

# UNFINISHED BUSINESS: THE BUSH ADMINISTRATION AND RACIAL PREFERENCES

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## INTRODUCTION

To evaluate the Bush Administration's record in opposing preferential treatment on the basis of race, ethnicity, or sex—"affirmative action"<sup>1</sup>—we have to look not only at what it did, but also at what it *needed* to do. That is, we must first look at how current law requires, encourages, or allows such affirmative discrimination and what steps, ideally, need to be taken to change this situation. After establishing that baseline, we can then measure how close the Bush Administration came to fulfilling this ideal. We cannot judge how far the Administration advanced the ball, particularly in the courts, without knowing where the ball was in the first place.

Unfortunately, the Administration's record is, in short, decidedly mixed. As a general matter, the Bush Administration's record in this area improved on the Clinton Administration's. The latter aggressively encouraged the use of racial preferences; the former's improvement was not so much that it discouraged such use, but that it did nothing. There were some exceptions: Sometimes the Bush Administration continued to accept preferences, and sometimes it actively opposed them. But its savings and sins were principally of omission, not commission.

The Administration said very little about this subject, and when it did say anything, it was because its hand had been forced, such as when the University of Michigan cases, *Gratz v.*

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1. This Essay will refer only to "racial preferences" with the understanding that ethnic and gender preferences are generally included as well.

*Bollinger*<sup>2</sup> and *Grutter v. Bollinger*,<sup>3</sup> were before the Supreme Court and the topic was unavoidable. It took no position on the Michigan Civil Rights Initiative<sup>4</sup> (which proposed to overturn the Court's decision in *Grutter*), and it managed to avoid revising the Department of Education's guidelines and regulations in this area, even after the Court had decided *Grutter* and *Gratz*. Occasionally the Administration would comment that a pending bill containing a racial preference raised constitutional problems,<sup>5</sup> but it never proposed legislation that would have cut back on such preferences.

Indeed, if the Administration could have avoided saying anything at all about the subject of racial preferences—if it could have simply made the issue go away—it would have done so eagerly. This is probably because, on the one hand, its lawyers and policy advisers thought such discrimination difficult or impossible to defend, but its political experts were reluctant to court attacks from race-baiting Democrats and the civil rights establishment.

The use of racial preferences is concentrated in four areas: voting, government contracting, education, and employment. There are some exceptions (for example, the use of such preferences in appointments to state boards and some aspects of health care), but they are relatively minor.

Voting is a special case. The Voting Rights Act, which is used to require racially gerrymandered districts,<sup>6</sup> has federalized the issue. As a result, there is nothing that the States can do about it. Realistically there was and is nothing to be done through the political branches either. Congress overwhelmingly reauthorized these provisions in 2006,<sup>7</sup> and President Bush signed the

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2. 539 U.S. 244 (2003) (concerning undergraduate admissions).

3. 539 U.S. 306 (2003) (concerning law school admissions).

4. MICH. CONST. art. I, § 26.

5. See, e.g., Letter from Brian A. Benczkowski, Principal Deputy Assistant Att'y Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to U.S. Rep. Henry A. Waxman, Chairman, Comm. on Oversight & Gov't Reform (Apr. 30, 2008) (on file with Author) (discussing the Senior Executive Service Diversity Assurance Act, H.R. 3774, 110th Cong. (2007)).

6. See Voting Rights Act of 1965, 42 U.S.C. § 1973c (2006).

7. See 152 CONG. REC. H5207 (daily ed. July 13, 2006) (390-33 House vote); 152 CONG. REC. S8012 (daily ed. July 20, 2006) (98-0 Senate vote). Note that many Republicans *like* racial gerrymandering. After cramming lots of black voters into a relatively few districts, the "bleached" neighboring districts tend to vote Republi-

bill.<sup>8</sup> Thus, all that can be done for now is to challenge the Act's constitutionality.<sup>9</sup>

The rest of this Essay proceeds seriatim through the other three areas. For each, the status of the law varies, and so do the roles of the federal government, state and local governments, and the private sector. In what follows, the Essay will interweave commentary on what the Bush Administration did along with discussion of what needed to be done (and, alas, still needs to be done).

## I. GOVERNMENT CONTRACTING

The case law regarding government contracting is very favorable to those challenging state and local racial preferences.<sup>10</sup> In 2004, for example, the U.S. District Court for the Southern District of Florida not only struck down a program in Miami, but also held the officials who applied it *personally liable*.<sup>11</sup> Companies that have lost out on contracts have served as will-

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can. See ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 234 (1987).

8. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

9. As it happens, such a lawsuit is currently before the Supreme Court. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008), *prob. juris. noted*, 129 S. Ct. 894 (2009) (mem.). My colleague Linda Chavez and I testified against the constitutionality of the relevant sections of the Voting Rights Act when it was up for reauthorization in 2006, later publishing a law review article based on that testimony. Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 GEO. J.L. & PUB. POL'Y 561 (2007). The Bush Administration defended the constitutionality of section 5 in *Northwest Austin*, but I do not hold this against it. Generally, the executive branch feels compelled to defend the constitutionality of federal statutes unless there is no colorable argument for doing so or the law in question undermines the executive branch's own authority. And I give the Administration credit for filing a decent amicus brief in *Bartlett v. Strickland*, No. 07-689, slip op. (U.S. Mar. 9, 2009). That brief urges a reading of the Voting Rights Act that will limit the amount of racial gerrymandering required under section 2, 42 U.S.C. § 1973 (2006). See Brief for the United States as Amicus Curiae Supporting Affirmance, *Bartlett* (No. 07-689). The Administration also deserves credit for its willingness to enforce the Voting Rights Act to protect white voters from discrimination. See *United States v. Brown*, No. 07-60588, 2009 WL 485709 (5th Cir. Feb. 27, 2009).

10. See, e.g., *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999); *Webster v. Fulton County*, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 2000); see George R. La Noue, *A New Era in Federal Preferential Contracting?* *Rothe Development Corporation v. U.S. Department of Defense and Department of the Air Force*, ENGAGE, Feb. 2009, at 13, 13.

11. See *Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade County*, 333 F. Supp. 2d 1305, 1335-38 (S.D. Fla. 2004).

ing plaintiffs, and anti-preference public interest groups, such as the Pacific Legal Foundation and the Mountain States Legal Foundation, among others, have brought many of their cases.<sup>12</sup> Note that in the event of a legal challenge, the state or local government will have to pay its lawyers and expert witnesses; moreover, if it loses (and it will), it will also have to pay the *other* side's lawyers and expert witnesses. On the other hand, many of these state and local programs still exist, and the Bush Administration did nothing to challenge them.

The case law is not as favorable with regard to federal contracting preferences, although plaintiffs have also won some cases there. The most important victory was the 1995 decision in *Adarand Constructors, Inc. v. Peña*, which established that racial preferences in federal contracting would be subject to strict constitutional scrutiny, just as state and local preferences are.<sup>13</sup> In addition, this past November, the Federal Circuit in *Rothe Development Corp. v. U.S. Department of Defense* struck down an important program setting aside a certain percentage of Department of Defense contracts for minority-owned businesses because it failed the strict scrutiny demanded in *Adarand*.<sup>14</sup>

Yet the Bush Administration's record with respect to such federal set-asides was mediocre. It made some marginal improvements in these programs, most importantly with regard to gender (but not racial) preferences in the Small Business Administration's programs, where it required specific showings that discrimination was the cause of any disparities.<sup>15</sup> But it failed to make any kind of principled or systematic revisions.

In court, the Administration defended those programs when challenged. As noted above,<sup>16</sup> this is to be expected; the executive branch generally feels obliged to defend even programs that it dislikes so long as there are colorable arguments in their

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12. See Roger Clegg, *Equality Under the Law*, in BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT 97-125 (Lee Edwards ed., 2004); see also Pac. Legal Found., Issues & Cases: Race and gender-based preferences, <http://community.pacificlegal.org/page.aspx?pid=272> (last visited Mar. 18, 2009).

13. 515 U.S. 200, 227 (1995).

14. 545 F.3d 1023, 1035-36, 1050 (Fed. Cir. 2008).

15. See Women-Owned Small Business Federal Contract Assistance Procedures, 72 Fed. Reg. 73,285 (proposed Dec. 27, 2007) (to be codified at 13 C.F.R. pts. 121, 125, 127, 134).

16. See *supra* note 9.

favor and so long as they do not compromise the executive branch's own authority. But to the Administration's credit, in at least one case—*Western States Paving Co. v. Washington State Department of Transportation*—its defense conceded that localized findings of discrimination must be made to satisfy the remedial predicate required by the “compelling interest” prong of strict scrutiny.<sup>17</sup> And in a brief filed in the first year of the Bush Administration, the Department of Justice defended the Department of Transportation's Disadvantaged Business Enterprise program with the concession that state actors “may use race-conscious remedies only as a last resort,” that is, “where the effects of discrimination are stubborn, persistent, and incapable of eradication through race-neutral measures.”<sup>18</sup>

Any program that uses classifications and preferences based on race, ethnicity, or sex raises serious constitutional issues. Using racial classifications and setting goals of particular racial percentages inevitably encourage discrimination as a means to meet them, and so these practices should and do trigger strict constitutional scrutiny.<sup>19</sup> Legal issues aside, programs that discriminate on these bases are divisive and unfair, and any system that awards contracts to anyone other than the lowest qualified bidder will cost the government and its taxpayers money.

So what is needed now is not much different from what was needed when the Bush Administration began and Adarand was, once again, before the Supreme Court:<sup>20</sup> namely, a decision holding that, although remedying discrimination (the only governmental interest advanced for preferences in contracting) is a compelling interest, it is now basically impossible for the use of preferences to be narrowly tailored. Instead, federal programs should be race-blind and race-neutral. To the extent that the government is concerned that racial groups face discrimination in its contracting programs, there are effective responses that do not require racial classifications or preferences.

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17. See 407 F.3d 983, 996 (9th Cir. 2005); George R. La Noue, *Narrow Tailoring the Federal Transportation DBE Program*, ENGAGE, Mar. 2006, at 20, 21.

18. Brief for the Respondents at 19, 38–39, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (No. 00-730).

19. See, e.g., *Lutheran Church-Mo. Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998).

20. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (dismissing certiorari as improvidently granted).

To defend their use of racial preferences, governments frequently point to evidence of racial disparities in their contracting. A disparity is not necessarily evidence of discrimination, however, let alone proof. Likewise, much anecdotal evidence is dubious, particularly when those presenting it stand to gain monetarily if the government uses contracting preferences. And most importantly, even if statistical or anecdotal evidence establishes a pattern of recent discrimination, there are better ways to end such discrimination than racial classifications and targets.

As I testified before the U.S. Commission on Civil Rights on behalf of the Center for Equal Opportunity,

At every step of the [contracting] process, it is clear that there are more narrowly tailored remedies than using racial preferences. If companies are being excluded from bidding because of unrealistic or irrational bonding or bundling requirements, then those requirements should be changed for *all* companies, regardless of the skin color of the owner. If companies who could submit bids are not doing so, then the publication and other procedures used in soliciting bids should be opened up—but, again, to all potential bidders, not just some. And, finally, if it can be shown that government bids are being denied to the lowest bidder because of that bidder's race, then there should be put in place safeguards to detect discrimination and sanctions to punish it—but, again, those safeguards and sanctions should protect all companies from racial discrimination, not just some.

Contracts are not like hiring, promoting, or even university admissions, where there is an irreducible and significant amount of subjectivity in the decisionmaking. Contracting is an area that can be made very transparent and where this transparency should make it relatively easy to detect and correct discrimination.

Even if there could still, in theory, be a few cases of discrimination that go unremedied in the absence of racial classifications, there will be many more cases of discrimination that will result from the institutionalization of racial and ethnic preferences.<sup>21</sup>

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21. See Roger Clegg, *The Use of Disparity Studies to Justify Racial and Ethnic Preferences in Government Contracting*, Prepared Statement of Roger Clegg, Vice President and Gen. Counsel, Ctr. for Equal Opportunity (Dec. 16, 2005), in U.S. COMM'N ON CIVIL RIGHTS, *DISPARITY STUDIES AS EVIDENCE OF DISCRIMINATION IN*

In 2005, the U.S. Commission on Civil Rights published an excellent report collecting and discussing these race-neutral alternatives to racial classifications and quotas.<sup>22</sup> The only shortcoming of the Commission's report is that it does not make clear that the aim of these alternatives is to correct and end discrimination, not to achieve diversity for its own sake. But that should be obvious in light of the case law in this area. The judicial decisions make very clear that the desire to achieve a particular politically correct mix is not itself a compelling interest; that would be "discrimination for its own sake. This the Constitution forbids."<sup>23</sup> Rather, the use of preferences can be justified only if there is an interest beyond such bean-counting—in the case of government contracting, ending racial discrimination.

But, again, if the federal government believes that racial discrimination is occurring in its contracting, there are many race-neutral steps it can take to fight it. It is very unlikely that, in 2009, the only way to end race discrimination in contracting is through race discrimination in contracting. As Chief Justice Roberts wrote recently, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>24</sup>

## II. EDUCATION

With respect to K–12 education, the most prominent use of racial preferences has been the consideration of race in assigning students to public schools. The Supreme Court in 2007 struck down such preferences,<sup>25</sup> but how much more work needs to be done here will depend on how school boards react

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FEDERAL CONTRACTING: A BRIEFING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS HELD IN WASHINGTON, D.C., DECEMBER 16, 2005, at 71, 73 (2006), available at <http://www.usccr.gov/pubs/DisparityStudies5-2006.pdf>. The same approach should be used with respect to subcontracting: Rather than requiring prime contractors to use racial preferences in subcontracting, we should require them to publish subcontracting opportunities broadly, to keep records (which could later be audited) of the responses and bids they receive, and to explain and justify any decision not to accept the lowest bid. Racial discrimination should be forbidden and punished.

22. See U.S. COMM'N ON CIVIL RIGHTS, FEDERAL PROCUREMENT AFTER ADARAND (2005), available at [http://www.usccr.gov/pubs/080505\\_fedprocandarand.pdf](http://www.usccr.gov/pubs/080505_fedprocandarand.pdf).

23. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

24. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007).

25. *Parents Involved*, 127 S. Ct. 2738.

to the decision;<sup>26</sup> the jury is still out on that. In its amicus briefs, the Bush Administration opposed the race-based student assignments, but I am not aware of any evidence that it aggressively followed up on the decision by, for instance, moving against an individual school district or issuing strict guidance (although, with regard to the former, I am also not aware whether the Administration had evidence of noncompliance).

The use of preferences with regard to university students is, of course, both widespread and controversial.<sup>27</sup> With regard to admissions preferences, there is little political accountability (unlike at the K–12 level), and, moreover, the political branches at every level seem unwilling to intervene. The Center for Equal Opportunity has pushed for “sunshine” legislation at both the federal and state level,<sup>28</sup> but this is an uphill battle. The federal Department of Education could aggressively monitor admissions preferences, and the Center for Equal Opportunity has filed some complaints with it (some based on admissions data obtained through freedom-of-information requests filed by the Center for Equal Opportunity and the National Association of Scholars). But as useful as pressure from the Department of Education might be (even assuming that the current Administration is willing to bring such pressure, as the Bush Administration was not), it can only limit the use of preferences; it cannot end them. For that, there has to be a ballot initiative in the relevant state<sup>29</sup> or a Supreme Court ruling.

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26. See Roger Clegg, *A Good—If Mixed Bag...with a puzzle inside*, NAT'L REV. ONLINE, July 5, 2007, <http://article.nationalreview.com/?q=ZDFjODM4NDM4Njk1ZmJiZDY2NWNkMmEyYjgyOTRkYzlk=>.

27. The Center for Equal Opportunity, for instance, has documented the use of racial and ethnic preferences in undergraduate, medical school, and law school admissions all over the country. The studies are available at Center for Equal Opportunity, Preferences in College Admission, <http://www.ceousa.org/content/blogcategory/78/100/> (last visited Mar. 18, 2009).

28. See Press Release, Ctr. for Equal Opportunity, CEO Proposes “Racial Preference Disclosure Legislation” (Feb. 16, 2004), available at <http://www.ceousa.org/content/view/453/119/>. The U.S. Commission on Civil Rights endorsed such legislation in its briefing report *Affirmative Action in American Law Schools*. U.S. COMM'N CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS 6, 143 (2007), available at <http://www.usccr.gov/pubs/AALSreport.pdf>.

29. Such initiatives have passed in California, Michigan, Nebraska, and Washington. See CAL. CONST. art. I, § 31; MICH. CONST. art. I, § 26; NEB. CONST. art. I, § 30; WASH. REV. CODE § 49.60.400. See generally CAROL M. ALLEN, ENDING RACIAL PREFERENCES: THE MICHIGAN STORY 11–20, 26–34 (2008) (discussing the California and Washington initiatives); *id.* at 47–154 (discussing the Michigan initiative). The

When admissions preferences were last before the Court, the Bush Administration's amicus briefs reached the right bottom line—namely, that the preferences there were illegal.<sup>30</sup> But the briefs argued only that the university's use of preferences was not narrowly tailored; they carefully avoided taking a position on whether educational benefits from student body diversity constitute a compelling governmental interest. The Justice Department's draft briefs had said there was no such interest, but the White House insisted on removing that part of the brief.<sup>31</sup> We will never know if Justice O'Connor might have been persuaded to vote the other way in *Grutter* if the original briefs had been filed.

Universities also use *non-admissions* preferences (for example, for summer programs, internships, and scholarships). But the Center for Equal Opportunity and others have been quite successful in ending the racial exclusivity of these programs (occasionally by filing complaints with the Department of Education, which sometimes played a helpful role during the Bush Administration, although slowly and unsystematically).<sup>32</sup> For example, a lawsuit by the Center for Individual Rights against Virginia Commonwealth University, the Dow Jones Foundation, and the *Richmond Times-Dispatch* recently ended the use of preferences in a summer journalism program jointly run by these three entities that had

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threat of such an initiative also led Florida's governor to end preferences in public university admissions by executive order. *See id.* at 35–39.

30. Brief for the United States as Amicus Curiae Supporting Petitioner, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); Brief for the United States as Amicus Curiae Supporting Petitioners, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

31. *See* PETER SCHMIDT, COLOR AND MONEY: HOW RICH WHITE KIDS ARE WINNING THE WAR OVER COLLEGE AFFIRMATIVE ACTION 190–91 (2007); Roger Clegg, *Affirmative Opportunity*, NAT'L REV. ONLINE, Dec. 4, 2004, <http://article.nationalreview.com/?q=NmM2NzkwN2l0ZmE1MzQ1NTJkYzE5YzVhNDVkZGU2OGE=>.

32. *See, e.g.*, Jonathan D. Glater, *Colleges Open Minority Aid to All Comers*, N.Y. TIMES, Mar. 14, 2006, at A1; Peter Schmidt, *Not Just for Minority Students Anymore*, CHRON. HIGHER EDUC. (Wash. D.C.), Mar. 19, 2004, at 17 [hereinafter Schmidt, *Not Just for Minority Students Anymore*]; Peter Schmidt, *The Education Department's Lawyers Appear to be Taking a Dim View of Minority Scholarship Programs*, CHRON. HIGHER EDUC. (Wash. D.C.), Apr. 16, 2004, at A23; Peter Schmidt & Jeffrey R. Young, *MIT Opens 2 Programs to White and Asian Applicants in Response to Federal Inquiry*, CHRON. HIGHER EDUC., Feb. 11, 2003, at A31; *see also* Peter Schmidt, *Education Department Pressures Wisconsin to Open Scholarship Program to White Students*, CHRON. HIGHER EDUC. (Wash. D.C.), Dec. 3, 2004, <http://chronicle.com/daily/2004/12/2004120302n.htm>; Jeffrey R. Young, *Princeton Ends Minority-Students-Only Policy for Summer Institute*, CHRON. HIGHER EDUC. (Wash. D.C.), Feb. 7, 2003, <http://chronicle.com/daily/2003/02/2003020702n.htm>.

been racially exclusive.<sup>33</sup> The case law is quite clear that racial exclusivity is illegal, but some degree of preference is probably still allowed under *Grutter*. Here again, this is unlikely to change absent a ballot initiative or Supreme Court decision, and even then, these programs could probably remain if they are run at arm's length by outside, non-federally funded organizations.

Racially exclusive programs violate Title VI of the Civil Rights Act of 1964, which forbids any recipient of federal money from discriminating "on the basis of race, color, or national origin."<sup>34</sup> The Supreme Court's decision in *Gratz* clearly demonstrates that racially exclusive programs will not pass constitutional muster, and although *Grutter* acknowledged diversity as a compelling governmental interest, both *Grutter* and *Gratz* explained that to pass the "narrowly tailored" prong of strict scrutiny, a school must engage in "individualized consideration" of students.<sup>35</sup> Certainly, a program that categorically excludes students based upon their race or ethnicity does not provide "individualized consideration." *Grutter* explicitly warns that there should be "no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single 'soft' variable" such as "race or ethnicity,"<sup>36</sup> and *Gratz* states that any program must "not contemplate that any single characteristic [again, such as race or ethnicity] automatically ensure[s] a specific and identifiable contribution to a university's diversity."<sup>37</sup> Likewise, the Supreme Court struck down the programs in *Parents Involved in Community Schools v. Seattle School District No. 1* because they "do not provide for meaningful individualized review of applicants but instead rely on racial classifications in a nonindividualized, mechanical way."<sup>38</sup>

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33. See Scott Jaschik, *Defeat for Affirmative Action*, INSIDE HIGHER ED, Feb. 15, 2007, <http://www.insidehighered.com/news/2007/02/15/dow>; Press Release, Pamela DiSalvo Lepley, Va. Commonwealth Univ. Comm'ns & Pub. Affairs, Public Statement: Settlement Reached in Urban Journalism Workshop Lawsuit (Feb. 14, 2007), available at <http://www.news.vcu.edu/news.aspx?v=detail&nid=1944>.

34. 42 U.S.C. § 2000d (2006).

35. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270–71 (2003).

36. *Grutter*, 539 U.S. at 337.

37. *Gratz*, 539 U.S. at 271.

38. 127 S. Ct. 2738, 2753–54 (2007) (citations omitted) (internal quotation marks omitted).

Accordingly, in recent years Princeton University, the Massachusetts Institute of Technology, the Harvard Business School, and many others have concluded that similar programs at their schools were indeed illegal and therefore ended the programs' racial exclusivity.<sup>39</sup> The Ford Foundation apparently had made the same determination some years ago and declined to continue funding Princeton's program.<sup>40</sup> And in the Bush Administration, the Office for Civil Rights at the U.S. Department of Education issued a statement that racially exclusive programs "are extremely difficult to defend" under the applicable law.<sup>41</sup> Even more recently, in February 2006, the U.S. Department of Justice forced Southern Illinois University to end the racial exclusivity of several graduate programs after the Center for Equal Opportunity brought these programs to the Department's attention.<sup>42</sup>

Progress against racial preferences in higher education will, accordingly, require chipping away at *Grutter*, limiting the circumstances in which a university's interest in preferences can be deemed "compelling" and "narrowly tailored," in both the admissions and non-admissions contexts.<sup>43</sup> Ultimately, of course, *Grutter delenda est*.

### III. EMPLOYMENT

The remaining area in which racial preferences are frequently used is employment. Here it is useful to divide public sector preferences from private sector preferences. Public sector preferences are more vulnerable because they are often more overt, and they are subject to attack under both Title VII of the 1964 Civil Rights Act<sup>44</sup> and the Fourteenth Amendment,<sup>45</sup> as well as ballot initiatives. But public sector employers provide a

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39. See Kevin Rothstein, *Harvard opens biz program to whites*, BOSTON HERALD, Feb. 18, 2004, at 18; Schmidt & Young, *supra* note 32.

40. See Schmidt & Young, *supra* note 32.

41. Schmidt, *Not Just for Minority Students Anymore*, *supra* note 32.

42. Glater, *supra* note 32.

43. For a discussion of some steps in this direction, see Roger Clegg, *Attacking "Diversity": A Review of Peter Wood's Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 424-36 (2005). See also George La Noue & Kenneth L. Marcus, "Serious Consideration" of Race-Neutral Alternatives in Higher Education, 57 CATH. U. L. REV. 991 (2008).

44. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

45. U.S. CONST. amend. XIV.

relatively small proportion of jobs in this country. Private sector preferences, on the other hand, are often more carefully disguised and harder to discover, and they cannot be challenged constitutionally. It is possible, however, that they will be held to the same constitutional standard as public sector preferences under 42 U.S.C. § 1981.

The Justice Department has enforcement responsibility over public sector employment discrimination, and the Equal Employment Opportunity Commission over the private sector. During the Bush Administration, the former attacked racial preferences more aggressively than the latter. The Justice Department's record in this area is the subject of the Appendix to this Essay.<sup>46</sup> I testified before the EEOC and urged them to challenge racial preferences,<sup>47</sup> but it is extremely unlikely that my testimony persuaded a majority of the commissioners.

The rest of this Part is divided into two subparts. Part III.A discusses current law regarding racial preferences in employment, particularly under Title VII. The bad news is that the law did not advance much during the Bush Administration, but the good news is that the law is already quite hostile to the use of racial preferences and could be used much more aggressively to challenge such preferences than it has been. Part III.B discusses a discrete but important subtopic here, namely the

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46. I previously delivered a paper, available as an Appendix to this Essay, comparing the employment discrimination lawsuits brought by the Justice Department's Civil Rights Division in the Clinton and George W. Bush Administrations and focusing specifically on "affirmative discrimination" and "disparate impact" race, ethnicity, and sex discrimination cases. Roger Clegg, *Employment Antidiscrimination Policies in the Clinton and Bush Administration* (June 2006) (unpublished paper), available at <http://www.harvard-jlpp.com/wp-content/uploads/2009/04/clegg-appendix.pdf>. It concluded that "the Clinton administration did not like to bring reverse discrimination cases, which the Bush administration was sometimes willing to bring; and the Clinton administration appeared to be more willing to bring disparate impact cases than the Bush administration has been." Clegg, *supra*, at 3. Although I presented the paper in June 2006, there were no dramatic reversals in policy during the last part of the Bush Administration. Disparate impact lawsuits were relatively rare, and there was the occasional challenge to racial preferences, right up to January 2009. See Press Release, Dep't of Justice, *Justice Department Files Lawsuit Alleging Race Discrimination Against Job Applicants by City of Gary, Ind.* (Jan. 12, 2009), available at <http://www.usdoj.gov/opa/pr/2009/January/09-crt-026.html>.

47. Roger Clegg, President & Gen. Counsel, Ctr. for Equal Opportunity, *Testimony before the Equal Employment Opportunity Commission* (Feb. 28, 2007), available at [http://www.ceousa.org/index.php?option=com\\_docman&task=doc\\_view&gid=148&Itemid=54](http://www.ceousa.org/index.php?option=com_docman&task=doc_view&gid=148&Itemid=54).

Department of Labor's regulations implementing Executive Order No. 11,246.<sup>48</sup> The failure of the Bush Administration to change these regulations, which unconstitutionally discriminate on the basis of race, ethnicity, and sex, and which force private employers to do so as well, was perhaps its single most disappointing shortcoming.

A. *Lack of Legal Justification for Racial Preferences in Employment*

If a business were caught awarding jobs or promotions on the basis of race, ethnicity, or sex today, its managers would likely defend the practice as a means of achieving "diversity." Companies may assume that the diversity rationale would shield them from legal challenge because the Supreme Court has accepted it for university admissions, but this is not true. In fact, the legal justifications for employment discrimination are much weaker. Current statutory and case law strongly oppose preferences in the employment context, and, for a number of reasons, employers that use such preferences are asking for legal trouble.

Unlike universities, companies face heightened vulnerability because hiring and promotion decisions are addressed by Title VII of the 1964 Civil Rights Act,<sup>49</sup> whereas racial and ethnic preferences in student admissions decisions are, for the most part, governed by Title VI.<sup>50</sup> The courts have interpreted the two statutes differently; thus, what is permissible under Title VI is not necessarily permissible under Title VII.

Title VI prohibits "discrimination" on the basis of "race, color, or national origin" in "any program or activity receiving Federal financial assistance."<sup>51</sup> Although the statute's text admits of no exceptions, the Supreme Court has interpreted it as coextensive with the ban on discrimination under the less sharply worded Equal Protection Clause of the Fourteenth Amendment.<sup>52</sup>

Title VII also contains a categorical ban, forbidding any employer to "discriminate" on the basis of "race, color, religion, sex, or national origin" in hiring, firing, or "otherwise . . . with respect

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48. 3 C.F.R. 167 (1965 Supp.).

49. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

50. 42 U.S.C. §§ 2000d to 2000d-4a (2006).

51. 42 U.S.C. § 2000d (2006).

52. U.S. CONST. amend. XIV, § 1.

to [an employee's] compensation, terms, conditions, or privileges of employment."<sup>53</sup> But the Court has not conflated Title VII with the Equal Protection Clause, and accordingly the Court's recent ruling in *Grutter* that the Equal Protection Clause permits discrimination in the name of "diversity" is inapplicable.

Will the courts nonetheless create a "diversity" exception to Title VII's prohibition of racial and ethnic discrimination? That is very unlikely. To be sure, the Court did allow racial preferences in *United Steelworkers of America v. Weber*,<sup>54</sup> handed down in 1979, and preferences on the basis of sex in *Johnson v. Transportation Agency*,<sup>55</sup> a 1987 decision. But the rationale the Court approved in these two cases was based not on diversity, but on remedying "manifest . . . imbalances" with regard to the discriminated-against groups "in traditionally segregated job categories."<sup>56</sup> In 2009, with every tick of the clock, it is becoming less and less likely that a company could plausibly assert that any imbalance, manifest or not, is traceable to traditional segregation.

Moreover, it is one thing to say that an antidiscrimination statute allows preferences in order to remedy discrimination, but quite another to say that such a statute allows discrimination so long as the employer and the courts think that there is a good reason for it. There is simply no way to reconcile the latter "interpretation" with the text of the statute.<sup>57</sup>

Note also that the Court in *Johnson* stressed that preferences could be used only to "attain," and not to "maintain," greater balance,<sup>58</sup> but diversity, unlike simple remediation, would require just such impermissible maintenance. Furthermore, the diversity rationale is premised on a belief in racial, ethnic, and gender dif-

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53. 42 U.S.C. § 2000e-2(a)(1) (2006).

54. 443 U.S. 193 (1979).

55. 480 U.S. 616 (1987).

56. *Weber*, 443 U.S. at 197.

57. This point—and others regarding why there is no "diversity" exception to Title VII—are made by Professor Kingsley R. Browne in his article *Nonremedial Justifications for Affirmative Action in Employment: A Critique of the Justice Department Position*, 21 LAB. LAW. 451, 461–72 (1997). In addition, Professor Nelson Lund has argued that Congress, in enacting the Civil Rights Act of 1991, implicitly rejected even the remedial justification for an exception to Title VII. Nelson Lund, *The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 GEO. MASON L. REV. 87 (1997).

58. *Johnson*, 480 U.S. at 639.

ferences that is quite at odds with the insistence in Title VII that people be judged individually and without regard to stereotypes.

If a diversity exception is created, it is hard to see why other exceptions should not also be put forward. Yet Congress explicitly declined to create even a “bona fide occupational qualification” exception to the statute for race, even as it did so for sex, religion, and national origin.<sup>59</sup> Furthermore, the diversity rationale could be—and frequently is—used to support discrimination *against* members of racial, religious, and ethnic minority groups and women. If a company’s aim is greater “diversity” and less “underrepresentation” in its workforce, then any group that is “overrepresented” will be on the short end of any preferential hiring or promotion; depending on the company, racial and ethnic minorities and women could all lose out. It seems very unlikely that Congress wrote Title VII to allow such anti-minority and anti-female discrimination so long as an employer could adduce a business reason for it.

These concerns are not hypothetical. For instance, Xerox not long ago lost an employment discrimination case before the Fifth Circuit.<sup>60</sup> At issue was the company’s “Balanced Workforce Initiative,” begun “in the 1990’s for the stated purpose of insuring that all racial and gender groups were proportionately represented at all levels of the company.”<sup>61</sup> The Houston office detected a racial imbalance, and so its general manager took steps “to remedy the disproportionate racial representation” there, “set[ting] specific racial goals for each job and grade level.”<sup>62</sup> The Fifth Circuit found that “the existence of the [Balanced Workforce Initiative] is sufficient to constitute direct evidence of a form or practice of discrimination.”<sup>63</sup> After all, “Xerox candidly identified explicit racial goals for each job and grade level,”<sup>64</sup> and the evidence “indicate[d] that managers were evaluated on how well they complied with” the initiative’s objectives.<sup>65</sup>

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59. See 42 U.S.C. § 2000e-2(e) (2006).

60. Frank v. Xerox Corp., 347 F.3d 130 (5th Cir. 2003).

61. *Id.* at 133.

62. *Id.*

63. *Id.* at 137.

64. *Id.*

65. *Id.*

This is an appalling company policy and an excellent judicial decision under any circumstances. But here is the kicker: The plaintiffs were African-Americans and the company had concluded that "blacks were over-represented and whites were under-represented."<sup>66</sup>

Thus, it is not surprising that the two federal courts of appeals presented with the diversity rationale in Title VII cases have refused to accept it. In *Taxman v. Board of Education*, the Third Circuit, sitting en banc, ruled in favor of a white school-teacher who had been laid off because her school desired a more "diverse" business-education department.<sup>67</sup> In *Messer v. Meno*, the Fifth Circuit ruled against the Texas Education Agency, which had "aspired to 'balance' its workforce according to the gender and racial balance of the state."<sup>68</sup> The court stated that "[d]iversity programs, no matter how well-meaning," are not permissible "absent a specific showing of prior discrimination."<sup>69</sup>

The Supreme Court itself has not yet ruled on the issue, but it is unlikely to carve out a "diversity" exception to Title VII. Such an exception would be inconsistent with the approach and language in the Court's *Weber* and *Johnson* decisions, as Professor Kingsley Browne discussed in a 1997 article in *Labor Lawyer*.<sup>70</sup> A majority of the Court takes statutory text very seriously, and that same majority remains very wary of racial and ethnic preferences. Conservatives are not alone in making this prediction. In 1997, when the Court granted review in *Taxman*, the civil rights establishment so feared losing on this issue that it raised enough money to pay off the plaintiff's claims and lawyer's fees.<sup>71</sup>

Finally, the D.C. Circuit has rejected the diversity justification, as an insufficiently compelling interest under the Equal

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66. *Id.* To its credit, the Equal Employment Opportunity Commission cited this case in the race-and-color section of its *Compliance Manual*. TITLE VII/AEDEA/EPA DIV., OFFICE OF LEGAL COUNSEL, EEOC COMPLIANCE MANUAL 15-34 (2006), available at <http://www.eeoc.gov/policy/docs/race-color.pdf>.

67. 91 F.3d 1547 (3d Cir. 1996), cert. granted sub nom. Piscataway Twp. Bd. of Educ. v. Taxman, 521 U.S. 1117 (1997), dismissed per stipulation, 522 U.S. 1010 (1997).

68. 130 F.3d 130, 133 (5th Cir. 1997).

69. *Id.* at 136.

70. See Browne, *supra* note 57.

71. See Abby Goodnough, *Financial Details Are Revealed In Affirmative Action Settlement*, N.Y. TIMES, Dec. 6, 1997, at B5.

Protection Clause in the employment context. This decision, *Lutheran Church-Missouri Synod v. FCC*, held that the FCC's Equal Employment Opportunity employment guidelines, which had "numerical norms based on proportional representation," triggered strict scrutiny under the Equal Protection Clause (the guidelines' ultimate goal was creating broadcast "programming diversity").<sup>72</sup> Similarly, the United States District Court for the District of Columbia struck down portions of the Army's affirmative action promotion policy on equal protection grounds.<sup>73</sup> And recall that Justice Powell's opinion in *Bakke* recognizing diversity as a compelling interest hinged on the medical school's First Amendment claims to academic freedom, so it was asserting a "countervailing constitutional interest" of its own against the white applicant's interest;<sup>74</sup> that countervailing interest is unavailable in the private employment context. On the other hand, the Seventh Circuit did apply *Gratz* and *Grutter* to recognize diversity as a compelling interest in an employment case involving police hires—but this decision involved only an Equal Protection Clause claim, not a Title VII claim.<sup>75</sup>

In sum, the case law for both public and private employment preferences is complicated and ambiguous, but the law is most fairly read as allowing preferences only in increasingly rare situations.<sup>76</sup> Nonetheless, conservatives could use a good Supreme Court decision or two here, too—specifically, a Title VII decision that, although it may leave *Weber* and *Johnson* intact, nonetheless rejects the diversity rationale and makes clear that even remedying "manifest racial imbalances in a traditionally segregated job category"<sup>77</sup> through preferences requires some showing of relatively recent discrimination that cannot otherwise be remedied. Barring that, it would be useful to limit at least public employers' discrimination by getting a decision

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72. 154 F.3d 487, 492–93 (D.C. Cir. 1998).

73. See *Saunders v. White*, 191 F. Supp. 2d 95, 123–34 (D.D.C. 2002).

74. See *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.).

75. *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003).

76. See Roger Clegg, *Someone Should Sue*, ENGAGE, Oct. 2007, at 25.

77. *Weber v. United Steelworkers of Am.*, 443 U.S. 193, 197 (1979).

that rejects a “diversity” rationale for employment discrimination as compelling in the constitutional context.<sup>78</sup>

B. *The Bush Administration, Executive Order No. 11,246’s Regulations, and the Law*

Perhaps the most disappointing failure of the Bush Administration with regard to racial preferences involved the regulations<sup>79</sup> that have been promulgated under Executive Order No. 11,246.<sup>80</sup> These regulations, which apply to companies that do a certain level of contracting work for the federal government, flesh out the executive order’s requirement that such companies have an “affirmative action” plan. The Center for Equal Opportunity repeatedly met with, wrote to, and cajoled Bush Administration officials at the Department of Labor, the Department of Justice, and the White House to change these regulations, explaining that they were (and are) unconstitutional and bad policy, but nothing was ever done.

It is wrong as a matter of law and policy for the Office of Federal Contracting Compliance Programs (OFCCP) to require covered federal contractors to set goals and timetables whenever they have a certain degree of “underrepresentation” among minorities and women.<sup>81</sup> The regulations’ present approach is at odds with the current case law. It is quite clear that this use of classifications based on race, ethnicity, and sex will trigger strict scrutiny.<sup>82</sup> Mere statistical disparities are not sufficient to justify the use of racial classifications; even if they were, there is no justification for goals and timetables to be triggered when women and minorities are “underrepresented,” but not when men and non-minorities are.

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78. This Term the Supreme Court will decide *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 894 (Jan. 9, 2009) (No. 08-328), a case that may shed important light on the limits of politically correct disparate treatment. The Bush Administration did not participate in the case while it was in the lower courts, but it should have.

79. 41 C.F.R. §§ 60-1.1 to 60-999.2 (2008).

80. 3 C.F.R. 167 (1965 Supp.).

81. 41 C.F.R. §§ 60-2.1 to 60-2.35, 60-4.1 to 60-4.9 (2008).

82. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”); *Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (“[W]e do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. . . . Strict scrutiny applies . . .”).

Specifically, there is no plausible remedial basis for the government's use of statistical underrepresentation to trigger mandatory goals, timetables, and additional regulatory burdens, let alone for the regulations' treatment of underrepresentation of some groups differently from the underrepresentation of others. The federal government has no recent history of systemic discrimination and has banned discrimination by its contractors since at least 1961,<sup>83</sup> and the private sector as a whole has been prohibited from engaging in such discrimination since the passage of the Civil Rights Act of 1964.<sup>84</sup> Finally, even if there were a remedial basis, the across-the-board approach taken by the regulations would not be narrowly tailored. Statistical disparities can result from nondiscriminatory reasons, and they can almost always be addressed through race- and gender-neutral means.

The current regulations are not only illegal, but as a practical matter result in more, not less, discrimination. The regulations inevitably pressure companies to "get their numbers right" by using surreptitious quotas and other hiring and promotion preferences based on race, ethnicity, and sex. This has been widely remarked upon and is generally accepted<sup>85</sup> (and is the reason that pro-preference groups are so enamored of the current approach). The Center for Equal Opportunity's experience in dealing with companies also leaves no doubt about it; companies we have asked to make a commitment to rejecting preferences regularly cite the regulations as a constraint in this regard. Obviously, the intent and result of the regulations are to push companies to keep an eye on skin color, national origin, and sex in making employment decisions. Even if this were legally defensible, it is bad policy because it is unfair and divisive, and it discourages employers from hiring and promoting simply on the basis of productivity.

Accordingly, the Center for Equal Opportunity provided the Department of Labor with a marked-up version of the regulations to show how they could be made to conform to sound

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83. Exec. Order No. 10,925, 3 C.F.R. 1977 (1961).

84. See Civil Rights Act of 1964, Pub. L. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006)).

85. See, e.g., NATHAN GLAZER, *Affirmative Discrimination: For and Against*, in ETHNIC DILEMMAS, 1964-1982, at 159 (1983); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 428-29 (1997).

law and policy. We sent the following comments along with the suggested changes:

First, it does not appear that there is any discrimination problem with the Executive Order itself, which would not have to be changed; indeed, the changes we recommend bring the regulations more into line with the Executive Order. The regulations as now written are internally inconsistent, because they purport to ban or at least not require preferential treatment when in fact they push employers in precisely that direction.

Second, we have focused on 41 C.F.R. 60-2 and 60-4, which are the most relevant parts of chapter 60 (there are probably other places where conforming changes would need to be made).

Third, we have kept the changes to a minimum and have aimed only at making the regulations nondiscriminatory. There may be other improvements that could also be made to the regulations, but we kept our focus narrow.<sup>86</sup>

We noted that “the main problem in the current regulations is the required use of ‘goals and timetables’ when the ‘incumbent’ percentage of ‘minorities or women’ is less than ‘their availability percentage.’”<sup>87</sup> We removed references to goals and timetables and the special focus on minorities and women, and replaced them instead with straightforward requirements that discrimination against anyone on the basis of race, national origin, or sex be identified, rooted out, and eliminated. We left in the requirements that demographic data be collected, but we clarified that it should be used only as a tool for uncovering actual, illegal discrimination. The only substantial revision was of the four short paragraphs at 41 C.F.R. § 60-2.16(a)–(d).

In a nutshell, we changed the centerpiece of OFCCP-mandated affirmative action plans from goals and timetables to a three-pronged commitment to nondiscrimination, inclusive recruitment, and addressing evidence of discrimination and correcting discriminatory practices when they are found. We thought the approach we took fit in well with the President’s

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86. Memorandum from Ctr. for Equal Opportunity to U.S. Dep’t of Labor (July 13, 2005) (on file with Author).

87. *Id.*

support of “affirmative access”<sup>88</sup> and his repeatedly stated opposition to preferences.<sup>89</sup>

We explained all this again and again, in a series of meetings, letters, e-mails, and phone calls with officials at the Labor Department, the Justice Department, and the White House that began the first year of the Bush Administration and continued until the last. But nothing happened.<sup>90</sup> Now maybe someone will sue, challenging the regulations as unconstitutional because they clearly are.

#### CONCLUSION

At the beginning of the Bush Administration, I drafted a speech that I thought the President ought to give on the topic of affirmative action. Here it is:

My fellow Americans, I want to speak with you tonight about what sort of nation America is, and has been, and will become.

The American Dream has always been that any American can work toward the life he or she wants, and will have the opportunity and the freedom to achieve and accomplish what he or she wants in life. There will be hurdles to overcome, but one barrier that should not be there is the color of an American’s skin or where an American’s ancestors came from.

We all know that for many years—for centuries—that dream was not allowed to many Americans. Too often discrimination because of race or ethnicity denied Americans the equality of opportunity they should have had.

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88. Comm’n on Presidential Debates, Debate Transcript: The Third Gore-Bush Presidential Debate (Oct. 17, 2000), *available at* <http://www.debates.org/pages/trans2000c.html>.

89. *See* Press Release, Ctr. for Equal Opportunity, Bush Is On Record as Opposing Racial and Ethnic Preferences (Jan. 2, 2003), *available at* <http://www.ceousa.org/content/view/460/119>.

90. The discussion in this Part is not meant to suggest that the Bush Administration did not administer and enforce the Executive Order and its regulations in a way less likely to drive employers toward preferential treatment than the Clinton Administration had. *See, e.g.,* Dennis Welch, *U.S. Penalizes Pro-Hispanic Hiring*, ARIZ. DAILY STAR, Feb. 2, 2007, *available at* <http://www.azstarnet.com/sn/printDS/170664>. But the overarching pro-preference framework was left in place.

We have made enormous strides in the last generation, however, to make that dream—the dream that Martin Luther King, Jr., had—a reality: to make real the words in the Declaration of Independence that all men are created equal, and the freedom that thousands of Americans fought and died for in our Civil War.

In the 1960s, one tool that was created for ending discrimination was affirmative action. Its original meaning was to require positive steps—affirmative action—to get rid of the unfairness that had come to permeate many businesses, governments, and other institutions. It had another early meaning, too: making sure that everyone was reached out to, not just a few. Those kinds of affirmative action were and are good, and should be continued.

But somehow another kind of affirmative action began, too—one that twisted and distorted the original ideal of the civil rights movement into its exact opposite. That kind of affirmative action was not ending discrimination but requiring it, the only difference being that there would be a new set of new victims.

This kind of affirmative action was well intentioned and maybe even necessary at the time. But the time has come to end it.

I think that all Americans would agree that our goal should be to have a society where no one—white or black, Asian or Hispanic, American Indian or Arab American—should be favored or penalized because of race or ethnicity. The only question is, do we follow that principle now, or wait until some unknown, uncertain future day?

I say the time is now. A 17-year-old applying to college today is not a former slave and did not live during the Jim Crow era. He or she was born in 1984, twenty years after the Civil Rights Act of 1964 was passed. An 18-year-old who joined the workforce when that statute became law would be 55 years old today.

I know that discrimination still exists. But, unfortunately, there will always be some discrimination. And I do not think that the best way to fight bias is with more bias. We have laws on the books that prohibit discrimination, and I pledge to you that I will aggressively enforce them and, where necessary, strengthen them.

Nor do I deny that too many Americans have limited opportunities because of the circumstances into which they are born. Some are members of minority groups and some are not, just as some well-to-do people are members of minority groups and some are not. Some disadvantaged children may be able to trace their circumstances to discrimination, others might not, but, really, what difference does it make whether the unfairness is of one kind or another? No child deserves to be denied an opportunity by any accident of birth, and no child should be left behind.

We will not make race relations better by picking winners and losers based on race. If the government creates double standards, or triple or quadruple standards, by ranking blacks ahead of Hispanics ahead of Asians ahead of whites, it will create only resentment and stigmatization.

And besides, the use of racial and ethnic preferences is just plain unfair. It is unfair when a school or college asks a student who wants to go there, what color are you? It is unfair when an employer asks an applicant, where did your ancestors come from? It is unfair when the government asks a contractor, or a prime contractor asks a subcontractor, what is your race?

It is unfair to those who are denied a spot in school, or a job, or a contract. And it is insulting to those who are supposedly benefited. African Americans have made enormous contributions to our national life and culture for hundreds of years in the teeth of slavery and Jim Crow—the worst discrimination you can imagine. And now we are telling them: You cannot be expected to succeed unless we lower the bar for you.

I don't buy it. I reject the soft bigotry of low expectations. No child should be left behind, but every child and every American will be held to the same standards as every other one of his countrymen.

There is another reason why racial and ethnic preferences are wrong. It requires the government to pigeonhole people as if everyone were either pure black or white, Hispanic or non-Hispanic, just one or the other. The truth is, as we learned in the latest census, not only is the American population increasingly multiracial and multiethnic, but so are Americans as individuals.

This is true of my own family, it is true of Tiger Woods, and it is true of millions of Americans. Few of us are just black, or just Hispanic, or just Native American. And so how can it make sense for the government to grant preferences as if we were? And how is the government supposed to rank who is the most deserving when there is an infinite number of racial and ethnic combinations, and that variety keeps growing as America does?

Most Americans believe as I do that it was always wrong to penalize people for their skin color or ancestry, and most Americans also believe that it is wrong to do so now. We can end the newer discrimination and still remain vigilant that discrimination of the old kind is punished, too. Racial profiling is wrong whether it is police stopping a black teenager or colleges telling an Asian teenager that they have "too many" of them already.

We should continue to have the kind of affirmative action that means taking special steps to root out prejudice and reaching out to everyone. But we should end the affirmative action that gives preferences to some over others because of race or ethnicity.

When Thurgood Marshall was the lead attorney in *Brown v. Board of Education*, he wrote: "Distinctions by race are so evil, so arbitrary and insidious that a state bound to defend the equal protection of the laws must not allow them in any public sphere." In that landmark case he insisted that "classifications and distinctions based upon race or color have no moral or legal validity in our society." He was right.

We are all Americans. God loves us all, and wants us to love one another no matter what our outward appearance. There is no room for bigotry in the heart of a patriotic American, and our government should likewise be color-blind. From now on, I pledge to you that it will be.

Thank you, and God bless America.<sup>91</sup>

Well, needless to say, the speech was never given. But hope springs eternal: Perhaps President Obama will deliver it. He has, after all, stated his misgivings about racial preferences, ac-

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91. A slightly edited version of this speech was later published as Roger Clegg, *Words of Advice*, NAT'L REV. ONLINE, Jan. 10, 2003, <http://www.nationalreview.com/clegg/clegg011003.asp>.

knowledging, for instance, that his daughters probably should not enjoy a preference in university admissions over disadvantaged students who happen to be white.<sup>92</sup>

As we await that speech, though, the struggle against racial preferences remains a multi-front battle. State ballot initiatives and even state legislation ought to be pursued, and the issue must be kept before the court of public opinion.

The issue should especially be kept before the courts. In the short term, significant progress will require good judicial decisions. The good news is that there are strong legal arguments to be made against racial preferences in all the major areas where they are found. The bad news is that we must get these issues before the courts quickly because their composition is likely to get worse in a hurry. In short, let's sue!

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92. Interview by George Stephanopoulos with Senator Barack Obama on *This Week with George Stephanopoulos* (ABC television broadcast May 13, 2007).