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RISING ABOVE THE PAST: AFFIRMATIVE ACTION AS A NECESSARY MEANS OF RAISING THE BLACK STANDARD OF LIVING AS WELL AS SELF-ESTEEM

THOMAS E. HANSON, JR.*

I. INTRODUCTION

An African-American friend of mine just experienced the beauty of giving birth. While at the hospital, an African-American nurse, after looking at the child and noticing her very light complexion and straight hair, remarked how "lucky" the child was for having a White father. Actually my friend is married to a light complected Black man who has himself been called "White" by other Blacks because he is a professional, a chemist. He responds to such comments by stating that "Blacks are chemists too." However, mere words will not rectify the common association of positivity with being White and negativity with being Black; whether the context is physical appearance, educational achievement, or occupational advancement.\textsuperscript{1} Where an African American disparages, or associates negativity with, his or her own racial group, feelings of diminished self-worth and low self-esteem are manifested.\textsuperscript{2}

America's devaluation of the Black culture, the lack of Black role models in both the professional and academic fields, and the disproportionate occupation of positions of authority by Whites accounts for and reinforces a feeling of inferiority and a belief in the inability to achieve among the Black population in America.\textsuperscript{3} Although these detrimental characteristics of American society find deep roots in the history of this country, their reversal is crucial to the lifting of the Black self-esteem and the facilitation of progress and advancement.

This Note argues that the opportunities and examples provided by affirmative action are a means by which the diminished self-esteem

\* Executive Editor, \textit{Boston College Third World Law Journal}.

1 See Richard Williams, \textit{They Stole It, But You Must Return It} 76 (1986).

2 See id.

3 See id.
felt by many African Americans can be alleviated. It is further asserted that the opportunities made available through the targeting, admitting, and employing of African Americans, in areas where their past and present representation has been, and continues to be, dismal, undoubtedly holds the potential of breaking the cycle of economic deprivation created by America's history of discriminatory employment practices.

Despite these critical benefits to be gained through affirmative action, the recent Supreme Court opinion in *Adarand Constructors, Inc. v. Pena* digresses from prior jurisprudence and heightens the scrutiny with which Federal affirmative-action programs are to be examined for constitutionality under the Fifth Amendment. In rejecting the 1991 holding in *Metro Broadcasting, Inc. v. F.C.C.*, Justice O'Connor's majority opinion erased, for the purpose of Fifth Amendment scrutiny, the distinction between benign and burdensome racial classifications, thus equating affirmative action, beneficial in its purpose, with such legislation as Black Codes and Jim Crow laws. In the Court's view, any Federal legislation that classifies individuals by race must be narrowly tailored and in furtherance of a compelling governmental interest.

In his concurrence to the majority opinion in *Adarand*, Justice Thomas takes an even greater stride in opposition to affirmative-action programs stating that all governmental racial classifications are unconstitutional. He further determines that programs seeking greater minority representation impose a "badge of inferiority" upon their beneficiaries commensurate to that inflicted by the exclusion of Blacks through discriminatory practices. This belief that those benefiting from affirmative action are simultaneously stigmatized has also found support

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6. See id.; *Metro Broadcasting* held that the F.C.C.'s minority preference policies, promulgated in the interest of broadcast diversity, were congressionally mandated, benign race-conscious measures that were "constitutionally permissible to the extent that they serve[d] important governmental objectives within the power of Congress and... [were] substantially related to achievement of those objectives." 497 U.S. 547, 552, 564–56 (1991).

7. See id. at 2112–13. Black Codes have been described as legislation which "limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts." University of Cal. Regents v. Bakke, 438 U.S. 265, 390 (1977) (Marshall, J.).


9. See id. at 2119.

10. See id. at 2118 (Thomas, J., concurring).
among certain Black intellectuals and commentators who denounce preferential treatment of minorities.\(^11\)

Amidst the conservative climate of both the present Congress and the Supreme Court,\(^12\) this Note analyzes the often overlooked connection between America's not so distant past and the current position of African Americans within this society. Part II examines the historical employment discrimination suffered by African Americans and, through an examination of relevant statistics and case law, outlines the extent to which Blacks were excluded from gainful and rewarding employment. Upon establishing the general economic despair of African Americans at the time of the Civil Rights Act of 1964, Part II continues with an analysis of how such economic deprivation is intergenerationally transmitted and perpetuated. Part III depicts the sources and indications of the diminished self-esteem within the Black population, which exists in total separation from any alleged stigmatization caused by affirmative action. Lastly, Part IV puts forth and substantiates the ultimate conclusion that affirmative action is a means of improving the African-American economic position, while also ameliorating the feelings of diminished self-worth quite prevalent among the African-American population.

II. THE ENGENDERING OF AFRICAN-AMERICAN ECONOMIC DESPAIR THROUGH HISTORICAL EMPLOYMENT DISCRIMINATION

[T]he Afro-American has had the dubious honor of having had the longest period of economic restrictions imposed on him with the least to show for the time and effort he has expended in his struggle for social improvement.\(^13\)

Minorities, Blacks in particular, have been historically excluded from employment positions that provide economic success and prestige.\(^14\) Prior to the enactment of the Civil Rights Act of 1964, Blacks were openly discriminated against and simply not hired into upper-level employment positions.\(^15\) Once the Civil Rights Act made such


\(^{12}\) David A. Kaplan, This Court's Not on TV, Newsweek, Oct. 9, 1995, at 64.


\(^{15}\) See Susan Spencer, On The Front Lines, Black Enterprise, Nov. 1995, at 151-52; Lowery,
course of action unlawful, numerous employers instituted less overt means of insuring that the most coveted positions would remain all-White.16

The open discrimination through the 1960s, and the discrimination that continues up to this day, have proved extremely detrimental to the Black population.17 Employment discrimination has the unique ability to negatively affect those who have suffered such treatment first hand as well as intergenerationally engendering cycles of injury that span for years in the future.18

A. Employment Discrimination and its Effect on the Minority Labor Force

African Americans comprise the largest minority group in the United States labor market.19 However, their levels of economic achievement have not fared well, historically, in comparison to Whites.20 In the years preceding the enactment of the Civil Rights Act, Blacks were largely relegated to unskilled and semi-skilled labor.21 Blacks were, and continue to be, severely underrepresented among professionals, managers, foremen, and similar positions.22

The employment statistics which follow demonstrate the degree to which African Americans suffered from economic hardship as a result of employment discrimination, treatment in accord with negative stereotypes, and certain socioeconomic factors.23 Case law deciding claims of employment discrimination, pursuant to Title VII of the Civil Rights Act of 1964, further accentuates the overt as well as more subtle ways in which African Americans have been limited "to the most unskilled, unattractive, and poorly paid occupations."24

Derrick Bell identified three forms of discrimination which African Americans and other minorities have suffered in the American workplace. The first type involves the firing of or refusal to hire qualified Black employees in favor of White workers. The second focuses on decisions not to promote Black employees to positions of greater status and higher wages. The third involves compensating Black employees at a rate lower than their White counterparts, even though both groups of employees occupy identical positions.

These forms of employment discrimination coalesced to yield staggering inequalities in employment statistics between Whites and minorities within the United States labor market. At the time of the enactment of the Civil Rights Act, minorities faced a higher incidence of unemployment, suffered unemployment for longer periods of time, and experienced greater representation in part-time work in nearly every occupation across the employment spectrum.

Moreover, the relegation of minorities to the lower employment stratum caused great hardship for these groups as the United States moved toward automation and the need for unskilled and semi-skilled workers markedly decreased. In 1947, the minority unemployment rate was 64 percent higher than the unemployment rate for Whites. By 1962, this figure had mushroomed to 124 percent.

For minorities who could find employment, the latter two forms of employment discrimination assisted in limiting them to lower wages and lower status. In 1959, a minority male who graduated college earned less than a White male who never attended high school. Minority males from age 24 to 65 who had completed elementary school earned median incomes equal to 62 percent of their White counterparts. Among high school and college graduates, minority
males earned respective salaries of only 70 percent and 62 percent of those earned by similarly situated Whites. \(^{37}\) It was also found that a minority male in the work force could only increase his earnings by $1,000 by completing college after high school, while White males increased their earnings by over twice that amount. \(^{38}\)

Economists have posited that a variety of factors, including employment discrimination, served to deny Blacks access to meaningful employment. \(^{39}\) First on the list is the stigmatizing effect of "the image of inferiority stamped upon...[African Americans] by slavery." \(^{40}\) The fact that Blacks were thought of as inferior engendered a belief among those who sought the perpetuation of a preferred status for their occupations that the exclusion of Blacks was required. \(^{41}\) Similarly, the stereotype that Blacks were better suited for certain lower level jobs, formed by Black exclusion from skilled and technical occupations, influenced hiring practices, attitudes among White workers, and even the aspirations of African-American job seekers. \(^{42}\) Among the social and cultural factors cited—Black segregated neighborhoods, inadequate education and training, and the self-fulfilling manner in which community-wide job exclusion affects the goals of individuals—each was thought to further restrict African-American employment opportunities. \(^{43}\)

In response to the malady that employment discrimination inflicted upon the Black labor force, Congress enacted Title VII of the Civil Rights Act of 1964. \(^{44}\) Congress believed that Blacks would have to be admitted into higher paying and more steady occupations if they were

\(^{37}\) See id.

\(^{38}\) Id. In stressing the relative uselessness of higher education to African Americans, Senator Clark, during the hearings concerning the Civil Rights Act, quoted testimony indicating that "most" Black mail carriers were in fact college graduates. 110 Cong. Rec. 7205 (1964).


\(^{40}\) Id. at 8.

\(^{41}\) See id.

\(^{42}\) See id. The author described a common employer view of Black employees as follows: "Negroes, basically and as a group, with only rare exceptions, are not as well trained for higher skills and jobs as whites. They appear to be excellent for work, usually unskilled, that requires stamina and brawn—and little else. They are unreliable and cannot adjust to the demands of the factory." Id. at 10-11. The author further stated that management decisions were also influenced by the "fears of reaction from white workers and the white community." Id. at 11.

\(^{43}\) See id.

\(^{44}\) See 110 Cong. Rec. 6547-48 (1964). Senator Humphrey emphasized the "plight of the American Negro" in the American economy as a key problem with which the Civil Rights Act would have to deal. Id. He also recognized that employment discrimination was not confined to one particular region, but was "widespread in every part of the country." Id. at 6547. See also 110 Cong. Rec. 7204 (1964). Title VII describes unlawful employer practices as follows:
to realize the economic and social benefits of integrated American life. However, by the late 1960s, only 5 percent of the Black population was considered to be a part of the American middle class. Another 5 percent was classified as upper middle class. Considering the Civil Rights Act became effective in 1965, it does not appear that its provisions were successful in facilitating a boost in the standard of living for Blacks within the first five years of its enactment. These negative statistics and Title VII's apparent ineffectiveness illustrate the pervasiveness of the employment discrimination experienced by Blacks of that time period.

2. Case Law Outlining Both Overt Discrimination and Subsequent Less Open Means of Restricting the Advancement of African-American Laborers.

Federal decisions construing allegations of illegal employment practices under Title VII of the Civil Rights Act of 1964 document a distinct pattern of overt racial discrimination up to the mid-1960s followed by less-open, race-neutral practices which perpetuated the effects of the earlier, overt discriminatory efforts. Overt discriminatory practices were evidenced by the respective employer's relegation of a disproportionate number of African-American employees to "the lowest paid," "lower status," "unskilled jobs." This restriction of African-American laborers was mainly accomplished through the hiring of

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . .; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . . 42 U.S.C. § 2000e-2 (1995).

46 Blank, supra note 19, at 15.
47 Id.
48 See infra text accompanying notes 46-47.
49 See infra text accompanying notes 51-89.
50 See infra text accompanying notes 53-89.
51 Jones v. Lee Way Motor Freight, 431 F.2d 245, 248 (10th Cir. 1970); United States v. Hayes Int'l, 415 F.2d 1038, 1041 (5th Cir. 1969). Even after July 2, 1965, the effective date of the Civil Rights Act, case law has found that certain employers and unions continued their overtly discriminatory practices. See United States v. Bethlehem Steel Corp., 446 F.2d 652, 655-58 (2d Cir. 1971); Hayes, 415 F.2d at 1041 (the segregation of Black employees in a manner that deprived them of advancement opportunities remained unchanged after the effective date of the Civil Rights Act); United States v. Sheet Metal Workers Int'l Assoc., 416 F.2d 123, 127-28 (8th Cir. 1969).
Blacks into the lowest departmental categories or into segregated job classifications, both without opportunity for advancement.\textsuperscript{52}

In \textit{Griggs v. Duke Power Co.}, the Supreme Court examined numerous discriminatory practices utilized by a North Carolina employer.\textsuperscript{53} To comprehend the depth of the discrimination undertaken by this employer, the structure of its operations must first be examined. The jobs offered at its Dan River Steam Station were divided into five departments: (1) labor, (2) coal handling, (3) operations, (4) maintenance, and (5) laboratory and testing.\textsuperscript{54} The first two departments were considered less desirable than the latter three.\textsuperscript{55} In fact, the labor department’s highest paying position paid less than the lowest paying positions in the other four departments, into which only Whites were employed.\textsuperscript{56}

Prior to the Civil Rights Act, Blacks were only hired into the labor department and were not promoted into the more desirable positions.\textsuperscript{57} In August 1966, five months after charges with the Equal Employment Opportunity Commission had been filed, an African-American employee was first assigned to a position in an operating department.\textsuperscript{58}

Similarly, in \textit{Albemarle Paper Co. v. Moody}, prior to the Civil Rights Act, the employer expressly reserved the skilled, higher paying “lines” within its employment departments for White employees.\textsuperscript{59} The statistics, studies, and the case law exhibit the regularity with which employers openly reserved their superior employment positions for White employees, while Blacks remained at the bottom of the employment ladder.\textsuperscript{60} The White employees benefited from higher salaries and prestige, and the Black employees, through varying forms of overt employment discrimination, were forced to take on the more labor intensive work for less pay.\textsuperscript{61}

\textsuperscript{52}United States v. St. Louis-S.F. Ry., 464 F.2d 301, 304–07 (8th Cir. 1972) (Blacks were hired as train porters instead of brakemen and paid lower wages); United States v. Chesapeake and Ohio Ry., 471 F.2d 582, 586 (4th Cir. 1972) (Black employees worked in “Barney” yards with limited promotional opportunities, irregular provision of work, and salaries 20 percent lower than their White counterparts in the “General” yard).


\textsuperscript{54}\textit{Id.} at 427.

\textsuperscript{55}See \textit{id.}.

\textsuperscript{56}\textit{Id.}

\textsuperscript{57}See \textit{id.}.

\textsuperscript{58}See \textit{id.} at 427 n.2.

\textsuperscript{59}422 U.S. 405, 427 (1975).

\textsuperscript{60}See \textit{supra} text accompanying notes 29–38, 46–47, 50–59.

\textsuperscript{61}See \textit{id.}.
Because Title VII was fashioned as a prospective prohibition of employment discrimination, the existing stratified labor market could not be remedied under its provisions. Instead, the Federal courts focussed their remedial efforts toward the elimination of procedures that perpetuated the effects of past discrimination. Thus, the District Court deciding *Quarles v. Phillip Morris, Inc.* found that “Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act.” The Fourth Circuit likewise stated in *United States v. Dillon Supply Co.* that “Practices, policies or patterns, even though neutral on their face, may operate to segregate and classify on the basis of race at least as effectively as overt racial discrimination.

Such facially neutral practices, often referred to as covert forms of discrimination, include the denial of, or imposition of onerous conditions on, departmental transfers, the requiring of special qualifications, and collusion between employer and union. In *Jones v. Lee Way Motor Freight, Inc.*, the Tenth Circuit examined an employer’s facially neutral “no-transfer” rule. The African-American plaintiffs claimed that the company’s rule against transfers ensured them employment within the inferior jobs they were forced to accept, prior to the Civil Rights Act, when the employer’s openly discriminatory practices were in effect. In agreement with the plaintiffs’ position, the court ruled that the systematic relegation of the plaintiffs to jobs of lower pay and status, in combination with the application of a policy against transfers, “locked” these individuals into “jobs which, because of their race, were the only ones previously available to them.”

The Fourth and Eighth Circuit decisions in *Robinson v. Lorillard Corp.* and *United States v. St. Louis-San Francisco Railway Co.* both depict situations where the employer’s policies greatly restricted the transfer of African-American employees, who essentially could not advance in employment level without relinquishing their seniority and, in the latter case, without a substantial reduction in pay rate. Each of the

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63 See, e.g., id.
65 429 F.2d 800, 804 (4th Cir. 1970).
66 See *Jones*, 431 F.2d at 248–49; BLOCH, *supra* note 13, at 49.
67 *Jones*, 431 F.2d at 245.
68 Id. at 247.
69 Id. at 248.
70 *St. Louis-S.F. Ry.*, 464 F.2d at 306; Robinson, 444 F.2d at 796.
employer's policies were found to maintain the prior discriminatory segregation of their employment systems. In the Second Circuit opinion deciding United States v. Bethlehem Steel Corp., the court characterized the discriminatory practices as "a general pattern of racial mistreatment" marked by the assigning of Black employees to the "hotter and dirtier jobs." The court stated that the prior, overt discrimination within the plant "was a microcosm of classic job discrimination in the north, making clear why Congress enacted Title VII. . . ." Similar to the Robinson and St. Louis-San Francisco Railway Co., the employer's transfer policies were found to have a "lock-in" effect that became stronger as African-American employees continued to work at the particular plant, and therefore had more to lose upon bettering their employment status.

Refocusing on the employer in Albemarle, it was found that once Title VII removed the overt restrictions on minority upward mobility, the Black employees were required to pass both the Beta and Wonderlic Tests in order to transfer into the skilled lines. Due to a very poor passing rate, few African-American employees were successful in their attempts to leave the ranks of the unskilled. In defense of its promotion standards, the employer claimed that its plant was becoming more modern and that the test requirements were instituted to ensure that transferring employees could competently perform the tasks that they would face. But oddly enough, incumbents on the skilled lines were not required to take the examinations to retain their positions or their promotion rights. In addition, "[t]he record show[ed] that a number of white incumbents in high-ranking job groups could not pass the tests." Upon concluding that the district court erred in finding the tests to be adequately job related, the Court remanded the case for consideration in light of its clarification of the proper standard.

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71 St. Louis-S.F. Ry., 464 F.2d at 306; Robinson, 444 F.2d at 795–96.
72 446 F.2d at 655.
73 Id. at 655.
74 Id. at 658 (African-American employees could only transfer upon penalty of losing their seniority rights and suffering a reduction in pay rate).
75 Albemarle, 422 U.S. at 428–29.
76 Id.
77 See id. at 428.
78 Id. at 429 (emphasis added).
79 Id.
80 Albemarle, 422 U.S. at 435–36. The crux of the Court's examination of the test requirements, in adherence to Griggs, was whether they were sufficiently "job related." See id. at 427. The Court found the proper validation technique to be that found within the EEOC guidelines for determining job relatedness. Id. at 431. It was further found that the employer's method of validation was "materially defective" in comparison to that of the EEOC. See id. at 430–31.
Collusion between an employer and union, with discriminatory effects, is exhibited by the defendants’ actions in *Glover v. St. Louis-San Francisco Railway Co.* Thirteen employees of a railroad company (Company), eight Black and five White, brought suit against their employer and the Brotherhood of Railway Carmen of America (Brotherhood) claiming that the defendants tacitly agreed to call apprentices to perform railroad repairs instead of the plaintiffs in order to thwart the African-American plaintiffs’ efforts at gaining experience that would qualify them for a promotion to the level of Carmen. When the African-American employees complained to the Brotherhood, they were allegedly told “(a) that they were kidding themselves if they thought they could ever get white men’s jobs; (b) that nothing would ever be done for them; and (c) that to file a formal complaint with the Brotherhood or with the Company would be a waste of their time.” The White plaintiffs were called “nigger lovers” and told that they were inviting trouble. The Supreme Court, in reversing the dismissal upheld by the court of appeals, found that the Railroad Adjustment Board lacked the power to order the relief required by the situation at hand and that the administrative remedies were effectively exhausted when the plaintiffs made repeated complaints to the company and Brotherhood officials. The case was remanded for trial.

Although Title VII discouraged open discrimination against minority applicants, the case law documents the inescapable conclusion that employers who had once been open in their efforts before the Civil Rights Act, thereafter, resorted to more clandestine means of excluding African Americans from desirable employment positions. Reaching into the 1970s, employers were still able to largely exclude Black employees from the fruits of upper-level employment. This exclusion had the potential to permeate every facet of an affected employee’s existence and have detrimental consequences not only for him or her personally, but also for those within subsequent generations who would be disadvantaged by its invidious grasp.

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81 393 U.S. at 324–32.
82 See id. at 325.
83 Id. at 326–27.
85 See id. at 328–31.
86 See id. at 331.
87 See Feagin, supra note 16, at 19. Author states that “blatant discrimination has been joined by much subtle and covert discrimination.” Id. See also supra text accompanying notes 63–86.
88 See generally Bell III, supra note 14, at 812.
89 Marshall, supra note 39, at 1. Author states that “the impact of inadequate jobs is much more serious for Negroes. And the problem is not only in terms of dollars, but also in terms of
B. The Far-Reaching Negative Effects of Employment Discrimination and Economic Deprivation

Over the past two and one-half decades, the Black socioeconomic position in American society has not, on an overall level, been improving when compared to that of Whites.90 Despite the emergence of a Black middle class, the income gap between Black and White families has increased since 1971.91 Researchers have found these statistics to be an indication of the degree to which Black families on the fringe of being classified as poor fell into the ranks of deep poverty.92 With respect to the unemployment rate, Blacks have historically been unemployed at greater levels than have their White counterparts.93 The 1990s pose no exception. Of White Americans in the United States labor force, 5.3 percent were unemployed in 1994.94 Among Black Americans, the unemployment rate was 11.5 percent, 113 percent higher.95

1. The Negative Cycle of Socioeconomic Deprivation

The economic despair experienced by Blacks from the days of slavery to the 1960s, and the continuing persistence of high income and unemployment rate differentials in the 1990s, demonstrate the cyclical manner in which socioeconomic status is perpetuated.96 The ability to achieve within the United States labor market is strongly influenced by one’s familial background.97 Parents who are themselves educated and economically prosperous tend to pass their motivation to succeed on to their children.98 Conversely, individuals with parents who are undereducated and have not gained economic success are less likely to achieve in the marketplace, falling prey to individual despair, family dissolution, and aberrant behavior.99 This phenomenon oper-
ates in a cycle that allows the offspring of those who have made economic gains to make such advancements themselves.\textsuperscript{100} On the downside, those born into families stricken by poverty, unemployment, or low economic achievement are likely to continue within their socioeconomic stratum and never make significant economic gains.\textsuperscript{101}

The impact of past socioeconomic deprivation upon the present status of African-American workers was studied as part of the National Survey of Black Americans (NSBA), published in 1991.\textsuperscript{102} Under the heading of African-American work life, the NSBA researchers present a comprehensive breakdown of African-American job attainment as it is influenced by sociological factors.\textsuperscript{103} The model which serves as a basis for the interpretation of the NSBA findings integrates the competing perspectives of the dual labor market paradigm, which focusses on structural sources of inequality and poverty, and the mobility, or competing human capital model, premised on the individual’s personal motivation, ability, and investment in education as determinative of economic advancement.\textsuperscript{104} Adopted from the dual labor market paradigm is the division of the labor market into a primary and a secondary sector, with an upper and lower stratum within the primary sector.\textsuperscript{105} The upper stratum of the primary sector consists of professionals, managers, and administrators.\textsuperscript{106} The lower stratum includes sales, clerical, and craft and kindred workers.\textsuperscript{107} The secondary sector is comprised of service workers, operatives, and unskilled laborers.\textsuperscript{108}

At the outset, it was determined at the time of the NSBA survey that Blacks disproportionately occupied employment positions within the secondary sector of the labor market.\textsuperscript{109} Specifically, 52 percent of both Black men and women occupied secondary sector jobs, while only 19 percent had careers in the upper stratum of the primary sector.\textsuperscript{110}

\begin{itemize}
\item \textsuperscript{100} See Massey, supra note 97, at 149.
\item \textsuperscript{101} See id.
\item \textsuperscript{102} Bowman, supra note 4. The NSBA data are based on a rigorous national probability sample providing an accurate description of all Black adult workers. Id.
\item \textsuperscript{103} Id. at 137.
\item \textsuperscript{104} Id. at 127-129.
\item \textsuperscript{105} Id. at 129, 136-37.
\item \textsuperscript{106} Id. at 132. The primary sector jobs are likely to require a certain skill, the employees are usually highly productive, and the wages paid are significant. A. Dale Tussing, Poverty in A Dual Economy 33 (1975).
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id. Secondary sector employment is largely unstable, wages are low, and little skill is required or developed through training. Tussing, supra note 106, at 33.
\item \textsuperscript{109} See id. at 131.
\item \textsuperscript{110} Id.
\end{itemize}
Within the secondary sector, Black men were predominately found in positions such as operatives and unskilled laborers.\textsuperscript{111} Black women were concentrated in service positions.\textsuperscript{112} For Blacks within the lower stratum of the primary sector, women were overwhelmingly employed as clerical workers, and men were most likely to be found within the ranks of craft and kindred workers.\textsuperscript{113} Perhaps the most telling fact within the NSBA findings is the rarity of Blacks, regardless of gender, being found in the "higher professional roles" of physician, pharmacist, lawyer, engineer, college professor, and accountant.\textsuperscript{114} As opposed to occupying positions within these highly touted professional roles, Black men within the upper stratum of the primary sector were likely to be employed as managers or administrators, while Black women were most likely to be school teachers and, secondly, nurses and health technicians.\textsuperscript{115}

Having set forth the employment position of African Americans within the United States labor market, the NSBA survey sought to determine whether intergenerational mechanisms influenced the employment attainment of African-American job seekers by comparing the employment and educational status of Black fathers and mothers with the employment and educational achievements of their children.\textsuperscript{116} The results indicate a striking, yet consistent, correlation between the employment level of parents and the occupational position of their children.\textsuperscript{117} Of individuals with a father or mother employed within the secondary sector, 53.9 percent, on average, were themselves employed within the secondary sector, while only 16.7 percent pursued careers within the upper stratum of the primary sector.\textsuperscript{118} Contrasted to these figures are those of the individuals whose father or mother served in the upper stratum of the primary sector where 39.9 percent were at that parent’s level, and another 26.3 percent occupied lower stratum primary sector positions.\textsuperscript{119} The percentage employed within the secondary sector dropped by approximately 59 percent.\textsuperscript{120}

\textsuperscript{111} See id.
\textsuperscript{112} See id.
\textsuperscript{113} See id.
\textsuperscript{114} See id.
\textsuperscript{115} See id. at 133.
\textsuperscript{116} See id. at 135–37.
\textsuperscript{117} See id. at 137.
\textsuperscript{118} See id.
\textsuperscript{119} See id.
\textsuperscript{120} See id. The raw numbers are 33.9 percent as compared to 53.9 percent. Id.
As illustrated by the foregoing discussion, one cannot understand the economic condition of African Americans within present society without taking into account the economic deprivation of the past and the cyclical manner in which it caused the degree of poverty that now prevails. Blacks were thoroughly excluded from economic success while Whites on average were establishing the basis from which they would continue the upward cycle of economic advancement. While a certain percentage of Blacks have “made it,” the oppression and discrimination of the past, coupled with continued racism, has deprived the Black community of widespread and far-reaching economic advancement.

2. The Inability to Advance in Education as a Facilitator of Intergenerational Socioeconomic Hardship

Although a number of factors contribute to the downward cycle caused by economic deprivation, one key reason that the poor do not rise from their socioeconomic condition is their inability to obtain educational achievement. Similar to the previous discussion demonstrating the intergenerational perpetuation of employment status, the NSBA findings indicate the “powerful” impact of parental educational level on the job attainment of children.

The NSBA researchers compared the educational achievement of mothers and fathers with the subsequent employment level of their children. Measured through four educational categories—less than high school, high school graduate, some college, and college graduate—it was revealed that parents with minimal educational advancement were likely to have children who would eventually find employment within the secondary sector of the labor market. In contrast, children of college educated parents were disproportionately located in the upper stratum of the primary sector. This pattern was most strikingly illustrated in the case of the mothers’ educational level com-

121 See id. Included within this analysis is the segregation of a great number of Blacks in urban environments that impede their economic advancement. See MASSEY, supra note 97, at 149.

122 See BELL III, supra note 14, at 810; MASSEY, supra note 97, at 149.


125 See Bowman, supra note 1, at 136–37.

126 Id.

127 Id.

128 Id.
pared with their children’s advancement within the labor market. A child whose mother had not completed high school was over three and one half times more likely to be employed in the secondary sector as a child with a mother who graduated from college. Even further, the children with college educated mothers were greater than two times as likely to be located within the upper stratum, as opposed to the lower stratum, of the primary sector. This breakdown of employment among African Americans, in terms of the intergenerational influence of parental educational achievement on an individual’s job attainment, explicitly demonstrates the degree to which a parent’s educational advancement dictates an offspring’s progress within the employment spectrum.

While education appears to be an effective means of acquiring economic success, educational achievement, to a large extent, is only attainable when one first has reached a certain economic status. When a group is denied access to the economic tools by which education can be obtained, that group is in large part closed out of economic advancement in the future. In economic, as well as practical terms, educational achievement is expensive at every level. For high school students, attendance is based on the ability to forgo the income that could otherwise be gained in the job market. Similarly, undergraduate and graduate studies, in addition to their opportunity costs, require substantial outlays in tuition and fees. Those whose economic positions allow them to receive education at the high school level, and beyond, will benefit from higher paying occupations and the ability to pass their values concerning achievement in education and employment on to subsequent generations. For over a century, Whites have had the opportunity to enjoy the benefits of socioeconomic achievement, perpetuated by educational attainment. Blacks, on the other

129 *Id.*
130 *Id.*
131 *Id.*
132 See *id.*
133 *See Jones, supra note 124, at 60–61; Massey, supra note 97, at 149.*
134 *See Jones, supra note 124, at 60–61; Massey, supra note 97, at 149.*
136 *See Jones, supra note 124, 60–61.* This author also finds that the most selective public universities receive the greatest level of subsidy. *Id.* This subsidy is defined as educational plus aid expenditures minus tuition. *Id.* This phenomenon causes further stratification in that the poor disproportionately attend two-year colleges that receive the lowest subsidies. *Id.*
137 *See Massey, supra note 97, at 149.*
hand, have been largely excluded from such a way of life and the effects of this exclusion are presently apparent.138

III. A BRIEF DESCRIPTION OF THE DIMINISHED SELF-WORTH FELT BY MEMBERS OF THE AFRICAN-AMERICAN POPULATION

Recently a number of Black commentators have come forth to argue against the continuation of affirmative action. These African-American scholars, who have achieved great heights in their respective fields, claim that treating Blacks in a preferential manner will not facilitate advancement and can instead cause the beneficiaries to be perceived by themselves and by their peers as inferior, and unable to achieve without special treatment.139 This perception of inferiority, it is argued, is causing beneficiaries of affirmative action to be stigmatized by its programs.140

In actuality, African Americans are repeatedly bombarded with images and experiences that relate the message that “White is right” and being Black is somehow second-class.141 This constant denigration has engendered a certain degree of self-hate and diminished self-esteem among Blacks in America.142 However, the demeaning of black culture is not limited to the United States. In Brazil, a popular saying is that “In Brazil, there is no racism: the Negro knows his place.”143 The racial bias within Brazil is simply characterized as “white is best and black is worst and therefore the nearer one is to white, the better.”144 Receiving the message that one’s skin color makes one inferior can be quite damaging to an individual’s psyche, and can have a negative impact on one’s future aspirations.145

The assertion that affirmative action stigmatizes its beneficiaries overlooks the negativity that has been attributed to African-American culture since colonial times.146 Arguably, affirmative action will play a

138 Bowman, supra note 4, at 136–37.
139 See, e.g., CARTER, supra note 11, at 56–62; ELLIS GOSE, THE RAGE OF A PRIVILEGED CLASS 130–33 (1993); Woodson, supra note 11, at 42–43.
140 See CARTER, supra note 11, at 56–62; Woodson, supra note 11, at 42–43.
142 See Hopson, supra note 141, at 62.
144 Id. at 164–65.
145 See Hopson, supra note 139, at 62.
major role in breaking down the belief among numerous African
Americans that they cannot advance in the greater American society.\textsuperscript{147} By increasing the number of Blacks at every level of the employment spectrum, the messages of Black inferiority will be counteracted by images of Black success and progress.\textsuperscript{148} The good to be gained through affirmative action greatly outweighs the marginal discomfort complained of by a select few of its beneficiaries.\textsuperscript{149}

Returning to a depiction of the feelings of diminished self-worth felt by African Americans, those in contact with older Black role models, whether parents, aunts, uncles, or friends, will attest to the disheartening comments that these individuals on occasion make concerning the Black race.\textsuperscript{150} The common target for these remarks are physical characteristics unique to those of African dissent.\textsuperscript{151} Another object of attack is the work habits of African Americans or their personal motivation.

Beginning with facial features, “Oooh, he has good hair,” to denote straight hair, or “look at how long her hair is,” to indicate approval for a woman’s appearance, are examples of what types of physical characteristics are favored.\textsuperscript{152} In addition, large, robust lips and wide noses are not seen as attractive.\textsuperscript{153} However, light skin complexion and light eyes are perceived as especially beautiful.\textsuperscript{154} If one constructs a composite of the features that are held in high regard, omitting of course those that are disfavored, the individual would have long, straight hair, a thin nose, thin (or not “too large”) lips, a light skin complexion, and light brown or green eyes.\textsuperscript{155} All the characteristics which make an individual distinctively Black would be removed from the equation.\textsuperscript{156}

Another component of Black self-hate is the refusal of many Blacks to hire people from their own race to perform services for them.\textsuperscript{157}

\textsuperscript{147} See infra text accompanying notes 185–97.
\textsuperscript{148} See Kennedy, supra note 146, at 1329.
\textsuperscript{149} See infra text accompanying notes 167–97.
\textsuperscript{150} See Hopson, supra note 141, at 62; James P. Comer & Alvin F. Poussaint, Black Child Care 202 (1975).
\textsuperscript{151} See Comer, supra note 151, at 206–07.
\textsuperscript{153} Id. Elaine Brown depicts the derision that girls with “nappy” hair and “liver” lips endured during her youth. Id.
\textsuperscript{154} See generally id.
\textsuperscript{155} See id.
\textsuperscript{156} See Word, Ysb, May 1995, at 10 (Nigerian-born female recounts the stigma she experienced due to continually being called an “African bush boogie” by her African-American classmates).
\textsuperscript{157} It has been found that total Black income exceeds the aggregate annual receipts of the 450,000 Black businesses by $325 billion. T.M. Pryor, Gwinnett Extra, Atlanta J.-Const., Nov. 2,
Black construction workers, building managers, lawyers, and other service oriented business people often complain that their own people will readily hire Whites when they need a job done. Whether this refusal is attributable to a belief that Blacks are incapable of doing a good job, or the product of mistrust of African-American business persons, both bases are unfair generalizations engendered by the belief that Whites will perform the services in a superior fashion.

Although deplorable, it should not be surprising that the generation raised amidst the racial injustices of the 1930s, 1940s, 1950s, and 1960s would feel the way they do. In fact, Kenneth and Mamie Clark's study of young Black children in 1947 yielded the ultimate conclusion that these young people overwhelmingly associated negativity with being Black, and positivity with being White. By using Black and White dolls, the Clarks asked the children to identify the doll that best represented certain positive statements, and the one that best represented certain negative statements. The children as a whole exhibited a preference for the White doll in connection with positive statements, and a preference for the Black doll in relation to negative statements. Moreover, children with lighter skin showed even greater tendencies towards the above associations, while children with darker skin exhibited the associations to a lesser degree. Regardless of the racial makeup of the child's school, segregated or desegregated, the connection of White to positive and Black to negative held true.

Dr. Richard Williams, a health educator, traces the inferiority felt by Blacks to the days of slavery where not only the physical charac-

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158 See, e.g., William C. Rhoden, Protests Push into Athletes' Sheltered Lives, EMERGE, May 1995, at 56. "In many ways, the Black athlete symbolizes the opulence of a community that primarily enriches the White power structure: hires White attorneys, visits White doctors, turns to White realtors to buy homes in White communities, sends children to White schools to be taught by White teachers." Id. At a Sub-regional Black Law Students Association meeting, a member of the Massachusetts Black Lawyer's Association spoke to us about upcoming events. At one point in his talk he went off on a tangent indicating that Blacks will go to a White attorney if they have a legal problem as if Black attorneys do not exist.


160 See id. at 285.

161 See id.

162 See id.

163 Id.
teristics of slaves were debased, but also anything that was different from White.\textsuperscript{164} Similarly, the overt oppression and devaluation of the Black culture by the White majority is undoubtedly the cause of the reactions that the children within the Clark study displayed toward the respective dolls.\textsuperscript{165} In present times, Dr. Williams finds that the stereotypes portrayed by the mass media and the educational system combine with the lack of African Americans in "positions of authority" to indoctrinate America's citizens at a young age that White is superior to Black.\textsuperscript{166}

IV. AFFIRMATIVE ACTION'S POTENTIAL FOR THE PROVISION OF GREATER EMPLOYMENT OPPORTUNITY AND ENHANCED SELF-ESTEEM AMONG THE AFRICAN-AMERICAN POPULATION

By the mid-1960s, it became increasingly clear that the mere outlawing of employment discrimination would not effectively promote widespread diversity in the United States labor market.\textsuperscript{167} To assist with this goal, a policy of affirmative action was instituted by both the Federal Government and a number of private corporations.\textsuperscript{168} Affirmative action is the label for programs which seek to include minority group members in employment positions where they have been historically underrepresented.\textsuperscript{169} The actual practices vary from merely recruiting minorities for educational or employment positions at one end of the spectrum, to reserving a specific number of openings for minority candidates at the other.\textsuperscript{170} Affirmative-action programs and practices have been employed to aid minority individuals competing against Whites who benefitted greatly from their marked advantage in access to educational and economic opportunities commensurate with

\textsuperscript{164}Williams, supra note 1, at 76.

\textsuperscript{165}See Farrell, supra note 159, at 284–85. In his Letter From Birmingham Jail, Rev. Martin Luther King, Jr. noted the "ominous clouds of inferiority beginning to form..." within the minds of young children denied access to public facilities within the segregated South. Martin Luther King, Jr., Letter From a Birmingham Jail, in Christian Century, June 12, 1963. Similarly, Melba Pattillo Beals, in her recount of the integration of Little Rock High School, states "Nobody presents you with a handbook when you're teething and says, 'Here's how you must behave as a second-class citizen.' Instead, the humiliating expectations and traditions of segregation creep over you, slowly stealing a teaspoonful of your self-esteem each day." Melba Pattillo Beals, Warriors Don't Cry 6 (1994).

\textsuperscript{166}Williams, supra note 1, at 76.

\textsuperscript{167}See 5 C.F.R. Pt. 720, App.

\textsuperscript{168}See Nan, supra note 97, at 555–56; Kennedy, supra note 154, at 1346; Exec. Order No. 11,246, 3 C.F.R. 399, reprinted in 42 U.S.C. § 2000e.

\textsuperscript{169}See Kennedy, supra note 146, at 1329.

\textsuperscript{170}See id.
their decades of occupying an institutionalized superior position in American society.\textsuperscript{171} Affirmative action seeks to narrow the gap initiated by America’s history of denying opportunities for advancement to the minority population.\textsuperscript{172}

A. Affirmative Action’s Positive Effect on the Minority Labor Force

One commentator, Randall Kennedy, depicts the outcome of the subordination of the Black population and the rigid exclusion of Blacks from educational and employment opportunities as an “explo­sive crisis.”\textsuperscript{173} The response to this crisis was affirmative action.\textsuperscript{174} In Kennedy’s view, affirmative action has been a great benefit to Blacks as a group.\textsuperscript{175} He believes that its programs have enabled Blacks to reach educational and occupational levels at a rate that would have been impossible in their absence.\textsuperscript{176} Furthermore, he believes the benefits of affirmative action are self-perpetuating; including the accumulation of valuable experience, the expansion of a professional class, the eradication (or at least a lessening) of debilitating stereotypes, and the inclusion of Black participants in the making of consequential decisions affecting Black interests.\textsuperscript{177} As discussed in Part II, the importance of these benefits is not limited to their positive effect on today’s population, but their potential to reverse the trends that have led to the crisis in the first place.\textsuperscript{178}

Carlos J. Nan, in his discussion of critical race theory, exhibits skepticism of the present rationales for affirmative action, and posits in the alternative that minorities have an “affirmative right” to the gains to be made through its policies.\textsuperscript{179} Affirmative-action, in his view, should be seen as an entitlement that serves as reparation for the economic deprivation of minorities throughout American history.\textsuperscript{180} Furthermore, he believes people of color deserve this remedy for the exploitation they have endured while enhancing America’s wealth.\textsuperscript{181} Expanding on Nan’s position, affirmative action should be classified

\begin{itemize}
  \item \textsuperscript{171} See id. at 1330–32.
  \item \textsuperscript{172} See Bell III, supra note 14, at 810.
  \item \textsuperscript{173} See Kennedy, supra note 146, at 1331.
  \item \textsuperscript{174} See id.
  \item \textsuperscript{175} Id. at 1328.
  \item \textsuperscript{176} Id.
  \item \textsuperscript{177} Id.
  \item \textsuperscript{178} See id.
  \item \textsuperscript{179} Nan, supra note 90, at 571–72.
  \item \textsuperscript{180} See id. at 572.
  \item \textsuperscript{181} See id.
\end{itemize}
as a right and more widely utilized simply because it is a requisite to placing minorities into the economic position they would hold had past discrimination never taken place.\textsuperscript{182} It is true that the clock cannot be turned back, and the oppression of the past cannot be eliminated from the history books, but the effects of this oppression can be ameliorated by further implementation of affirmative-action policies.\textsuperscript{183} Minorities of this country are entitled to this remedy.\textsuperscript{184}

B. Affirmative Action as a Means of Raising Black Self-Esteem in General, Regardless of the Minimal Injury that Certain Beneficiaries Claim

In a May 1995 article in the magazine \textit{Emerge}, it was reported that Black males and Black females comprise 2.3 and 2.2 percent of the vast numbers of executives, administrators, and managers in the \textit{private sector}, respectively.\textsuperscript{185} These staggering statistics indicate that young African Americans have very few successful role models, aside from sports and entertainment, that they can seek to emulate.\textsuperscript{186} These statistics also reinforce the feeling of Black inferiority and inability to achieve, which becomes a self-fulfilling prophecy.\textsuperscript{187}

1. The Potential, Through Affirmative Action, for Lifting the Self-Esteem of African Americans

American society has been described as one that measures well-being and worth "by what one does," and indeed a major component of self-fulfillment is attributable to one's advances in employment.\textsuperscript{188} Therefore, a feeling of satisfaction with one's position in society is greatly influenced by the type of employment and the level within the workplace to which one advances.\textsuperscript{189} In addition, the ability to achieve

\textsuperscript{182} See id.
\textsuperscript{183} See Kennedy, supra note 146, at 1328–30.
\textsuperscript{184} See Nan, supra note 90, at 572.
\textsuperscript{185} See \textit{Rise}, supra note 4, at 39.
\textsuperscript{188} See \textit{Bell III}, supra note 14, at 812.
\textsuperscript{189} See id.
or even hold the outlook that advancement within the labor market is plausible carries with it the potential to lift the spirits of those dissatisfied with their present condition.\textsuperscript{190} Conversely, the despair produced by unemployment or underemployment can only intensify a feeling of self-worthlessness that culminates in "apathy, lack of marketable skills, a poor outlook on life, a tendency to sublimate life's troubles in alcohol and drugs, or a tendency to resolve them with criminal behavior."\textsuperscript{191}

It is this potential for transformation and improvement held within employment opportunity that makes affirmative action a critical component of alleviating the self-hate and despair internalized by a large percentage of this country's Black population.\textsuperscript{192} Affirmative action is vital in this respect on two levels. First, it serves to employ individuals who directly benefit from an opportunity to prove themselves, which is accompanied by increased feelings of self-worth.\textsuperscript{193} On a larger scale, affirmative action has the potential to influence entire populations through the examples and the positive role models that it provides.\textsuperscript{194} It is essential that those who are not direct beneficiaries of affirmative action recognize the opportunities that are available for people just like them. These individuals must be provided material examples of achievement, not mere tokens, which will spur their enthusiasm and willingness to reach greater heights.

Furthermore, it is crucial that Blacks see their own people in positions associated with positivity.\textsuperscript{195} Such will reverse the norm that equates worth and value, whether it be physical characteristics or motivation to achieve, with being White.\textsuperscript{196} African Americans will be able to look upon their own achievements as evidence of the sacrifices, determination, and hard work that is truly indicative of the Black experience in American history.\textsuperscript{197}

\textsuperscript{190} See id.
\textsuperscript{191} See id. at 813.
\textsuperscript{192} See generally Kennedy, supra note 146.
\textsuperscript{193} See When the Doors Have Been Opened. . ., EMERGE, May 1995, at 46–47 [hereinafter When the Doors] (a collection of stories told by African Americans about how they were able to excel after affirmative action provided them the opportunity to do so).
\textsuperscript{194} See Kennedy, supra note 146, at 1329.
\textsuperscript{195} Black professionals depicted in newspaper and magazine articles have set great examples, but their numbers will have to increase if widespread recognition and appreciation for achievement is to be accomplished among the African-American population. See, e.g., When the Doors, supra note 193, at 46–47.
\textsuperscript{196} See id.
\textsuperscript{197} See id.
2. African Americans Who Have Spoken Out Against Affirmative Action

With such favorable aspects and potential for change, the concept of affirmative action would appear to be a policy that is universally accepted among African Americans and other minorities. But while there is widespread support for its programs, certain Black commentators have come forward to contend that affirmative action is not really benefiting Black America.\(^{198}\) It has even been posited that affirmative action stigmatizes those who it assists and therefore should be terminated.\(^{199}\)

Stephen Carter, one such opponent of affirmative action, argues that the provision of preferential treatment causes Blacks to compete against each other in order to determine who is the “best black” person for the position in question.\(^{200}\) According to Carter, this “best black” individual is by definition inferior to his White counterparts due to the lower standards against which his qualifications are measured.\(^{201}\) He is therefore not respected by his peers and feels stigmatized because he will always wonder whether he is really worthy of his credentials.\(^{202}\)

To remedy this situation, Carter calls for an affirmative-action “pyramid.”\(^{203}\) This model envisions very modest preferences for minorities early on, i.e. undergraduate admissions, which lessens in degree until the point where no partiality is offered individuals seeking employment.\(^{204}\) It is believed that Blacks will just have to work “twice as hard,” if necessary, and present themselves as candidates of such distinguished caliber that the laws of economics will dictate greater representation of minorities in formally all-White occupations.\(^{205}\)

As a foundation for the forgoing theories, Carter presents a smattering of examples geared toward convincing the reader that his asser-

\(^{198}\) See Carter, supra note 11, at 56–62; Woodson, supra note 11, at 42–43; Cose, supra note 139, at 130–33.

\(^{199}\) See Carter, supra note 11, at 56–62; Woodson, supra note 11, at 42–43.

\(^{200}\) Carter, supra note 11, at 54–58.

\(^{201}\) See id. at 57–58. In depicting his perception of White attitudes toward affirmative action, Carter states, “this is the way many of the white people who provide affirmative action programs and other goodies tend to think about them: there’s Category A for the smart folks, and Category B for the best blacks.” Id.

\(^{202}\) See id. at 59–60.

\(^{203}\) See id. at 88–90.

\(^{204}\) See id.

\(^{205}\) See id. at 58, 94–95.
tions are correct. Common among this "evidence" is the misconception that the derogatory views put forth by White individuals are attributable to the "best black" theory and not ordinary racism. For example, he relates a story about a Black financial services supervisor who is sent out to solve a customer's problem. Upon arrival, the White customer asks him where is the supervisor, apparently relaying the fact that he does not believe Blacks occupy such positions. Carter contends that this customer's attitude toward the Black supervisor results from the belief that he is only the "best black."

To claim that the customer's response is support for the "best black" theory overlooks the preconceived notion held by many that Blacks are not, or, simply, should not be in positions of power. Affirmative action provides the opportunity for more Blacks to reach upper levels of employment where individuals such as the "customer" have a chance to become accustomed to working with intelligent and competent individuals of color.

Another potential shortcoming of Carter's arguments is the peculiar manner in which he tailors his theories and solutions to fit his own personal situation. His own background serves as the basis for his solutions that will somehow alleviate the problems of the public at large. But to be blunt, they simply do not apply. The most blatant generalization arises from an example of how he was denied the opportunity to compete for a National Merit Scholarship because Black students generally scored lower on the qualifying exam, and therefore, competed for what was labeled the National Achievement Scholarship. It turned out that his test score was above those within his high school who eventually received the National Merit Scholar-

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206 See id. at 47-49.
207 See id. at 56-58. Randall Kennedy recognized the weakness in the argument that affirmative action stigmatizes Blacks, stating "...the pall cast by preferential treatment is feared to be pervasive, hovering over blacks who have attained positions without the aid of affirmative action as well as those who have been accorded preferential treatment. I do not doubt that affirmative action causes some stigmatizing effect. It is unrealistic to think, however, that affirmative action causes most white disparagement of the abilities of blacks." See Kennedy, supra note 154, at 1330-31.
208 See CARTER, supra note 11, at 57-58.
209 See id.
210 See id.
211 See Kennedy, supra note 146, at 1330-31.
212 See id. at 1328.
213 See CARTER, supra note 11, at 89.
214 See infra text accompanying note 223.
215 See CARTER, supra note 11, at 47-49.
ship. Based on this one example, Carter reaches the general conclusion that all minority set-asides denigrate Blacks.

Similarly, Carter’s pyramid analysis is constructed in a manner that provides preferential treatment at the times when he needed a boost in his own career, and abolishes these preferences when in his own past he no longer required assistance. Carter was assisted by affirmative action in gaining admission to Yale Law School; therefore minor assistance is permissible at the professional school level according to his scheme. But once he had applied for his present teaching position he believed that he was among the best applicants for the job. Therefore, he did not need affirmative action, and the assumption is that neither does anyone else. Examining the broader picture, most African Americans are not blessed with the background from which Carter hails. They do not receive the benefits of a suburban high school education, parents who both graduated from college, and a middle-class genealogy that goes “a good way back.” It is patently unfair for Carter to issue a ringing indictment of affirmative action based on his own situation and experiences that are less than representative.

Carter’s tailoring of his arguments to fit his own situation leads one to wonder whether his theory of stigmatization has universal applicability. By addressing the greater Black population, Carter could recognize the stigma that is altogether removed from affirmative action that African Americans experience on a daily basis. It is this disparagement of the Black culture and the association of negativity with the Black population, reinforced, in part, by the racial makeup of the American employment spectrum, that deserves our problem-solving energies. As affirmative action embodies the potential for diversifying upper-level American employment and breaking down the association of achievement and positivity with being White, its beneficial impact on the Black American self-esteem greatly overrides any stigma complained of by a select group of its beneficiaries.

\footnotesize

216 See id. at 48–49.
217 See id. at 50.
218 See id. at 89.
219 See id. at 11, 89.
220 See id. at 11.
221 See id. at 11, 89.
222 See supra text accompanying notes 109–15.
223 See id. at 73.
224 See id.; supra text accompany notes 109–15.
225 See supra text accompanying note 223.
226 See supra text accompanying notes 139–66.
Ellis Cose, described as a Black liberal, has also put forth misgivings concerning the continuation of affirmative action. He argues that affirmative action will not solve the problems that face Black Americans, and urges Blacks to have "faith" that Whites within the business world will one day reform and discontinue their racially motivated, discriminatory hiring practices. Cose's position on affirmative action is troubling because he provides a good measure of statistical and anecdotal support for the contention that business people act arbitrarily in deciding to not hire or promote Blacks. The rationales for such behavior span from racial bias to the aversion of the economic risk which attends the promotion of Blacks to visible positions of power.

But instead of using this evidence to support a need for affirmative action or, alternatively, presenting an hypothesis for changing such behavior, Cose argues that the solution is for employers to stop discriminating. However, Title VII's prohibition on such discrimination became effective in 1965. If in the thirty years since, employers have not been persuaded to act in a racially unbiased manner, it is difficult to determine from where this impetus will arise.

C. The Supreme Court's Latest Pronouncement Concerning Affirmative Action in Adarand Constructors, Inc. v. Pena

The petitioner in Adarand claimed that the Federal Government violated the equal protection component of the Fifth Amendment's Due Process Clause in providing financial incentives to general contractors for hiring subcontractors controlled by "socially and economically disadvantaged individuals," such individuals rebuttably presumed to be certain minorities and women. The Court failed to resolve this issue but rather vacated the court of appeals' dismissal on the grounds that strict scrutiny was the proper standard by which to judge the constitutionality of the Government's actions. Precedent directly es-

228 See Cose, supra note 139, at 131–32.
229 See id. at 122–27.
230 See id. at 127.
231 See id. at 131–32.
233 Adarand, 115 S.Ct. at 2101–2103 (the Court noted that the presumption of disadvantage for minorities and women was rebuttable by evidence presented by third parties).
234 Id. at 2101, 2113.
establishing the scrutiny to be applied to an affirmative-action program employed by the Federal Government notwithstanding, the majority opinion, authored by Justice O'Connor, utilized “abstract” principles as the basis for finding strict scrutiny applicable.

1. The Majority’s Reasoning in Adarand

The premise underlying and maintaining the Court’s analysis in Adarand is that equal protection under the Fifth and Fourteenth Amendments is indistinguishable. This conclusion is admittedly reached primarily through the use of language within cases construing government action “burdening groups that have suffered discrimination within our society.” In reading these decisions as favoring uniformity in Fourteenth and Fifth Amendment equal protection analysis, the Court, as noted by Justice Stevens’ dissent, “virtually ignores” the distinction recognized in the affirmative action context between state and Federal programs. Justice O’Connor, in fact, recognized this very distinction in a passage joined by two other members of the Court in Richmond v. J.A. Croson. In distinguishing the facts of Croson from those in Fullilove v. Klutznick, she “observed that the decision in Fullilove had been influenced by the fact that the set-aside program at issue was ‘congressionally mandated.’”

Although based on questionable, and perhaps even contradictory grounds, the finding that equal protection under the Fifth Amendment is identical to that under the Fourteenth Amendment was a necessity if the Court was to legitimize its holding. At the outset, finding that the analysis of state programs is applicable to programs instituted by the Federal Government essentially ends the inquiry. The Court had previously decided in Croson that all state and local governmental classifications based on race would be required to withstand

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235 See id. (Stevens, J., dissenting).
236 See id. at 2108–12.
237 See id. at 2108 (emphasis added).
238 Adarand, 115 S. Ct. at 2108, 2125. Justice O’Connor writes: “We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate . . . .” Id. Justice Stevens contends that the majority “provides not a word of direct explanation for its sudden and enormous departure from the reasoning in past cases.” Id. at 2125 (Stevens, J., dissenting).
240 Metro Broadcasting, 547 U.S. at 565 n.13 (emphasis in original). See also Croson, 488 U.S. at 490.
strict scrutiny.242 In concluding that the Constitution requires equal protection from the Federal Government commensurate to that required from state governments, it only follows that Federal classifications would have to withstand the same level of scrutiny. But because Metro Broadcasting had already decided this issue and concluded that benign, Federal classifications are subject to intermediate level scrutiny, the Court was forced to continue with its analysis.243

Taking a step back, it must be realized that Metro Broadcasting is the only decision to yield a majority opinion concerning a Federal affirmative-action program.244 Fullilove indeed upheld a Federal affirmative-action program but no consensus on an applicable standard of review was reached.245 Therefore, the Adarand treatment of equal protection analysis as indistinguishable under state and Federal law allowed for the application of rationales found within decisions analyzing state affirmative-action programs.246 As such, a decision like Croson,247 and language from the plurality opinion in Wygant v. Jackson Board of Ed.,248 could be, and were, combined with carefully selected language in opposition to racial classifications in University of California v. Bakke and Fullilove v. Klutznick, two decisions where no majority opinion was agreed upon, to conclude that the Court "had established three general propositions with respect to governmental racial classifications;" each, strangely enough, found to be contravened by Metro Broadcasting.249

Skepticism of racial classifications, consistency in the standard applied regardless of the aggrieved party's race, and congruence between Fifth and Fourteenth Amendment equal protection analysis are the three propositions the Court found should govern its analysis.250 Upon establishing these principles, the Court employed congruence, a mere restatement of its overall conclusion concerning the uniformity between Federal and state equal protection, in its attack of Metro Broadcasting, finding objectionable the application of intermediate scrutiny to "benign" Federal classifications while simultaneously requir-
ing strict scrutiny of state classifications through Croson.\textsuperscript{251} Skepticism and consistency, although likewise considered breached by Metro Broadcasting, barely receive mention.\textsuperscript{252}

2. \textit{Adarand}'s Implications for Future Affirmative-Action Litigation

Justice Ginsburg's dissent in \textit{Adarand} attempts to discern a common ground between the Court's majority and its dissenters.\textsuperscript{253} In particular, she posits that strict scrutiny will mandate differing results depending on the type of racial classification at issue.\textsuperscript{254} Strict scrutiny, in her opinion, will not tolerate racial classifications which are burdensome to disadvantaged groups.\textsuperscript{255} However, Justice Ginsburg optimistically keys in on Justice O'Connor's assertion that strict scrutiny will not be "strict in theory, but fatal in fact" to conclude that legitimate, perhaps, "benign" governmental uses of race will be upheld.\textsuperscript{256} Although Justice O'Connor does recognize that government can act in response to the "lingering effects of racial discrimination," it appears that the majority's idea of what action is permissible, namely that which narrowly addresses "pervasive, systematic, and obstinate discriminatory conduct," is a bit more restrictive than what Justice Ginsburg contemplates.\textsuperscript{257} Moreover, if the Court in future decisions does not plan to apply strict scrutiny in a very limiting fashion, one would have to question why it went to such great lengths to overturn \textit{Metro Broadcasting}.\textsuperscript{258}

Nevertheless, the discussion in Parts II and III of this Note outline the devastating results of this nation's systematic and institutionalized racial oppression and discrimination. The distressing economic condi-

\textsuperscript{251} See id. The Court also found that \textit{Metro Broadcasting}'s application of intermediate scrutiny to benign racial classifications "turned its back on" the reasoning behind Croson's application of strict scrutiny. \textit{Id.} According to Croson, a searching judicial examination of race-based classifications ensures that the motives behind a governmental racial classification are appropriate. \textit{Id.} Because, according to the \textit{Adarand} majority, it may be less than clear that an affirmative-action provision is in fact benign, such enactments should also undergo exacting scrutiny. \textit{See Adarand, 115 S. Ct. at 2112.}

\textsuperscript{252} See \textit{id.}

\textsuperscript{253} \textit{Id.} at 2134 (Ginsburg, J., dissenting).

\textsuperscript{254} See \textit{id.} at 2135–36.

\textsuperscript{255} \textit{Id.}

\textsuperscript{256} See \textit{Adarand, 115 S. Ct. at 2135–36.}

\textsuperscript{257} See \textit{id.} at 2117, 2136. Consider that the "benign" classification in \textit{Metro Broadcasting} included legislation in furtherance of diversity within a certain field. 497 U.S. at 547. It is not likely that Justice O'Connor, nor the rest of the majority, would find such reasoning underlying a racial classification to be compelling. \textit{See id. at 602 (O'Connor, J., dissenting.).}

\textsuperscript{258} See \textit{supra} text accompanying notes 236–52.
tion and feelings of diminished self-worth among Black Americans should definitely be included in what Justice O'Connor terms the "lingering effects of racial discrimination." And indeed the Government should "not [be] disqualified from acting in response to . . ." them.

V. Conclusion

Affirmative action is a difficult subject to discuss among those with differing opinions on the subject. We at Boston College Law School encountered this challenge at one of our forums coordinated as part of our Diversity Month (March) activities. The comments offered ranged from the indifferent, to the passionate in favor of, to those deeply rooted in opposition.

Minority students told of the obstacles they faced as a result of their skin color and how affirmative action seeks to include minorities in fields, such as law, in which they have been historically excluded. In turn, some White students told of their own personal struggles and the hard work it took for them to reach law school. It is disheartening to think that those opposed to affirmative action may not realize that the present state of Black America is linked directly to America's history of discrimination and oppressive practices. Furthermore, it is easily overlooked by opponents of affirmative action that its programs seek to uplift and improve the plight of minorities who have been disadvantaged by this country's past. Nonetheless, the entire discussion displayed the great divide between the two factions that could not be closed through one afternoon's activities.

Considering the two distinct perspectives that those in favor of and those opposed to affirmative action brought with them, formed by their life experiences, it seemed very odd to hear opponents of affirmative action arguing that it is injurious to its beneficiaries. They echoed this statement with ease, but were they arguing it based on their own experiences, from statistics, or because it supports their ultimate conclusion and can be bolstered by the African-American commentators who have also expressed this sentiment? For those in the latter category, this Note is not likely to have an impact.

But for those who are on the margins, for those who have attempted intelligent inquiries into the Black experience, and for Afri-

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259 See Adarand, 115 S. Ct. at 2117.
260 See id.
can Americans who take on the struggle everyday, I sincerely hope that this Note has offered a somewhat different perspective on the affirmative-action debate. A perspective that will rekindle the minds of those who will eventually formulate a comprehensive plan, with affirmative action as a mere component, to combat the true stigma and socioeconomic deprivation that pervades the African-American population.