Department of Commerce and the Small Business Administration (SBA) joined to develop and finance minority businesses in a number of targeted communities. The ARA funded the business development aspects of the initiative, while the SBA offered loans to new or existing businesses.¹⁸

This joint action by the Commerce Department and the SBA was shortly overtaken by the authorization of an Economic Opportunity Loan Program under Title IV of the Equal Economic Opportunity Act of 1964, most widely remembered as the principle piece of legislation in President Johnson's War on Poverty. Title IV, devoted to employment and investment incentives, empowered the Office of Economic Opportunity (OEO) to disburse loans of up to \$25,000 for fifteen years to eligible persons. Emphasis was placed on the loan applicant's character,

integrity, and ability to operate a business successfully.¹⁹

Although the Office of Economic Opportunity eventually delegated the power to approve and disburse loans under Title IV of the Economic Opportunity Act of 1964 to the SBA, the Office of Economic Opportunity retained firm control of the policy governing the loan program and identified the purpose of the program narrowly. Loans would be made only to applicants, regardless of race or gender, who were in poverty or, if not themselves poor, would agree to hire the hard-core unemployed or underemployed. The loans were to represent the last possible financial opportunity for applicants. Applicants were not only required to have been turned down by at least two private banks but also had to be unqualified for other forms of SBA financial assistance.²⁰

The scope of the program was severely limited until the 1966 and 1967 amendments to the Equal Economic Opportunity Act transferred direct statutory responsibility for the loan program to the Small Business Administration and expanded the range of potential beneficiaries of the Act. The amendments commanded the SBA to accomplish the statutory directives of the Equal Economic Opportunity Act by incorporating the provisions of Title IV into the Small Business Act. In so doing, all other applicable programs within the Small Business Administration could then be used to strengthen the Economic Opportunity Loan Program.²¹

The amendments also directed attention to labor surplus areas and to small business concerns owned by economically disadvantaged individuals. The intent of the program was shifted to give poor people, especially blacks and other ethnic minorities, the chance to succeed in areas of business to which they had historically been denied access. According to SBA historian Addison W. Parris, this change of purpose demonstrated the realization that "unless and until a much higher number of disadvantaged people have a stake of their own in America through business ownership, they will remain second-class citizens."²²

At the same time that the changes in the Equal Economic Opportunity Act were implemented, the SBA was also beginning to use an obscure provision in the Small Business Act to further assist the interests of minority entrepreneurs. Section 8(a) of the Small Business Act allowed the SBA to acquire from federal agencies prime contracts to provide articles, equipment, supplies, or materials and to arrange for their completion by awarding the subcontracts to small business concerns. Section 8(a) was derived from the Smaller Defense Plants Administration, where a

similar provision allowed the agency to rescue small defense contractors following the end of the Korean War.²³

The Defense Department, in response to the 1967 report of the Commission on Civil Disorders (the Kerner Commission), introduced the notion of using Section 8(a) of the Small Business Act to aid minority small businesses. At the time an obscure provision of the act, Section 8(a) soon became a promising way of placing federal contracts in the hands of minority business concerns. The idea excited such interest in the ranks of the SBA that, after receiving favorable rulings on the legality of such action from the Attorney General and the General Accounting Office, Section 8(a) soon became one of the SBA's principle programs.²⁴

According to Lyndon Johnson, affirmative action aspired not to guarantee an outcome at the finish line, but to give every American an equal chance out of the starting block.

The purpose of 8(a) (both in 1967 and currently) is to provide managerial, technical, and marketing assistance to eligible businesses to help develop the proper business skills needed to compete in the economy. To aid in the accomplishment of this task, the SBA utilizes two tools. The first, Section 8(a) of the Small Business Act, allows the Small Business Administration to award both sole-source and limited-competition federal government contracts to 8(a)-certified firms in the belief that these firms will develop sound business practices as a result of receiving such contracts.²⁵

The second device used by the SBA is the Section 7(j) Management and Technical Assistance program. The 7(j) program is designed to help 8(a) firms develop the proper business skills needed to compete in the marketplace. The SBA solicits the expertise of both private and public organizations to aid in the delivery of these services. The 7(j) program provides support for 8(a) firms in accounting and finance, marketing, and proposal or bid preparation. The 7(j) program also provides financial support to help educate 8(a) entrepreneurs.²⁶ Currently, the 8(a) program has approximately fifty-four hundred participating firms. To receive 8(a) certification, a business must survive a rigorous application process during which the SBA must be convinced that the applicant business is at least 51 percent

unconditionally owned, controlled, and operated by an individual or individuals who are socially and economically disadvantaged.²⁷ The product the firm produces or the service that the firm provides is not a factor in eligibility for certification as long as the SBA determines that the firm has the requisite contract, financial, and management assistance to support its competitive viability within a reasonable period of time.²⁸ Once admitted to the program, firms are allowed to participate for a nine-year fixed term.²⁹

According to a report issued by the General Accounting Office in May 1988, from the program's inception in 1968 until September 1980, about 31 percent of all 8(a) contracts had gone to only fifty firms.

Section 8(a)(5) of the Small Business Act specifies the type of individual who is considered by the SBA to be socially disadvantaged. The law states that "socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."³⁰ The statute categorically identifies Black Americans, Hispanic Americans, Native Americans, Indian Tribes, Asian Pacific Americans, and Native Hawaiian Organizations as socially disadvantaged. Other Americans, who may have suffered from social disadvantage because of racial or ethnic prejudice or cultural bias and who chose to apply for 8(a) certification, must have social disadvantage established by the SBA on an individual basis.

Section 8(a)(6) of the Small Business Act specifies the type of individual who is considered by the SBA to be economically disadvantaged. The law states that "economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."³¹ The statute maintains that, in general, the assets and net worth of a socially disadvantaged individual is an adequate measure of the degree of diminished credit and capital opportunities.³²

There are presently four means by which firms can exit the 8(a) program. First, firms can be forced to exit the program at the conclusion of their nine-year participation.

Second, a firm can request removal from the program by voluntary withdrawal. Third, a firm can complete the program by proving its ability to compete in the market before the conclusion of the nine-year fixed program participation term. Finally, a firm can be terminated from the program prior to the conclusion of the fixed program participation term by overcoming economic disadvantage as defined by the Small Business Act.³³

At first, three Executive Orders functioned as the basis of the SBA's new 8(a) program. In the first Executive Order (EO 11458), issued in March 1969, President Nixon created the machinery for developing and coordinating a national program for minority business enterprise and established an Advisory Council for Minority Enterprises. In a significant but not widely recognized provision of the Executive Order, the president noted the importance of the business development aspect of the SBA's objectives. The order stated that the purpose of 8(a) was to contribute to the "establishment, preservation and strengthening of minority business enterprises."³⁴ This purpose was comparable to the ideal of equality of opportunity found in other affirmative action initiatives.

A second Executive Order (EO 11518), dated March 1970, widened the authority of the SBA by requiring the agency to represent the interests of the minority small business community with eleven other federal agencies.³⁵ Finally, a third Executive Order (EO 11625), issued in October 1971, defined the term "minority business enterprise" as a firm owned or controlled by one or more socially or economically disadvantaged or deprived persons. The order stated that disadvantage could refer to a handicap due to cultural or racial background, or chronic economic circumstances.³⁶

The Evolution of 8(a)

During the late 1970s and throughout the decade of the 1980s, the stated purposes of affirmative action policy did not waver. The overall economic growth of the American economy in that period clearly helped facilitate this sustained support. Equality of opportunity, as defined in the Johnson era, continued to be the ideal toward which political and civil rights leaders struggled.

While the stated purpose of affirmative action policy remained steadfast, the SBA's 8(a) program, like many other affirmative action programs of its kind, strayed from its original equality-of-opportunity mission. By the late 1970s, the fact that the business development goals of the 8(a) program were not being properly fulfilled under

President Nixon's Executive Orders was increasingly apparent. Members of both the House and Senate Committees on Small Business were displeased that the volume of contract activity was being used as a valid measure of the 8(a) program's achievement, instead of the potential long-range viability of stable firms owned by economically disadvantaged people.³⁷

In 1978, in the hope of reversing this trend, the leadership of both the House and Senate Committees on Small Business decided to grant a statutory basis to the 8(a) program. By legislatively establishing the policy goal of helping businesses owned by socially and economically disadvantaged persons, Congress hoped to strengthen the legitimacy of the Small Business Administration program. Public Law 95-507, signed into law in October 1978, was intended to increase and improve the level of management and technical assistance furnished by the SBA to 8(a) firms. To accomplish this goal, management and technical assistance services under Section 7(j) of the Small Business Act had to be designed to meet the specific needs of each 8(a) participant.³⁸

By 1980, the SBA was still having trouble helping firms develop to a point where they could leave the 8(a) program and compete successfully in the free market. Instead, the 8(a) program was primarily helping large, politically influential firms meet increased contracting goals. According to a report issued by the General Accounting Office in May 1988, from the program's inception in 1968 until September 1980, about 31 percent of all 8(a) contracts had gone to only fifty firms.³⁹ As a result, Congress attempted to refocus the 8(a) program toward the achievement of its business-development mission.⁴⁰

Public Law 96-481, which President Carter signed in October 1980, required the SBA and each 8(a) firm to fix in advance an exact date when the firm would be expected to overcome its economic disadvantage and "graduate" from the 8(a) program. The anticipated graduation date would then be included in the firm's business plan, along with specific business targets, objectives, and goals aimed at correcting the economic impairment of the firm. By underscoring the inevitability of graduation, this change in the law was designed to shift emphasis in the 8(a) program away from obtaining sole-source contracts. In recognizing the limited gains the contracts would confer upon firms at the time of graduation, many in Congress believed Public Law 96-481 would impress upon 8(a) participants the importance of true business development.⁴¹

In April 1981, the General Accounting Office issued a

report, entitled "The SBA 8(a) Procurement Program—A Promise Unfulfilled," which concluded that the 8(a) program was still not aiding firms in business development even though the program had already undergone two legislative reviews. Immediately after the issuance of the General Accounting Office report, President Reagan considered abolishing the 8(a) program altogether.⁴² Instead, Reagan temporarily froze admission into the program and proposed that audits of firms in the program be increased. As a result, twenty-one firms were found ineligible for participation in the 8(a) program and were eventually ousted at the conclusion of the auditing period. Perhaps the best explanation of Reagan's decision not to proceed with his initial plans to dismantle 8(a) is that continuing public support for affirmative action policy prevented him from acting on this intent.⁴³

The evolution of the 8(a) program has distorted the notion of equality of opportunity that has been the cornerstone of good affirmative action policy.

As mentioned earlier, this lack of forceful opposition to affirmative action may have been associated with a lack of economic hardship felt by a majority of Americans at the time. Notwithstanding the recessionary economy of the early 1980s, most of the Reagan era was characterized by high levels of real income and low levels of unemployment.⁴⁴

Indeed, the most notable attempt by Congress to reform the 8(a) program in the 1980s came not in response to opposition to affirmative action but in reaction to, in the vernacular of the times, "fraud, waste, and abuse." In the first few months of 1987, executives of the Wedtech Corporation, a New York-based defense contractor, admitted to bribing government officials to help the company win sole-source contracts through the SBA. In light of the fact that individual owners of Wedtech were each worth tens of millions of dollars, the SBA was understandably faced with a difficult task in explaining how the Agency had reached the decision that Wedtech deserved 8(a) assistance in the first place.⁴⁵

In the wake of the Wedtech scandal, the House and Senate Small Business Committees decided to attempt a third review of the misdirected legislation governing 8(a). The modifications that were made to the existing legislation are

commonly referred to as the Business Opportunity Development Reform Act of 1988. The title of the legislation succinctly describes its overriding purpose: to enhance the 8(a) program by strengthening business development provisions that, to date, had been ignored by both the SBA and the participating 8(a) firms.⁴⁶ The improved legislation was designed to accomplish its business development objectives by introducing competition to the 8(a) program and by setting goals concerning the amount of non-8(a) business activity firms should attain in any given year during program participation.⁴⁷

In the past several years, at least three independent sources have attested to the failure of the Business Opportunity Development Reform Act of 1988. Testimony before the House Committee on Small Business from the General Accounting Office in March 1992; the July 1992 findings of a commission established by the Business Opportunity Development Reform Act of 1988; and testimony before the Senate Committee on Small Business from the inspector general for the SBA in July 1994 all cited the same chronic problems: the 8(a) program appeared to benefit only a small number of companies, and too few companies received the majority of 8(a) contracts. In addition, the three sources also found that participants were being allowed to stay in the program even after surpassing the standard which classified the firm as economically disadvantaged.⁴⁸ A reform proposal to revamp the 8(a) program a fourth time has been forwarded to Congress by the SBA, but no action has been taken on its passage by either the House or the Senate Committees on Small Business.⁴⁹

The Growing Disservice to the Cause of Affirmative Action

The evolution of the 8(a) program has distorted the notion of equality of opportunity that has been the cornerstone of good affirmative action policy. The 8(a) program's distortion of the concept of equality of opportunity has transformed 8(a) into a minority small business program that has allowed race to become an assurance of access. Whereas correctly applied affirmative action envisions race as only one of many factors in a complex decision-making process, the 8(a) program has come to conceive race as the only factor.⁵⁰ Instead of providing businesses with a calculated break, the program has become a guarantee of sorts. Implementation of 8(a) legislation has permitted the 8(a) program to become an entitlement for minority firms, rather than simply an opportunity.

The 8(a) program guarantees entitlement to minority firms in two ways. First, the 8(a) program guarantees certification to nearly all interested minority small businesses, even those not found to have an economic disadvantage. This is not the purpose of affirmative action policy and was never the intent of the enabling legislation that governs 8(a). The legislators who drafted the 8(a) statutes championed equality of opportunity by stipulating that, to qualify for certification, firms had to be both socially and economically disadvantaged. Firms that met these two criteria were most in need of the business development opportunities that had historically been denied to minority concerns. However, the program's administrators would seem to have all but ignored the spirit of the law.

Such a departure from the expressed intention of the program creates a dangerous gap between what Congress expected and what the executive branch is delivering.

Also, because 8(a) has consistently devoted a majority of its resources to finding and obtaining sole-source contracts for 8(a) firms, the program has inaccurately recognized contracting as the purpose for 8(a)'s existence. By doing this, the 8(a) program has unintentionally guaranteed that every participating 8(a) firm is entitled to access to sole-source contracts. Yet, the law that governs 8(a) clearly entitles participants to nothing more than business development opportunities that have historically been denied to minority concerns. Such a departure from the expressed intention of the program creates a dangerous gap between what Congress expected and what the executive branch is delivering; as political and economic forces change, this gap can become the source of great tension between the two branches of government.

Affirmative action was designed to give black Americans an equal chance out of the starting block in the race that is life. Affirmative action was never meant as a guarantee to a certain outcome at the finish line of that race. By distorting equality of opportunity, affirmative action programs, like the Small Business Administration's 8(a) program, have transformed affirmative action into a concept that makes both minorities and non-minorities feel like victims. Members of non-minority groups are likely to perceive that less qualified minority applicants are the cause of lost jobs. At the same time, members of minority groups are likely to be upset

when denied preferences, opportunities, and entitlements.⁵¹

The Current Challenge to Affirmative Action Policy

The current reexamination of affirmative action policy by the three branches of the federal government and by the state of California is characterized by many as an assault on the ideal of racial equality. That an examination of 8(a) should form the vehicle for the Supreme Court to revisit affirmative action policies generally is perhaps unsurprising in light of a similar review that took place in the Court six years ago.

In 1989, the Supreme Court handed down its opinion in *City of Richmond v. Croson*, a case involving a plan by the city of Richmond, Virginia, to set aside 10 percent of government contracts for minority firms, consistent with the goals of federal affirmative action plans. The Court, while not sounding the death knell to affirmative action programs generally, declared that the Richmond plan was not constitutional. Additionally, the Court decided that federal law and policies that engaged in line-drawing on the basis of race would henceforth be subjected to the "strict scrutiny" test of Constitutional interpretation.⁵²

If *Croson* represents the first step by the government in making affirmative action plans more restrictive—or indeed, of undermining the foundation of the plans altogether—many would say that the case and the Court did not go far enough. The 1990s have been witness to a slowing of economic growth and a consequential drop in real income that has Americans throughout the country fearing for their individual financial security. In times of such economic difficulty, many people find themselves unable to attribute economic insecurities and pessimism about the future to the economic and political changes within the broader society. Instead, in such times, people tend to scapegoat minority individuals for societal problems and racial discrimination flourishes.⁵³

Opponents of affirmative action policy are currently arguing that the time has come to act on the principle that the United States Constitution is colorblind, because favoring one person on the basis of race is as destructive as punishing another on the same grounds.⁵⁴ According to this notion, no matter what the case has been historically, qualified minorities no longer have to worry about being excluded solely because of the color of their skin.⁵⁵

Opponents deem the concept of equality of opportunity a sham and see the principles of affirmative action as only a thinly veiled sanction for reverse discrimination.⁵⁶ Changes

in the economy have ushered in what is thought by many to be the beginning of an era of conservative politics. In the election of 1994, nearly 62 percent of white males voted Republican. Senate Majority Leader Robert Dole has implied that Congress should consider these results a mandate for the critical examination of affirmative action.⁵⁷

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Jan Meyers, a Republican Congresswoman from Senator Dole's home state of Kansas, is one of many Republicans in Congress who strongly support Senator Dole's reexamination of affirmative action in general and the 8(a) program specifically. Although such reform-minded thinking has long been debated on Capital Hill, Congresswoman Meyers' position is all the more influential these days given her new status as chairwoman of the House Small Business Committee. Indeed, upon accepting her position as chairwoman, Congresswoman Meyers singled out the SBA in particular as one federal agency under the jurisdiction of her committee which should expect funding cuts should the budgetary goals expressed in the House Republican's "Contract with America" be enacted. Congresswoman Meyers has also indicated a willingness to see the 8(a) program eliminated entirely.⁵⁸

Although no such action has been taken as of the writing of this article, a recent hearing before Congresswoman Meyers' committee suggests that the 8(a) program is in jeopardy. Throughout the hearing, the Republican majority on the committee expressed unfavorable opinions toward the current functioning of the 8(a) program. Perhaps the most scathing remarks came from Congressman Roscoe Bartlett (R-Maryland), who informed the committee that Reverend Dr. Martin Luther King, Jr. would be distressed at the implementation of the 8(a) program. Congressman Bartlett went on to say that Dr. King himself had always hoped that someday people would be judged by the content of their character and not the color of their skin. Congressman Bartlett, like many Republican members of the committee, concluded that special preferences for

some cannot be justified when they work against open opportunity for all.⁵⁹

Conclusion

After maintaining sufficient levels of public support for nearly thirty years, affirmative action may soon face dramatic restructuring, if not outright repeal, due in large part to the current, unprecedented levels of opposition from both voters and policy makers. This shift in public opinion regarding affirmative action has occurred during an era of declining economic well-being for the majority of Americans, conditions which have arguably helped to shape our thoughts about the role of government in rectifying past discrimination. Although affirmative action policy has survived several periods of economic hardship in the United States, the current climate is somewhat different given the historically low number of affirmative action's defenders now found in powerful institutions like Congress and the Supreme Court.

There is little indication that the goal of affirmative action programs—the creation of a racially just society—has been achieved. Nevertheless, the divisive political debate about affirmative action now taking place seems to mask this fundamental intent. Affirmative action policy was originally designed to remedy racial discrimination and, to date, few could make a convincing case that racism in this country

has been eliminated.⁶⁰

Affirmative action policy was supposed to create a framework for consensus in America. The crafters of affirmative action intended the policy to build upon the unifying achievements of the Civil Rights era which helped bring minority and non-minority individuals together in situations where the two groups had never before interacted. By aiding the injured runner, as President Johnson analogized in 1965, affirmative action would help “dissolve” racist attitudes which “diminish the holders, divide the great democracy, and do wrong—great wrong—to the children of God.”⁶¹ Affirmative action was thus designed to help both minority and non-minority citizens to overcome their prejudices and, as a result, society could become more just and productive.

The programs that fall under the auspices of affirmative action, like the Small Business Administration's 8(a) program, are not acting as a unifier and are in need of revision. As a result of the current debate, supporters of affirmative action are sharpening and clarifying their views on how the policy can best be applied. The federal government should pledge itself to refining and retooling affirmative action policy until the last vestiges of racial discrimination have been destroyed.⁶² After all, racial discrimination is the wound that affirmative action was merely meant to heal. ★

Notes

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²Kevin Merida, “Right Debate: Both Sides Studying Repeal of Affirmative Action,” *Washington Post*, 6 February 1995. The notion of colorblindness was given birth by Justice John Marshall Harlan when he dissented from *Plessy v. Ferguson*, 163 US 537 (1896).

³Jeffrey Smith, “GOP Senators Begin Studying Repeal of Affirmative Action,” *Washington Post*, 6 February 1995, A1.

⁴Merida.

⁵Helen Dewar, “Dole Requests Affirmative Action Hearing,” *The Washington Post*, 7 March 1995, A4.

⁶Federal News Service, “Excerpts from President Clinton's News Conference,” *Washington Post*, 4 March 1995, A8.

⁷Ann Devroy, “Clinton Orders Affirmative Action Review,” *Washington Post*, 2 February 1995, A1.

⁸*Adarand v. Peña*, Brief for the Respondents.

⁹*Adarand v. Peña*, Brief for the Respondents.

¹⁰*Adarand v. Peña*, Brief for the Respondents. The anticipated decision on *Adarand* has civil rights activists nervous. While only one member of the five justice majority from 1990's *Metro Broadcasting, Inc. v. FCC* remains, the four dissenters are still on the court. In addition, Clarence Thomas, who was appointed to the Supreme Court in 1991, has also been an ardent critic of governmental affirmative action programs. (Joan Biskupic, “Court to Rule On Race-Based Public Policy,” *Washington Post*, 17 January 1995, A1, A4; *Metro Broadcasting, Inc. v. FCC* 497 U.S. 547 (1990).)

¹⁰Emphasis added. George F. Will, "A Spoils System With a Constituency," *Washington Post*, 2 March 1995, A21.

¹¹Lincoln Caplan, "Why Affirmative Action is Divisive, Difficult — and Necessary," *Washington Post*, 12 February 1995, C3.

¹²*Brown v. Board of Education*, 347 US 483 (1954).

¹³Lyndon B. Johnson, "To Fulfill These Rights," *Public Papers of the Presidents of the United States: Lyndon Johnson, 1965*, vol. 2 (Washington, D.C.: Government Printing Office, 1966), 636.

¹⁴*Ibid.*

¹⁵Gauging public opinion, especially on a multifaceted issue like affirmative action, is difficult to do well. Correctly measuring how people feel about a certain issue depends heavily on the aspect of the policy that is addressed and the wording of the questions that are posed. Therefore, performing a trend analysis that gauges support for affirmative action is nearly impossible. Having said that, one of the best time-series studies published was done using the General Social Survey datasets from 1970 through 1987. Data is not readily available before 1970, probably because the issue was too new to have gauged public opinion prior to that time. Although the way in which the question was worded in the General Social Survey resulted in a consistently low demonstration of white respondents' support for the principles of affirmative action between 1970 and 1986, a slight decline in the level of this reported support can be seen between 1974 and 1975. During this same period, civilian unemployment rose from 4.4 percent to 7.2 percent among white males and median household income for whites in constant 1993 dollars fell from \$32,603 to \$31,728. Although countless independent variables other than unemployment and real income may have contributed to this decrease in reported favorability for "improving the conditions of blacks," these findings nevertheless lend support to the claim that reported public opinion on affirmative action may correspond with changes in economic conditions affecting the majority of U.S. citizens. (Lee Sigelman and Susan Welch, *Black Americans' Views of Racial Inequality: The Dream Deferred*, [Cambridge: Cambridge University Press, 1991], 135-136; Council of Economic Advisors, *Economic Report of the President*, [Washington, D.C.: Government Printing Office, 1995], 321; Department of Commerce, Bureau of the Census, *Current Population Reports: Income, Poverty, and Valuation of Noncash Benefits: 1993 Series P60-188* [Washington, D.C., February 1995], 464 D-2, Table D-1.)

¹⁶The National Business League was founded in 1900 by Booker T. Washington to represent the interests of African-American small businesses. (Addison W. Parris, *The Small Business Administration*, [New York: Frederick A. Praeger, 1968], 205.)

¹⁷A second conference of this kind was convened in 1946 and a third in 1948. Deanne Carson, ed., *The Vital Majority: Small Business in the American Economy* (Washington, D.C.: Government Printing Office, 1973), 410.

¹⁸*Ibid.*, p. 411.

¹⁹*Ibid.*

²⁰*Ibid.*, p. 411-412.

²¹*Ibid.*

²²Parris, 115.

²³Carson, 413.

²⁴*Ibid.*

²⁵Sole-source contracting is normally limited to federal government manufacturing contracts worth less than five million dollars and all other types of federal government contracts worth less than three million dollars. Contracts exceeding these cost thresholds are required to be competed among eligible 8(a) businesses. (House Committee on Small Business, *Statement of Robert Neal, Jr. for Government Contracting and Minority Enterprise Development*, 104th Cong., 1st sess., 6 March 1995, 5.)

²⁶House Committee, *Statement of Robert Neal*, 6.

²⁷House Committee, *Statement of Robert Neal*, 7.

²⁸House Committee on Small Business, *Report Amending the Small Business Act and the Small Business Investment Act of 1958*, 95th Cong., 2d sess., H. Doc. 1714.

²⁹House Committee, *Statement of Robert Neal*, 9.

³⁰*The Small Business Act*, U.S. Code, vol. 15, sess. 8(a)(5) (1953).

³¹*The Small Business Act*, sess. 8(a)(6).

³²The Small Business Administration's current regulations set the personal net worth limit for program entry at \$250,000. (House Committee, *Statement of Robert Neal*, 9.) According to Section 8(a)(6)(e) of the Small Business Act, a calculation of assets and net worth automatically excludes the value of investments that owners have in their business and the equity in their primary personal residences. (*The Small Business Act*, sess. 8(a)(6)(e).)

³³John F. Magnotti, "The Small Business Administration's 8(a) Program: Part Two—The 8(a) Program," *Contract Management*, (May 1985): 11. During the first four years of program participation, this standard for termination refers to an owner of an 8(a) firm achieving a personal net worth of over \$500,000. For the last five years of program participation, the standard for termination is raised to a personal net worth of over \$750,000. (House Committee, *Statement of Robert Neal*, 9.)

³⁴*Weekly Compilation of Presidential Documents, January 6, 1969*, Vol. 5. (Washington, D.C.: Government Printing Office, 1969), 372-373.

³⁵*Ibid.*

³⁶*Codification of Presidential Proclamations and Executive Orders, April 13, 1945 - January 20, 1989*, (Washington, D.C.: Government Printing Office, 1989), 218.

³⁷Senate Committee on Small Business, *Amending the Small Business Act and the Small Business Investment Act of 1958*, 95th Cong., 2d sess., 1978, S. Rept. 1070, 8.

³⁸*Ibid.*; Senate Select Committee on Small Business, *Amending the Small Business Investment Act of 1958*, 95th Cong., 2d sess., 1978, S. Rept. 1714; House Committee on Small Business, *Amending the Small Business Investment Act of 1958*, 95th Cong., 2d sess., H.Doc. 949.

³⁹U.S. General Accounting Office, *Small Business Administration: Status, Operations and Views on the 8(a) Procurement Program* presented before House of Representatives Committee on Government Operations (Washington, D.C.: General Accounting Office, May 1988).

⁴⁰House Committee on Small Business, *Report on Capital Ownership Development Reform Act of 1987*, 100th Cong., 1st sess., 1987, H. Rept. 460.

⁴¹*Ibid.*

⁴²Kevin D. Thompson, "Is the 8(a) Process Worth All the Trouble?" *Black Enterprise*, vol. 23, (August 1992): 65-74.

⁴³Magnotti, p. 14.

⁴⁴From 1984 to 1989, unemployment rates for white males fell consistently from 6.4 percent to 4.5 percent. (Council of Economic Advisors, 321.) In addition, the median household income for whites in constant 1993 dollars rose from \$32,887 to \$35,433 during the same time period. (Department of Commerce, D-2, Table D-1) The General Social Survey datasets, which contain recorded opinions through 1987, highlighted a small but substantial increase in support for affirmative action between 1984 and 1987. (Sigelman and Welch, 135-136.)

⁴⁵Paul Starobin, "Overhaul of SBA Minority Program Approved," *Congressional Quarterly Weekly Report* 46, no. 21 (Washington, D.C.: Congressional Quarterly Inc., 21 May 1988), 1404.

⁴⁶House, *Conference Report on Business Opportunity Development Reform Act of 1988*, 100th Cong., 2d sess., 1988, H. Rept. 1070, p. 55.

⁴⁷House, *Conference Report on Business Opportunity Development Reform Act of 1988*, 62- 63.

⁴⁸Michael Singletary, "SBA's Help to Minority Firms Hit," *The Washington Post*, 16 June 1992, C1; House Committee on Small Business, *The Small Business Administration's Progress in Restructuring Its 8(a) Business Development Program: Statement of Judy A. England*, -101st Cong., 1st sess., 4 March 1992; Senate Committee on Small Business, *Statement of James F. Hobbler,*

Inspector General, on the Business Development Opportunity Reform Act of 1988, - 103rd Cong., 2d sess., 27 July 1994.

⁴⁹U.S. Small Business Administration, *Minority Enterprise Development Program*, 21 June 1994.

⁵⁰Caplan, C3.

⁵¹Robert J. Samuelson, "A Mild and Pragmatic Affirmative Action," *Washington Post*, 1 March 1995, A21.

⁵²"Strict scrutiny" is a test which is sometimes used by the Supreme Court in cases which present challenges to guarantees under the First and Fourteenth Amendments. Using the strict scrutiny test, the Supreme Court seeks to afford a particular degree of protection to the implementation of certain Constitutional guarantees. Put another way, the strict scrutiny test places an exceptionally heavy burden of proof on challenges to certain Constitutional rights. (See generally *City of Richmond v. Croson*, 488 US 469 (1989).

⁵³(Rick Weiss, "Academics Warn That Misunderstanding of Genetics Could Fuel Racism in U.S.," *The Washington Post*, 20 February 1995, A7.) Between 1989 and 1993, median household income in constant 1993 dollars has fallen from \$35,433 to \$32,960 for whites. (Department of Commerce, D-2, Table D-1.) Unemployment for white males rose from 4.5 percent to 6.2 percent during this same period. (Council of Economic Advisors, 321.) Interestingly, a *Washington Post*-ABC News Poll taken in March of this year found that 81 percent of white respondents do not think blacks and other minorities should receive preference in hiring, promotions, and college admissions to make up for past discrimination. (Richard Morin and Sharon Warden, "Americans Vent Anger At Affirmative Action," *Washington Post*, 24 March 1995, A1, A4.)

⁵⁴Caplan, C3.

⁵⁵William Raspberry, "Not There Yet: Why we still need affirmative action," *Washington Post*, 17 February 1995.

⁵⁶Caplan, C3.

⁵⁷Senator Dole, in an appearance on the NBC program *Meet the Press*, asked rhetorically if affirmative action was an appropriate policy for government: "Has it worked? Has it had an adverse, a reverse reaction? Why did 62 percent of white males vote Republican in 1994?...I think it's because of things like this where sometimes the best-qualified person does not get the job because he or she may be one color. And I'm beginning to believe that may not be the way it should be in America." (Jeffrey Smith, A1.)

⁵⁸Alan Murray, "GOP Faces Severe Test Of Its Resolve to Cut," *Wall Street Journal*, 16 January 1995, 1.

⁵⁹House Committee, *Testimony of Robert Neal*.

⁶⁰William Raspberry, "...Blaming the Cure, Forgetting the

Disease," *Washington Post*, 15 March 1995, A19.

⁶¹Lyndon B. Johnson, *Public Papers of the President of the United States, Lyndon Johnson, 1965*, vol. 2 (Washington, D.C.:

Government Printing Office, 1966), 639.

⁶²House Committee, *Statement of Robert Neal*, 63.

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