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Involving the

FEDERAL RULES OF CIVIL PROCEDURE

and

FEDERAL RULES OF CRIMINAL PROCEDURE

NOTICE

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CHIEF JUDGE S.W. ROBINSON: If we may come to order. At this point, I will turn the gavel over to Judge Scalia, Chairperson of the Program Committee.

JUDGE SCALIA: Thank you, Chief Judge Robinson. My role in this panel is merely to introduce the participants. The subject as announced is Affirmative Action. The discussion leader will be Theodore J. St. Antoine, Professor of Law at the University of Michigan Law School, currently visiting at George Washington Law School. The panelists will be Lawrence H. Tribe, title of Professor of Constitutional Law at Harvard Law School; the Honorable William Bradford Reynolds, Assistant Attorney General for the Civil Rights Division, United States Department of Justice, Elaine R. Jones, Associate Counsel, Washington Office, NAACP Legal Defense and Educational Fund and Glenn Loury, Professor of Political Economy at JFK School of Government at Harvard currently on leave at the Institute for Advanced Studies at Princeton.

I turn the floor over to Professor St. Antoine.

PROFESSOR ST. ANTOINE: May I make a preliminary announcement. This should be most provocative and intriguing session with a number of quite contrasting views being expressed. If at one point of the proceedings, Professor Loury stomps off the platform, I do want you to know in advance that is simply because we're running late and he has a plane to catch.

My role is to provide a little sketch and sensitivity of the problem of Affirmative Action and as discussion leader to exercise my prerogative to lay down a few guidelines to the combatants that I trust they will follow. Knowing what unruly fellows they are, I have no great trust that my rules will be followed to the letter.

Affirmative Action, as I'm going to define it for today's discussion purposes doesn't yield what I think nearly everyone accepts. The desirability of making sure the previously disadvantaged groups are given a great deal of publicity about the opportunities available in an open society, that they are actively recruited for positions or for grants and the like but rather the fighting issue that has sort of divided good people in this country deals with the kind of Affirmative Action which actually involves the decisioned conferred benefits of various kinds.

To provide employment opportunities, special admissions to educational institutions, Federal grants for particular types of programs on the explicit basis of race or sex. That's the type of Affirmative Action that seems to me we are going to be dealing with today.

I practiced law roughly for ten years in the District of Columbia and I think one of my proudest moments was when I had the opportunity to play a very small role in securing the passage of the Civil Rights Act of 1964 and more specifically Title 7 Equal Employment Opportunity provision of that act.

I at least was a very naive young man in 1964 and my hunch is there were a great many naive people on Capitol Hill when the Civil Rights Act of 1964 was being adopted. The banner, the battlecry of that time was

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colorblindness, you could hear it throughout the legislative debates. The notion if we simply opened up opportunity and education in employment, in other types of Government programs and accommodations and the like that we would wipe out the problems of race and sex discrimination of the past.

We were simply wrong and the statistics are there to look at a very general picture, the fact that for a decade and a half and more, after the Civil Rights Act was adopted, the black family income of the United States is still less than 60% of the white family income. The black unemployment is still twice as much as white unemployment. That women's wages are still below the 60% mark in terms of men's wages.

In a more personal perspective, my own law school, University of Michigan which graduated the second known black person in the United States from the University Law School after the Civil War, when I returned to teach there in 1965, despite the fact it had numerous distinguished black graduates through the years, including some in this very room, that as of 1965 there was not a single black student at the University of Michigan Law School.

Something more was obviously needed and thus came the forces generating Affirmative Action preferential treatment in educational admissions, preferential treatment in job opportunities, preferential treatment in Government grants and the like and that then created what seems to me to be this terribly divisive and sensitive issue of the confrontation of rights between competing persons seeking particular benefits.

I'm going to pose three issues for our speakers today that are all going to be dealing with quite different perspectives but just to see if I can maintain some continuity, I'm going to raise three issues for their consideration.

First, when one really gets down to it, is the problem of Affirmative Action essentially the clash between individual justice, the vaunted American tradition, every person is treated on his or her own individual merits. Is the essential problem of Affirmative Action the conflict between that type of individual justice and the notion of group justice.

The notion that some persons have been so demeaned, so discriminated against in the past without regard to their individual concerns but rather simply because of their membership in a particular group, either racial group or a group based on sex. Is that the fundamental problem that we are confronting both morally and legally or is there something more subtle and profound beyond this simple notion that it's a matter of group rights vs individual rights.

Secondly, for the lawyers in the group, I'd like to raise the question is there something different about the constitutional prohibitions and the statutory prohibitions on discrimination in race and sex that effects the question of Affirmative Action. I guess from my own nonconstitutional lawyer's perspective I would have thought the equal protection clause of the 14th amendment and its equivalent concept of due process clause,

equal protection would be a rather expansive and flexible instrument in dealing with problems of Affirmative Action.

The mandating, for example of Title 7 and other titles of the Civil Rights Act, there shall be no discrimination because of race or sex would, if anything be a stricter and more tighter constraint upon any type of preferential treatment and yet as I look at the Courts, especially the Supreme Court, it would almost seem that they have been more concerned with preventing Governmental preferential treatment than preventing voluntary or affirmative voluntary private affirmative action programs.

And finally, the last issue that I would suggest would be worth considering, is there some significant difference between Affirmative Action on the basis of race and Affirmative Action on the basis of sex. I need not tell you that both race and sex have been divisive in our society and there has been much discrimination on those two grounds and yet surely as one looks at the different groups, blacks as a body, as women as a group, it seems to me quite clear that there are very different sides of constraints and associations that have been involved in those two types of discrimination.

Is there similarly some difference in the way of Affirmative Action should be viewed as to those two groups. Obviously our parties have to deal with political and economic considerations as well and I'm sure they will do so this morning.

I hope those three issues will be viewed among others. Our first speaker is going to be Professor Lawrence Tribe who is going to concentrate on providing a historical background and legal over-view of the problems of Affirmative Action. Professor Tribe.

PROFESSOR L.H. TRIBE: Thank you very much and I'm delighted to be here. My purpose this morning is not to recapitulate a body of doctrine whose major trajectory after all has yet to move across the constitutional firmament, or to predict the path that that projectory will take when the Supreme Court decides in all likelihood by late June or early July the teacher lay-off and fire fighter promotion cases from the Sixth Circuit that are now pending there and the Union Membership case from the Second Circuit that is now pending.

In this realm, whoever lives by the crystal ball must learn to eat ground glass and I think I would rather have a normal meal in the Virginia Room tonight. Besides, I think we will all know soon enough what the Supreme Court says and holds in those cases. What the opinions may or may not reveal clearly enough is why.

With that in mind, my focus in the legal over-view that I have been asked to provide will be on the Affirmative Action controversy, not so much as an artifact, a punctuation in our legal history as a window into the constitutional and judicial philosophy, the philosophy of constitutional meaning and of judicial role held by those who deem race specific preferences, for my thoughts to be in balance, subject only to a narrow exception for judicial relief to individual victims of proven discrimination.

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Just for shorthand, I'll call these the race neutralists and my question is why do the race neutralists set themselves against the view expressed by others, by Justice Blackmun concurring in the *Bakke* case and I quote him, "To get beyond racism, we must take race into account and to treat some persons equally" and I think he means that as individuals, "to treat some persons equally we must first treat them differently."

So my question is what constitutional sources can the race neutralists invoke for their suggestion there should be strict judicial scrutiny of affirmative action thus conceived. Of course there is first the notion that all racial classifications are inherently suspect. That broad notion itself I should remind everyone here does have a somewhat prophetic source. It was given its first explicit articulation in 1944 by the United States Supreme Court in *Carmotso v. The United States* and even in *Carmotso* the Court held the point of strict judicial scrutiny for racial classification is to detect whether they reflect pressing public necessity or in the Court's words, merely racial antagonism.

I suppose that we can all concede that racial antagonism is hardly the motive of minority set-asides but of course *Carmotso* is not the end of the search for a constitutional source of principle here.

Seeking a sounder source, the race neutralists often refer to the first Justice Harlan dissent in *Plessy v. Ferguson.* Indeed the nub of Solicitor General Fried's argument in the teacher seniority lay-off case, *Wygant v. Jackson,* leans heavily on *Plessy* and perhaps it's the powerful race, it says and I quote, "Whether a Plessy is ejected from a railroad coach because he is one-eighth black or laid off because he is seven-eighths white, the concrete wrong to him is much the same."

Now, to sum that up, it might seem that the cases differ in terms of integration, of equal worth, a perpetuation of slavery, a reenforcement of political exclusion but that might be too simple for it is true that as the Solicitor General points out in his reference to the obligatory quotation from the other Justice Harlan, our constitution is color blind.

Now, I don't know how many of you have gone back and read that but I did again recently and let me read you the four sentences that precede the famous line. "The white race deems itself to be the dominant race in this country," it says, the first Justice Harlan "and so it is in prestige, and achievements in education and wealth and in power, so I doubt not it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty" but he goes on. "In view of the constitution, in the eye of the law there is in this country no superior dominant ruling class of citizens. There is no caste here." Then comes the line "Our constitution is color blind."

So even if this late 19th century proponent of white dominance to whom of course ripping him out of historical context would be unfair, the color blind ideal was only shorthand for the concept that the 14th amendment prevents our law from enshrining and perpetuating white supremacy.

To say this voice is shared by all race specific minority set-asides strike me as a bit far-fetched. Is it really the same to lay off a white Plessy to make room for a black worker as it is to eject the black Plessy from a railroad coach to maintain white supremacy. The affirmative reply to that question by the race neutralists often invokes the reference to the original intent of the 14th amendment but that argument faces an enormous stumbling block and I do not refer here to the Freedman's Bureau of which it has been pointed out, the Bureau was really largely aimed to deal with the problems of former slaves.

I'm referring to a more fundamental point. We know with as much certainty as matters of this sort ever permit that the framers of the 14th amendment did not think equal protection of the law made all racial distinctions unconstitutional. They did not, for example, intend to outlaw racially segregated public schools. The research of Alexander Bickles and others made it quite plain.

It involves quite a stretch that all race specific distinctions, even those designed to facilitate meaningful equality, are presumptively unconstitutional. The necessary response it seems to me and a powerful one of the race neutralists is the Supreme Court of the United States was right in "*Brown v. Board of Education.*" It saw the original intent more clearly in 1954 than its predecessors had in 1896 when *Plessy* was decided.

And *Brown*, the race neutralists continue, *Brown* rightly held that all official distinctions based on race are presumptively unconstitutional but did it? That it seems to me is only one and rather the more sweeping and activist at least of two equally plus I believe reading of *Brown v. Board of Education.*

Let me identify them as *Brown-A* and *Brown-B*. *Brown-A* says that a century after the Civil War, all race distinctions must now be banned as inherently unequal. That may not have been the original understanding but that ought to be the law now. In light of modern and more enlightened values, Courts must create, even if the framers of the Fourteenth Amendment did not themselves intend, a general right never to be disadvantaged by law on account of one's race.

The fact that the 14th amendment authors would not have endorsed such a right is not decisive. That's *Brown-A*. Now let me suggest to you a somewhat more modest interpretation of *Brown*. I call it *Brown-B*. *Brown-B* says that the 14th amendment command of equal protection of the law was always intended at its most basic level to ban the use of law to subjugate black people.

We now see the Court says in 1954 as the 1896 Court did not, that segregation by law in public schools and other public facilities, despite its appearance of symmetry, in fact subjugates blacks because its meaning is unmistakably that of white supremacy. Therefore, racial segregation creates by law a denial of equal protection.

Now, on that virgin ground the Court creates no new right to color blind treatment of a sort the framers would not have endorsed. It rather says the broadest original intent not to permit subjugating blacks

by law requires not in light of a change of law but in light of today's more precise perceptions of the social meaning of segregation requires that certain forms of racial segregation be ended.

Now, on the face of it, *Brown-B* seems a rather more modest and less radical interpretation than *Brown-A*, particularly when a nation, state or local representative body adopts an affirmative action program consistent with *Brown-B*, striking it down as a violation of the *Brown-A*, at least to me seems a bit hard to square with judicial deference to political majorities, absent an historical clear prohibition.

The difficulty doesn't get easier when one as policy or instrument, argues how to reenforce racial stereotype in our society for the future if we do not adopt a color blind policy now. That is I would suppose that ordinarily if Government action violate no constitutional command, one would treat such consequently a piece of future effects as appropriately effects the political branches.

What is the constitutional command that race, specific affirmative action is thought by these activities to violate. I take it there is a possible principle and it would go something like this. Law and government must never restrict an innocent individual's liberty, using the liberty very broadly to encompass past job opportunity, a chance to go to law school. Law in government must never restrict an individual's liberty because of some immutable characteristic, like race or sex, even when such a restriction is justified by a desire to protect others who are equally innocent.

The innocent may not be restricted because of their immutable characteristics to protect other innocents. Let me make a rather provocative observation. A believer in that sweeping constitutional principle, I submit should find easy to defend. Since abortion restrictions limit the liberty, broadly defined of women because of an inherent characteristic, their unique capacity to remain pregnant, in order to protect giving the benefit of the doubt to those states that would restrict abortion to protect innocent unborns, now even those of us who like me regard that as problematic but ultimately defensible, would shrink from offering that general principle to defend it.

That is the general principle that law may never restrict innocent persons like the whites who don't meet the need for more black law for medical graduates may never restrict the liberty of innocent persons in order to advance the interests of other equally innocent persons. It seems to me that that broad principle however neutral, is unacceptably sweeping so I end with a genuine puzzle.

It seems to me that it is puzzling that the race neutralists do not in fact put themselves forward in other respects as constitutional radicals. I take them at their word when they purport to respect the historical intentions of the framers insofar as Noland. I take them at their word when they regard basic constitutional norms as alterable only by amendment, not by judicial improvisation. I think they mean when they urge

concerns to political majorities when a constitutional prohibition is at best arguable, I think they are deeply and profoundly serious.

Sometimes, in my view mistaken, when they resist judicial fashioning despite the ninth amendment of rights not enumerated in the constitution but given these positions, what principle is it that one can extract from the 14th amendment that justifies the extraordinary judicial activism that the race neutralist would invoke.

I find myself genuinely puzzled. Thank you. (applause)

PROFESSOR ST. ANTOINE: Thank you. You just heard the provocative views of a scholar who is often characterized as the most distinguished constitutional expert of his generation and now you have reason to know why. We're next going to hear the views of the principal administration spokesperson in the field of civil rights. William Bradford Reynolds is the Assistant Attorney General in charge of the Division of Civil Rights and he will be speaking for us.

This is a title that I imposed upon him and I'm not quite sure whether he ever fully succumbed but this he can tell us himself. I have described it as administration views and alternative approaches to affirmative action. William Bradford Reynolds.

MR. W.B. REYNOLDS: Thank you. It is an honor to be here and have an opportunity to participate on this distinguished panel of the Judicial Columbia Circuit. As you have been told, to me has fallen the welcome assignment of addressing the topic of discussion, Affirmative Action, from the point of view of this Administration, a task with which I admittedly have more than a passing acquaintance.

Let me start by stating what should be obvious to all in this room. There is no disagreement whatsoever among the panelists before you as to the end we seek to achieve. The desired objective, the ultimate goal in all our sights, is to remove from society, once and for all, the all-too-persistent blight of discrimination, to bring to a screeching and everlasting halt those practices that are tolerant of uneven treatment of individuals on the basis of racial, gender and ethnic differences.

The means best calculated to attain that elusive end are not nearly so clear-cut, which is what brings us together this morning. Using employment discrimination as the model for discussion, it plainly is not enough to declare the offending conduct unlawful and order it stopped. To be sure, a permanent injunction of the discriminatory practices is an essential part of any remedy. So, too, is an award of "make-whole" relief for each employee or potential employee who has been wronged by the employer's discrimination. But in addition, this Administration and its predecessors have insisted that specific affirmative steps must be taken by the employer to insure that the doors to job opportunities closed to so many for so long are opened wide to all applicants, whatever their race, color, sex, religion or national origin.

The debate that has preoccupied this area of the law for the past five years has centered essentially on how far the Government properly can go in its insistence on affirmative action. The Administration has hewed

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to the traditional view—that is, the one originally held by Presidents Kennedy and Johnson, by Senator Hubert Humphrey and his co-sponsors of the Civil Rights Act of 1964, and by the leaders of the civil rights movement throughout the 1960's. Affirmative action as understood by those great champions of civil rights was, as one would expect, faithful to the principle of nondiscrimination. It embraced affirmative recruitment, outreach and training programs designed to increase the pool of qualified job applicants who were to compete for available openings on performance and merit. No advantage or disadvantage; and national origin curried no favor.

This is not to say that such affirmative programs were invariably wholly oblivious to race, sex, or national origin. Obviously, where an employer's recruitment had relied for years on the "old boy network," for example, to the exclusion of available minorities and women in the relevant workforce, enhanced recruitment efforts designed to reach beyond the regular "stopping places" and into previously ignored communities of blacks and females—while necessarily race-conscious in order to "fill out" the employer's recruitment activities so that they reached all, not just a select few—were perfectly acceptable affirmative action. But there was no tolerance for preferential treatment in hiring, promotion, or other selection decisions because of gender, ethnic background or skin color.

This traditional understanding of affirmative action held sway through the 1960's. But in the early 1970's, the colorblind ideal that had been the civil rights rallying cry for over a decade began to give ground to a new demand. Instead of race neutrality, "racial balance" and "racial preference" were increasingly advanced as necessary means of overcoming racial bias. The quest for equal opportunity evolved, in many quarters, into an insistence upon equal results.

Those in the forefront of this movement embraced numerical parity, or at least numerical proportionality, as the test of nondiscrimination. Regulation and allocation by race, they maintained, are not wrong per se. Rather, their validity depends upon who is being regulated, on what is being allocated, and on the purpose of the arrangement. If a racial preference will achieve the desired statistical result, its discriminatory feature can be tolerated, we are told, as an unfortunate but necessary consequence of remedying the effects of past discrimination, Professor Tribe alluded to using race "in order to get beyond racism."

Yet, that suggestion is, in truth, no less oxymoronic than one that calls for using alcohol to get beyond alcoholism. There is nothing affirmative in counting by race or sex in an effort to achieve some preconceived balance or proportionality in the workforce. To the contrary, the use of numerical standards—call them what you will: quotas, goals-and-timetables, or set-asides—is distinctly negative. Rather than serving to throw open the doors of opportunity for all Americans regardless of their immutable and unimportant characteristics, such policies limit opportunity to a preferred few precisely because of their immutable and unimportant characteristics. Those denied on account of skin color, gender or

national origin have suffered discrimination no less offensive because of its so-called "benevolent" character than that suffered by Homer Adolph Plessy almost a century ago when his skin color (one-eighth "African blood") similarly was used to deny him access to a seat in the "white only" railroad car—thereby ushering in over a half century of the pernicious "separate but equal" doctrine.

It is that legacy which we desperately want to put behind us forever. And yet, while striving to distance ourselves from the evils of the past, there are those who insist upon reaching for the same evil practices as the only viable remedial response. It seems of no moment to them that to fight discrimination with discrimination is necessarily to compromise the principle of nondiscrimination. Selecting by race, gender or national origin encourages us to stereotype our fellow human beings. It invites us to look upon people as possessors of certain characteristics, not as the unique individuals they are; to view their advancements not as hard-won achievements, but as conferred benefits. It submerges the vitality of personality under the deadening prejudments of race, sex or national origin.

Those denied employment or advancement on any such basis suffer the indignity of being turned away, not on account of character, but on account of the most irrelevant of characteristics. Their individuality is crushed beneath the oppressive weight of group entitlements. Whether it be white firefighters in Memphis, Tennessee (laid off to protect newly hired blacks), Hispanic and female applicants for the police force in the City of New Orleans (totally ignored in the City's one-for-one black/white hiring quota for police officers), Asian-American students seeking entrance to certain Ivy League colleges (but denied admission because the universities had already exceeded their minority quotas), or blacks looking desperately for housing in New York City (but unable to occupy available units at the Starrett City complex due to the imposition of a quota masquerading under the euphemism of "integration maintenance")—whether it be any or all of these individuals, their exclusions in order to achieve a more exact racial, ethnic or gender balance is discrimination—plain and simple. And, in such circumstances the same degree of moral outrage should register whether the engines of discrimination (that is, the quotas, numerical goals, set-asides, and the like) operate in forward gear or are thrown into reverse.

Nor can much be said for such a process by those who are the chosen beneficiaries. There is little self-esteem to be derived from being selected solely to satisfy a numerical goal and meet a prescribed timetable. Professor Thomas Sowell, the noted black economist, has made this point quite well, writing:

"What all the arguments and campaigns for quotas are really saying, loud and clear, is that black people just don't have it, and that they will have to be given something. The devastating impact of this message on black people will outweigh any few extra jobs that may result from this strategy."

Graphic evidence of this was seen just recently in Miami where four Hispanic firefighters turned down preferential promotions that would have singled them out for special treatment as minorities, not rewarded them for a job well done. They understood full well that any action denying individuals the ability or truly knowing that their accomplishments were won on merit cannot be affirmative.

The policy pursued by this Administration has therefore been, and will continue to be, the policy of non-discrimination and let me expand on the quote that Professor Tribe referred to in the brief of the Solicitor General in the Wygant brief. The lines directly before and a few lines after the part that Professor Tribe quoted.

It stated, "The Equal Protection Clause is not merely a protection against the most flagrant wrongs. It embodies a broad principle or equality to all racial and ethnic classifications.

"Law granting preferences to members of enumerated minority groups are far from benign in practical effect. Such preferences inevitably harm innocent individuals. Whether a Homer Plessy is ejected from a railroad coach because he is one-eighth black or laid-off because he is seven-eighths white, the concrete wrong to him is much the same. Whether a Marco Defunis is excluded from law school because he is Jewish or because he is not Black, American Indian, Oriental, or of Spanish descendancy, his personal aspirations are equally thwarted.

"Preference also perpetuate and foster racial and ethnic divisions. And in a pluralistic and democratic society such as ours, when preferences are granted to some groups, there is inevitable pressure to benefit every group that can mount a claim of past discrimination."

It is with this understanding that the Reagan Justice Department has stood firm in the fight against quotas, numerical goals, set asides, and similar arrangements that count by race, sex, religion, or ethnic origin. They offend law and mock human dignity; they affirm nothing while negating the most fundamental of constitutional principles: equal opportunity for all.

We are all, each of us, a minority in this country: a minority of one. Our rights derive from the uniquely American belief in the primacy of the individual. And in no instance should an individual's rights rise any higher or fall any lower than the rights of others because of race, gender or national origin. Whatever group membership one inherits, it carries with it no entitlement to preferential treatment over those not similarly endowed with the same immutable characteristic. Any compromise of this principle is no more tolerable when employed remedially in the name of "affirmative action," to bestow a gratuitous advantage on members of a particular group, than when it is used for the most invidious of reasons to disadvantage persons or groups because of their race, gender, or skin color.

This Administration's opposition to such discriminatory action is therefore resolute and will remain unyielding until that day arrives, which is a part of all our dreams, when we can boast with pride that no person in

the country is being held back, nor any advanced ahead, except according to the dictates of his or her individual talent, industry, character and worth.

Thank you.

PROFESSOR ST. ANTOINE: Thank you very much, Mr. Reynolds. We now had two fine opposing statements from the lofty perch of the academic world and from government with its dealings with the highest court in the land although, as discussion leader allegedly of this program, I cannot help but note with some chagrin under the tradition of this affair, neither speaker has paid the least attention to the three issues proposed by me.

We are now going to move Elaine Jones who has spent all of her professional career working for the NAACP, the famous Legal Defense Fund either in New York or Washington at all levels and also with the extra effort on the side, for several major bills in Congress. It gives me great pleasure to give you Elaine Jones. Elaine is going to speak from the view of the Civil Rights movement.

MS. E.R. JONES: I am not the Civil Rights movement but I do have some pretty strong views on this subject as you would imagine.

Every time I hear Brad, it is my fervent wish that he had been a founding father because with his notion of egalitarianism and fundamental fairness, we wouldn't have this notion of slavery to creep into our original constitution because I guess Brad, if you had been a founding father, the Declaration of Independence would have been consonant in the original document, is that right?

Where do I begin with this? I think first, the point that I was making was that we know within the Declaration of Independence the cherished principle is there. All men are created equal. All men are created equal and we also know that the original document expressly countenanced slavery. Now, you know, a slave was carried as three-fifths of a person, a person for purposes of apportioning representation among states.

Slavery, the original document insured the immigration and importation of slaves and made it legal and decent until the year 1808. Also, it provided that an escaped slave must be returned on the claim of the owner. As Professor John Hope Franklin so eloquently characterized it, he said the founding fathers in this nation was really built on conflict. We were built on the inherent conflict between the principle of the Declaration of Independence and the enshrinement of slavery in our constitution. That Americans proudly accepted the challenge and responsibility of their new political freedom by establishing the machinery and safeguards that insured the continued enslavement of blacks.

The Civil Rights effort was really begun with some seriousness in the sixties, mid sixties and served all of us well by advancing the country toward achieving the goal of equality. However, as Thurgood Marshall wrote in his concurring opinion and partial dissent in Buxton, and I quote, "the position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment measured by

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any bench-mark of comfort or achievement. Meaningful equality remains a distant dream for the Negro. In light of the sorry history of discrimination, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to insure that America will forever remain a divided society."

The Civil Rights Act of 1964 of which Title 7 is part, critical part from which we find many of our principles that support Affirmative Action in employment and training program and hiring and promotion, was the first comprehensive federal legislation ever to address the problem of discrimination against blacks in modern American society.

Now, we cannot overlook a special legacy of 244 years of slavery. That's something to drag with you into the twentieth century. Now from 1619 until the Emancipation Proclamation in 1863, government turned its back and in 1976 with haste and then it was not benign neglect. All of the laws were written in the place and all those, the 13th, 14th amendment had been passed in the late eighteen sixties, early eighteen seventy.

The states ignored it and began to enact their own code of laws as if those amendments did not exist. So you have a period there that although there was the Emancipation Proclamation and although there was a Civil War which ended in 1865, you don't have us as a nation addressing this problem of race.

You have everything we were doing, you know, was going toward enshrining in practice the legal status of slavery which had been abolished but we were still enshrining it in practice. And 1864—in 1964 when this nation got busy and passed this Civil Rights Act of 1964 and you must remember this. Anything that comes through Congress is as a result of a compromise and Title 7 of the 1964 Act is no exception.

Now, that Act in 1964 was passed during a period of enormous domestic turmoil. And eight days before sending that bill to Congress, President Kennedy addressed the nation on national TV audience and he said it is better to settle these matters in the courts rather than on the streets and we need a new law—new laws are needed at every level. Title 7 and the entire Civil Rights Act were passed to avert a national crisis to end the odious legacy of slavery and racial pressure and to resolve the conflict in the courts and not in the street.

The Act was a remedial Act. It was an attempt to change the conduct of America on a grand scale. There were—the Act was structured in two important parts. The remedial provision, there was a make whole provision which is in terms of your identifiable victims and individual class members who are harmed, to make them whole but for the discrimination they had suffered; put them in the place they would have been but there was also a second remedial provision in Title 7 which was clearly as important if not more important.

That was the prospective relief; it was to make a systemic change in the way we did business in this society with regard to blacks in the process, in the economic mainstream and employment. Now, the Court

has made it clear that Congress directed the thrust of Title 7 in the '64 Act to the consequences of the employment practices and not simply through to its motivation.

Now, let's get a few things straight about affirmative action. It has nothing to do with someone getting a job that they're not qualified to handle. It has nothing to do with pulling in someone off the street, bumping whites out of incumbent positions and wrongfully elevating blacks ahead of them. Now, we need to understand that.

When we speak of affirmative action embodied in this concept where the notion that merit is involved, these are people who simply need the opportunity to perform the job or perform the task. They meet the criteria and the standards and they, if given the chance, they have every opportunity of being successful.

Now look, when I tell you that the 1964 Act was the result of compromise, the make whole provision for the individual versus prospective relief to make systemic changes in the society, let's look at the Department of Justice's position and look at the limitations of the Act and how it impacts on their position.

There was an underlying assumption in the Department's position that Title 7 is designed to give full and immediate relief to individual victims and if adopted, their position would preclude the application of effective remedy to long standing practices of systemic discrimination. Yet as presently drafted and construed, Title 7 does not provide adequate relief.

For example, the notion of bumping. Early on, the Court effected a substantial compromise within Title 7. If a black worker was discriminatorily denied a job for which he was qualified, the Court did not immediately order that victim be placed on the job. The Court ordered that the victim must wait for a vacancy to occur in the job position.

That white incumbent, even though he or she was the beneficiary of discrimination and should not have gotten the job, and as the proven individual victim, the white incumbent would not be bumped from the job. That the black employee would simply have to wait until the next vacancy occurred. The Courts did that in 1968, 1969. That was the compromise.

If the overriding principle that the Department of Justice is asserting is full individual relief, there was no justification for the denying relief for the black worker because of concern for the white worker who moved into the job as a result of discrimination. The no bumping limitation which was accepted and understood, the no bumping limitation like race conscious affirmative action was a practical response to making Title 7 work in an effective and least disruptive manner.

In the equitable and remedial section of Title 7, the Courts have tried to take into account the interest of both white and black workers. If the Justice Department rejects the application of affirmative action as a practical and effective remedy and seeks to rely entirely on proven victim relief, then a maze of stumbling blocks, quote the no bumping rule unquote to effective individual relief should be removed.

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Furthermore, Title 7 provides only limited monetary relief, you know, and that monetary relief only goes back for a period of two years. There's a two year limitation. A victim may receive only a back pay reward. That's all he gets under the Act. There is no monetary remedy for the pain, suffering and humiliation of racial discrimination. Not like in tort law or malpractice law and also an approach to the anti-discrimination employment law which depends solely upon seeking full relief for individual victims of discrimination as advanced by the Justice Department should properly include the development by statutory change or otherwise, of substantially more extensive provisions for monetary relief.

Now listen to some of the practical problems of the Justice Department approach. First, the Justice Department takes the position that proven victims of discrimination are only those who should recover as we should ignore the systemic prospective remedial provisions of the statute. Well now, this standard, this standard would seriously undermine settlements and voluntary compliance. In every settlement which I am familiar with, the defendants have insisted the settlement provide there is no admission or determination of liability.

Moreover, in order for settlements to provide a remedy, the system of that remedy must be discrimination. In other words, there is no possible room for settlement of the liability issue because you're in there trying to prove guilt. Furthermore, once an individual has established that he or she is a proven discriminatory, of course the person will seek full relief. There is no room for compromise in that situation.

The resource requirement which would be necessary to establish individual entitlement to injunctive and back pay relief, even a modest class action of say 500 persons is staggering. Also, secondly, individual remedies for group discrimination, how is it to be done? Where are those blacks now, who were unfairly turned down years ago? How do you find them and what do you offer them? Entry level jobs like the ones they originally applied for?

Do you hire them as police Lieutenants, Captains, even though they never got the necessary experience as patrolmen since they weren't hired in the past? It sounds good, good public relations but it is impractical and unenforceable. It can't work. The individuals cannot be found and if they can, the passage of time prevents an effective personal remedy.

Another example of the impracticality of the approach, especially in light of the systemic prospective relief designed under the statute, we know how hard it is to identify individual victims. Let's take even after a finding of liability or agreed upon resolution between the parties. We've identified 50 vacancies and 200 qualified persons apply. How does one go about identifying who should have received the job. Let's say the case involved applicants.

First we have to find the people and if you can find them, can one imagine the weeks and months and possibly years of hearings trying to determine who should have gotten what. And you're looking at five or ten years down the road as to see who was the best applicant ten years

ago and among those 200 applicants, which should have gotten the job. It can't be done.

At least it is a guessing game. Shouldn't the goal be to have a fair system rather than trying to rehash the past. The company has discriminated in hiring. That is established. Now what do you do prospectively? Go back and look over ten years of records to find whoever applied and decide which he should have hired? Wouldn't it be better to develop some sort of affirmative action plan for hiring based on goals and time tables.

The last point, another example of a practical point. We have a class action, 2000 employees. You've established there was discrimination in appointing blacks to supervisory positions. Liability clearly established. Now there are 3000 people; some of the three thousand are not effected, not all. How does one identify ten years later which of the 3,000 would have been promoted to supervisory positions absent discrimination? Wouldn't it be a better use of judicial resources and the parties time to set up an affirmative action plan regarding future promotions? Those taking advantage of the affirmative action plan should be those who would have been supervisors.

It wouldn't be a perfect fit but a reasonable approach is what you're seeking. You can go on and on with the practical problems of this individual approach which sounds good but when you look at the law and you look at the development of the law and you look at it on a case by case basis, it simply won't work.

Affirmative action is reasonable. It's not used in any—in all circumstances. It is a remedy that has to be applied with sensitivity, with care and with skill. You don't bump the employees out of jobs. What you try to do is create opportunities just like in the Wygant case. They created a training program for which both white and blacks in the union participated.

We aren't always going to agree on what an appropriate affirmative action plan is, but I tell you, it clearly should be countenanced under the law and it is something that we should work toward trying to develop these plans on a case by case basis and it is my hope that the Supreme Court will continue to let us do that. (applause)

PROFESSOR ST. ANTOINE: We have had the views of the lawyer. Our last speaker of the morning is Professor Glenn Loury. He's a professor of Political Economics at the Kennedy School of Harvard University. I'm delighted to claim him as a former colleague of my own. From personal experience, a very savvy fellow; an economist by discipline, a humanitarian by inclination and he's going to be dealing with the economic and social implications of affirmative action. Glenn Loury.

PROFESSOR G. LOURY: I am honored to have the opportunity to address a question of such importance before this distinguished legal audience. The debate over affirmative action which has been raging in the legal community at least since the *Defunis* case, seems no closer to resolution now than it was five or ten years ago. Perhaps the cases to

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The stakes are very high. Many in the civil rights community regard the continuation of affirmative action as a litmus test of our nation's commitment to racial justice. Many critics of affirmative action see in the use of color to allocate positions another form of racism, plain and simple. It is evident that the debate has become more polarized since the advent of the Reagan Administration.

I will not attempt to address the questions of constitutional law raised by this debate. There are more competent persons than me on this panel and in this audience to take up that task. Rather, I would like to discuss this issue as a matter of public policy looking at Affirmative Action as one of a number of tools available to courts, government agencies and private institutions that can be employed to achieve various ends. The question then becomes: Does the use of racial and sexual preference help to achieve these desired goals at tolerable costs?

Let me begin by listing some of the goals that proponents of this policy aim to achieve:

(1) To open previously foreclosed opportunities to women and minorities through advertising, outreach, training, et cetera.

(2) To insure non-discriminatory hiring practices by those doing business with the federal government through goals, timetables and compliance reviews.

(3) To correct for the effects of past discrimination through, for example, court-order hiring targets, given a finding of past discrimination.

(4) To reduce the significant inequality between the races which continues to exist in American society through legislature's use, for example, minority business set-asides.

(5) To secure "inclusion" greater dignity and respect, for "out" groups. This list, while not exhaustive, captures the major goals of the policy.

The first of these aims—sometimes referred to as "weak affirmative action"—is seldom contested by opponents of Affirmative Action. Indeed, it is often advanced by them as an example of what affirmative action was "originally intended" to achieve—namely, greater representation of qualified minority personnel without giving explicit racial preference at the point of an employment decision. The record, as best I can tell, is that these "outreach" efforts have been valuable and necessary, given the history of exclusion of women and minorities from various sectors of the society. They have served to make employers more conscious of what they are doing when recruiting and hiring workers, so that practices which inadvertently excluded women and minorities could be identified and corrected. Wider advertising, the advent of various training and skills-development programs, and the conscious efforts to bring previously excluded groups into higher education have helped open up opportunities without apparently disadvantaging others.

Let us note that, by conceding the legitimacy of this weak form of Affirmative Action, critics acknowledge the inadequacy of a pure "color blind" position. For a race/sex-based recruitment strategy necessarily confers some modest benefits on the targeted groups, and disadvantages those groups not aggressively pursued in this manner. There are undoubtedly some white males who would benefit from out-reach and training efforts, but who do not receive this treatment because of their race and sex. Monies used to underwrite such weak Affirmative Action, for example recruitment expenses, could be used instead to expand the number of positions offered. For example, a university could use those funds spent looking for minority students to finance additional scholarships offered on a race-blind, competitive basis. This would increase opportunities for those not targeted by weak Affirmative Action. Therefore, since even weak Affirmative Action involves the distribution of benefits based on race/sex, its supporters and that includes nearly everyone, have already implicitly rejected the pure "color-blind" position.

The second goal, that of insuring non-biased hiring practices through the use of goals and timetables, is more controversial. The proposed revision of Executive Order 11246 would, as I understand it, make the use of such targets entirely voluntary on the part of employers. The rationale is that to require employers to formulate numerical targets for racial groups departs from the principle of "color-blind" hiring. This seems to me a confused argument. While, as I will discuss momentarily, the Labor Department regulations implementing Executive Order 11246 and the enforcement practices of the Office of Federal Contract Compliance Programs could usefully be altered, I also think a strong case can be made for government agencies collecting the relevant information and comparing a firm's actual "utilization" of women and minorities to their "availability." This would appear to be both a natural and an efficient means of determining whether or not a more in-depth examination of a firm is required.

Let me give an analogy from another area of the law, anti-trust. The Department of Justice routinely issues numerical guidelines regarding market shares for mergers between two firms operating in the same industry. If the post-merger entity exceeds the indicated share, then the transaction will be scrutinized for possible anti-competitive effects. By doing this, the Department of Justice does not suggest that it is illegal for a firm, through its superior business acumen, to grow beyond a given numerical share of the market. It is simply maintained that, as a law enforcement strategy, given limited resources, it makes sense to look closely at those firms which exceed the guidelines. Similarly, it is plausible to use numerical information on racial and sexual employment practices in order to identify firms which may warrant closer investigation as possible illegal discriminators. This practice, too, departs from the pure "color-blind" stance, but is wholly consistent with the race-neutral goal of achieving through law enforcement the ideal of non-discriminatory employment practices in the private sector.

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This rationale for the use of goals and timetables would, however, imply changes in the administration of Executive Order 11246. An 8% employment of minorities by a firm operating in a market where minorities are 10% of the labor pool means something different when a firm has 10 employees, than it does when a firm employs 1,000. The same 2% deviation could easily have happened by chance in the first case, but not merely so easily in the second. Moreover, it is clear that employers have more information about who is actually qualified for various positions than does a regulator. The regulator's definition of the relevant labor pool uses a much cruder skills categorization than that actually employed by those making hiring decisions. For example, the fact that blacks make up say 5% of all lawyers is not relevant to a Wall Street firm looking for associates or, for that matter, a Supreme Court Justice looking for law clerks. These employers have more relevant sub-pools. A proper enforcement-oriented use of numerical goals and timetables would be sufficiently flexible to take these factors into account.

The third goal, correcting for the effects of past discrimination, seems to me a defensible justification for racial preference only when it is ordered in response to an explicit finding of discrimination, and when it aims to compensate the particular victims of those discriminating acts. Otherwise, racial/sexual preference risks bestowing benefits on persons who were not necessarily harmed from those acts, and disadvantaging individuals who have not benefited from those acts. The doctrines of collective benefit, all white males have gained from past discrimination, and collective harm, all blacks have been disadvantaged by it, strike me as morally pernicious and factually weak. It permits the denial of opportunities for a legal education, say to lower-class whites, and their provision to upper-class blacks, on the basis of nothing more than the color of a person's skin. On what factual or logical basis are all whites, no matter what their individual circumstances, assumed to be the beneficiaries of some collective benefit associated with past discrimination? Similarly, what historical experience permits one to assert that all blacks, no matter how well-off they may be, should be treated as if they are "damaged goods?"

This doctrine of collective claims leads to such questions as this: Have white women as a collective been so advantaged by virtue of their race that, notwithstanding their presumed general sexual disadvantage they still deserved to be passed over in employment or educational admissions in favor of black men, whose presumed collective sexual advantage is more than offset by racial disadvantage? There is something absurd about an attempt to seriously answer such a question. Moreover, in a nation of immigrants, as we have been and shall for some time continue to be, the use of this generalized historic harm/advantage model creates indefensible distinctions for example, between those new arrivals from South America on the one hand, and the south of Europe on the other which have no logical or historical basis.

The fourth goal to significantly reduce overall racial inequality through Affirmative Action is very often invoked by proponents of the

policy. As a matter of politics, it seems that the continued existence of profound racial economic disparity, higher poverty and unemployment rates for blacks, growing welfare dependency, inner-city urban decay, et cetera, provides a primary source for Affirmative Action. Yet, as a matter of policy, as distinct from symbolism, there is simply no evidence that racial preference has played anything other than a marginal role in achieving this goal. There is no evidence that the minority set-asides for millionaire black businessmen have caused benefits to "trickle down" to the poor blacks. The studies of the impact of Office of Federal Contract Compliance Programs show employment effects too small to meaningfully impact on the racial difference in unemployment rates. Looking at black economic progress since 1940 one finds that most of the gain occurred before the advent of affirmative action in the 1970s. Moreover, the progress in narrowing the black-white wage gap has been relatively greatest for the most highly educated blacks, and those working in the most prestigious occupations.

The reason for this is straightforward—Affirmative Action cannot get at the deep effects of past discrimination, namely poor skills, disrupted family life, communities in decline, in part because of the opportunities for upwardly mobile blacks which integration has created, and the poor quality of inner-city primary and secondary education. It is one thing to say that the past demands redress, another to prescribe employment preferences useful only to persons not suffering the worst consequences of that past as the means of affecting that redress. It is a cruel hoax to foist this Affirmative Action policy as a solution to the profound social problem of racial inequality, for it is nothing of the sort.

Finally, there is the fifth goal, securing dignity and respect for "out groups" through the greater inclusions which Affirmative Action brings about. Here one finds mentioned the benefits of having more same-group "role models"; it is argued that a group is better represented in the halls of power when persons belonging to the group are placed in positions of influence. Respect from others in the society is said to be enhanced by the demonstration of achievement which Affirmative Action helps to attain. It may be asked, though, whether the fact of two persons belonging to the same race or sex should overwhelm all the other things which work to make them alike or different, so as to become the sole determining criterion of whether one person can be a "role model" for, or a representative of the other. Might not poor kids in the ghetto and poor kids in the barrio find as much inspiration in the example of a poor white kid from rural West Virginia rising to success as they would find in the, by now rather routine, saga of an upper-middle-class black kid finding success at Choate and Harvard?

This is ultimately an empirical question; it cannot be answered a priori. The evidence for generalized "role model" effect is not that strong. Moreover, there is the danger that reliance on Affirmative Action to achieve minority or female representation in highly prestigious positions can have a decidedly negative impact on the esteem of the group, because it can lead to the general presumption that members of

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the beneficiary group would not be able to qualify for such position without the help of Affirmative Action. If, in an employment situation, say, it is known that racial classification is in use, so that differential selection criteria are employed for the hiring of different racial groups, and if it is known that the quality of performance on the job depends on how one did on the criteria of selection, then it is a rational statistical inference, absent further information, to impute a lower expected quality of job performance to persons of the race which was preferentially favored in selection. Using racial classification in selection for employment creates objective incentives for customers, co-workers, et cetera, to take race into account after the employment decision has been made. Selection by race makes race informative in the post-selection environment.

In what kind of environments is such an "informational externality" likely to be important? Precisely when it is difficult to obtain objective and accurate readings on a person's productivity, and when that unknown productivity is of significance to those sharing the employment environment with preferentially selected employee. For example, in a "team production" situation, like a law firm, where output is the result of the effort of several individuals, and each individual's contribution cannot be separately identified, the willingness of workers to participate in "teams" containing those suspected of having been preferentially selected will be less than it would have been if the same criteria of selection had been used for all employees.

Also, when the employment carries prestige and honor, because it represents an unusual accomplishment of which very few individuals are capable, an appointment in a top university faculty, for example, the use of preferential selection will undermine the ability of those preferred to garner for themselves the honorary, as distinct from pecuniary, benefits associated with the employment, and this is true even for individuals who do not themselves require the preference. If for example, Nobel prizes in physics were awarded with the idea in mind that each continent should be periodically represented, it would be widely suspected by those insufficiently informed to make independent judgments in such matters, and that includes nearly everyone, that a physicist from Africa who won the award had not made as significant a contribution to the science as one from Europe, even if the objective scientific merit of the African's contribution were as great. If Law Review appointments at a prestigious law school were made to insure appropriate group balance, it could become impossible for students belonging to the preferred groups to earn honor available to others, no matter how great their individual talents.

An interesting example of this phenomenon can be found in the U.S. military. Recently sociologist Charles Moskos published an article in The Atlantic Monthly describing the results of his investigation of the status of blacks in the U.S. Army, "Success Story: Black in the Army," Atlantic Monthly May 1986, page 64. He noted that roughly 7% of all Army generals are now black, as is nearly 10% of the Army's officer

corps. Moskos reports that among the black officers he interviewed the view was widely held that in the Army blacks "still have to be better qualified than whites in order to advance." One senior black officer was "worried about some of the younger guys. They don't understand that a black still has to do more than a white to get promoted. If they think equal effort will get equal reward, they've got a big surprise coming." Yet, despite this awareness of racial discrimination, these officers were dubious about the value of racially preferential treatment in the military. Black commanders tended to be tougher in their fitness evaluation of black subordinates than were white commanders of their white subordinates. Even those officers who thought affirmative action necessary in civilian life disapproved of its use in the military. According to Moskos: "They draw manifest self-esteem from the fact that they themselves have not been beneficiaries of such preferential treatment, rather the reverse. Black officers distrust black leaders in civilian life who would seek advancement through racial politics or as supplicants of benevolent whites."

In conclusion I would like to stress four points: First, the affirmative action debate has taken on a political and symbolic importance beyond significance. Support for it has come to be identified with a continued commitment to the goal of achieving racial equality. This is unfortunate, because in my judgment Affirmative Action is simply too imprecisely targeted a tool to be of more than marginal benefit in attacking the central source of racial inequality today—the problem of the inner-city poor. Argument about it therefore threatens to distract us from dealing with these difficult problems. Second, the pure color-blind position of those who identify Affirmative Action with racial discrimination against whites is not tenable. Most of those adopting this position support extraordinary recruitment, outreach and training activities based on color. Moreover, it is difficult to envision how the prohibition on discrimination by color in the private sector could be effectively enforced by government officials who refuse to "take race into account" in the normal course of their law enforcement activities.

Third, the policy Affirmative Action cannot correct for history's wrongs, and should not be promoted as a rightful reparation for the collective sins of American society. The moral calculus invited by such a collective guilt-collective harm doctrine seems to be inherently fraught with pitfalls. It forces us to make assignments of victims and perpetrator status to individuals far removed from the effects of identifiable, wrongful acts. Finally, the use of Affirmative Action cannot, alone, secure dignity and respect for historically excluded groups. Sometimes it can be positively destructive of attaining these worthy goals. The high regard of one's fellow citizens ultimately depends upon the individual accomplishments of members of disadvantaged groups. Permanent, widespread dependency by blacks upon special preferences in order to attain what others in the society must earn on their merits is no way to achieve true and meaningful equality between the races. (applause)

PROFESSOR ST. ANT
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PROFESSOR ST. ANTOINE: Thanks very much for that most hard hitting presentation. In light of Professor Loury's plane, I'm going to suggest my colleagues proceed in order first of Professor Tribe and then, then Glenn you go ahead and Brad and then Elaine and just proceed without me interrupting the free flow from this time on and if you wish, stay at your seats.

PROFESSOR TRIBE: I'm an informal guy. I just as soon stand up. We're told we have to keep these remarks very, very brief and I will try to abide by that. Surely the fact that particular versions of affirmative action cannot be counted on as a panacea, an overnight cure to 244 years of mistakes is a correct observation but does not, I think illuminate the constitutional issue about the permissibility of particular forms of affirmative action and the fact that the preferential yet does not do anything to get at the problems of poor skills, doesn't help us much in deciding whether preferential access to skill operating programs, as in the Webber case make both political and constitutional sense.

Now, look at the details that have developed from the different speaker's perspectives on this issue, by Elaine Jones, Glenn Loury and some concerns addressed by Brad Reynolds which are relevant in thrashing out the policy of the School Board or Collective Bargaining representative or City Council might have to make in working out the details of affirmative action. However, those practical and detailed concerns I think leave us still with no real light on what I think is a rather fundamental question that I want to raise at the outset and that is what constitutional principle justifies displacing the decisions of the representative bodies of various political majorities on this particular matter with the intervention of courts.

We're offered by Brad Reynolds in this respect an abstract anti-discrimination principle which may be a thing of beauty and a joy forever but I remain puzzled as to where it is rooted in the constitution of the United States and I really heard no answer. I heard a number of themes that do resonate with constitutional values, individual justice versus group claims. Brad said, and I think I quote him correctly, he doesn't want to crush individuality under the deadening weight of group entitlement. I don't either. It's not a pleasant prospect but it also is, I think something of a red herring.

As I suggested at the outset in quoting from Justice Blackmun, there is at least a responsive perspective that meaningful equality for individuals may be deemed by a political majority in particular circumstances to require attention to that individual's membership in a minority race and when the political majority has reached that conclusion, the question of the constitutional warrant for judicially invalidating it remains something of a mystery.

There is said to be denigrating implication that blacks, in Brad's words, don't have it or in Glenn's words might be damaged goods. Somehow this is the reason to reject at least some, if not all forms of affirmative action. A full answer to that would take more time than I have. There are three points I think you should keep in mind. First, when that

argument is made in particular cases, you should ask yourself who exactly has standing to make it. Second, there is the question of why it should be deemed constitutionally decisive rather than a policy argument and third, there is the faculty matter.

Certainly my own black colleagues on the Harvard Law firmament know that without affirmative action they would not have been given that opportunity and they do not feel like damaged goods. Brad made the point that fighting discrimination with discrimination is like using alcohol to fight alcoholism, is an oxymoronic, a contradiction in terms. I think rather than being oxymoronic, it's a case of begging the question. The question is whether we should legitimately call it discrimination.

Consider the *Bakke* case for example. In brief, Cal Davis decided to set aside some 16 places for disadvantaged minorities in a class of 100. It is true that Allan Bakke, being white, could not compete for those 16 places. The question is in what sense was he being discriminated against. Now, if the goal of Cal Davis was more minority doctors, truly it would have made sense to Allan Bakke's claim that he fully qualified but he doesn't happen to have that qualification.

But even if the Court is more narrowly defined, there is the intriguing discussion in the footnote 43 in the Court's *Bakke* position, the Powell opinion for himself alone but decisive in the *Bakke* outcome. In footnote 43 of the Powell opinion, the question is raised perhaps this program simply is a way of making sure that the composition of the class looks rather like it would if there hadn't been discrimination. He says the record in this case does not permit resting judgment on that premise but I submit to you if he started with the premise that once you have the relevant population in view, proportional representation is likely to have been the result of a genuinely neutral selection process.

Then one way of simulating that in the process itself is to set aside, subject to a recognition you're only setting aside places for those who are qualified, set aside a number of places for minorities. So that the ultimate outcome you may not know precisely which individuals were themselves the victims, replicates what we might be like as a society if the gap that Elaine Jones identified between the Declaration of Independence and the original constitution had been a narrow one. And that leads me finally to a further contradiction in Brad Reynolds' position.

The contradiction not only between the judicial activism that he would encourage here and the more conservative position he would take elsewhere but a contradiction within the position itself. That is the position itself says make whole remedies are fine but I submit to you that meaningful affirmative action is an attempt to approximate at a make whole remedy. It is not enough to say it would replace individual justice with the crushing weight of group settlement when the bottom line is one cannot know with enough detail precisely which individuals were hurt to what degree by 244 years of history. So a perspective of individual justice leavened by understanding, leads not to a constitutional mandate but rather a constitutional tolerance by a relatively modest

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Affirmative action is a form that will not end 244 year legacy of racism but in many of the instances presented to the Court represents at least a constitutionally defensive response to a profoundly intractable problem. Thank you. (applause)

PROFESSOR LOURY: I'll be very brief. My reference to African scientists is not entirely abstract. It was meant as an example. To use real cases gets a little dizzy. Let's take the case of the professor at Harvard Law School. I know these people. One of them is a graduate of Princeton with honors, Yale Law School, Clerk of the Supreme Court, brilliant guy.

Another is a graduate of Swarthmore College with honors, attended the School of Government, Harvard Law School, brilliant guy. What do you mean they wouldn't have had jobs? To suggest something had to be done in order for these people of extremely outstanding qualifications to come to the Harvard Law faculty is to argue the school does not look upon them as outstanding people. One of those individuals said to me when he was being interviewed, he wanted to know that he wasn't being hired because he was black.

Lots of people want to know that they are not being hired as a partner in a law firm, or as a professor on the faculty, whatever, because they're black. They want to know. They want to know it because they want the fact of their hiring to be able to convey to them something truthful about what they actually achieved, to the person making the decision they respect.

As I said, these generals in the Army who are quite willing to tell an interviewer they resent the idea that special preference might be employed in their own battle with what I assume is a less enlightened environment than that at the law faculty at Harvard. And regarding who has standing to make this argument, I don't know how that determination is made. I assume I'm going to pass the test. I would ask who has standing to determine who has standing. (applause)

MR. B. REYNOLDS: I too will be brief. Professor Tribe asked for the constitutional underpinnings for the argument of that race neutralist. I guess the closest and most short form way is to say that if Brown–A model is certainly the one that fits and I can announce without fear of eating crumpled glass, that the Supreme Court this morning announced the Wygant decision in which it adopted the Brown–A model as the constitutional underpinning for these types of questions and said that the Sixth Circuit's upholding of the lay-off in that case based on race was an unconstitutional way in which to apply a remedial kind of program.

Under our constitution, we do not tolerate qualifications by race and that there is strict scrutiny, in fact the most exacting scrutiny must attach whenever racial and ethnic qualifications do indeed adhere. It is not sufficient, indeed the Supreme Court has never held with what

we—what was announced this morning that societal discrimination would be sufficient basis for any kind of class qualification by race.

PROFESSOR TRIBE: Could you tell us the vote?

MR. REYNOLDS: The vote was five to four, I'm pleased to announce. I would also simply touch on a couple of other matters that Professor Tribe alluded to. He said that might be the way he can get around the problem of compromising the principle of non-discrimination is simply to call it something else. I don't think that does deal very adequately with the reality of the situation.

I think what we are talking about is discriminatory activities when we classify people by immutable characteristics and the idea that somehow this is okay or this can be done because there is a general view that if we had non-discrimination that we would arrive at proportional representation or everybody would wind up in the job market, the classroom, in the neighborhood, represented proportionately. That has been shown to be inaccurate by any number of studies that demonstrate we do not simply come to any kind of endeavor in human life on the basis of some kind of proportional allocation by reason of race.

Indeed, any immutable characteristics, if you were to cast about and see whether on random selection it would arrive proportionately, you find out that clearly is not the case. The idea that we are attempting to approximate make whole relief assumes when you give the benefit to someone who is admittedly not a victim of the discriminatory activity, that that somehow is making that person whole as opposed to giving him a preference and I think as we defined the debate this morning, it is the fact we're talking here about preferential treatment and that goes beyond any need to make whole.

The make whole relief is something that comes at the first step and this remedy we are discussing is one that follows on after you have made whole all those victims of discrimination. Elaine Jones listed as some inherent difficulties with the position of race neutrality, the implementation or enforcement of Title 7 and went into the bumping rule and the back pay problem and resource problem.

I suspect the full answer to certainly the bumping rule and the two year back pay, that would be something that Congress can very easily address if it wants to change the Title 7 statute and recast it so as to make it clear that the rules to be applied, in the event of a finding of discrimination under Title 7, would tolerate that kind of judicial activity.

I think at the moment, the way the statute is screened, the Courts have made it clear that bumping is not something within the tolerance of remedial provision and the two year back pay provision is a legitimate exercise for Congress to have made. It certainly could have addressed it if it wants to again but that at least at the moment we have that public policy pronouncement made by the body that is supposed to make those kinds of decisions.

I don't think that—I think with that, that I have much more to add except to say it is a fact that as was asked originally, it is a fact that the

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constitutional decision which the Court decided in Wygant, constitutional question, does differ to a considerable extent from the statutory question which was—what we were asked to at least make some passing reference to. The statutory question, that is whether under Title 7, Courts can indeed fashion as part of their remedy some kind of a goal or quota or set-aside program that will prefer some and not others by reason of race or gender or national origin is before the Court in two other cases.

They were not decided today and still to be decided by the end of this term and we will have, I think at least the degree of an answer as to what Courts can or cannot do with regard to remedying employment discrimination under the authority granted in Title 7. I think that—the other question that was raised, we were asked to address briefly, was the difference between affirmative action on the basis of race and on the basis of sex. As my opening remarks indicated, I think you have the same response with regard to discrimination whether it's by race or gender. That the principle of non discrimination is one that I think cannot be compromised.

It is indeed the fact and will always be the fact as soon as you compromise that principle, what you do lose is the principle and all you're left with is the compromise. Thank you.

MS. E. JONES: No, affirmative action doesn't solve the problem of teen-age pregnancies or drugs in the community or high school dropouts or juvenile crime. I don't know of anyone who has said that they are opposed to it.

For economic opportunities, one needs several things. One needs economic goals, no inflation, and motivation and you need to educate yourself but you also need to have effective civil rights enforcements and the availability of the affirmative action remedy so you can measure whether people are in fact being included when they have prepared themselves.

The affirmative action remedy is one remedy in an arsenal of remedies that have to be used in this area and that is what I don't understand why it receives so much attention from the Department of Justice and from Brad and all in speeches everyplace is affirmative action. I don't hear anything about the housing discrimination problem and the racial scaring of blacks with money from the neighborhood. We don't hear anything about the inequities in the District but we hear constantly from him a barrage and this question of affirmative action.

Now, I agree with one thing that was said by Glenn and that is, you know, it's an important remedy but it's one remedy. It's not the remedy. It's not the panacea but under given circumstances in the context of a particular case it should be available to effect a resolution of the problem. Yes, I know that Congress made decisions to limit back pay to two years and I know that limitation that the Congress put on—put into the Act with regard to individual reasons but the reason that was done is because of the systemic discrimination that the Act, the prospective

relief that the Act was also designed to attack so therefore Congress compromised on both sides.

If you removed the prospective effect of ruling out the discrimination and then referred to the individual make whole statute on it, you have to go back to Congress and amend it. It's a little too cute but there are two problems. If you go back and look at the legislative history and read Title 7, who has standing to make the argument regarding minorities being hired, blacks being hired for various positions.

I say on this particular argument, I would love for any people here to talk to black policemen in this country. You know, in 1970 what the affirmative action policy of the seventies has done is to double the number of black policemen in this country. That is a good thing. The thing about affirmative action is that it works. It's an effective remedy. Look at the situation in Detroit. In 1972, 1973 Detroit, the police department was viewed as armed camp with a predominantly white police department. A number of policemen were killed in the black community.

Coleman Young gets elected. There was a community problem, there was an operational need problem. He then adopts and institutes the adoption of the affirmative action plan. For every one white he hired a black. What happened? Mr. Smith, six years later brings to Washington the police chief of Detroit and gives him an award for having a model police department and being effective.

After that affirmative action plan went into operation, for three or four years no policeman lost his life in the line of duty from 1974 to 1982. It was a radical change made throughout the city. So sometimes where there has to be a remedy, that is available.

The race versus sex, and race and sex issue, well you know, I come at it, you know, either way. They removed the thirteenth amendment, they removed slavery, they said now I'm free and the 14th amendment made me a citizen. I'm a citizen but the 15th amendment didn't give me the right to vote. It gave it to black males. I didn't get it until the twenties. I don't think we have to do either or situation here. We are told that we should go back to the founding fathers to find out what the original intent was.

With respect to the rights of women, Abigail Adams was married to John Adams. She wrote him, "please don't forget the ladies" and John Adams wrote back, "Abigail, I never heard anything as humorous as that." (applause)

PROFESSOR TRIBE: I couldn't resist recalling this wonderful moment in the hall when the people were standing in line and they were talking about the Marshall McLewin philosophy and Brad Reynolds said, "as it happens, I have Marshall McLewin right here." As I did predict at the beginning, we would know shortly what the Court held. I also continue to predict we may not, even after a reading of it, know entirely why. (applause)

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PROFESSOR ST. ANTOINE: I should call upon the official moderator, Judge Scalia for a closing word.

JUDGE A. SCALIA: Thank you, Ted. Just to go from the sublime to the benign, I have a few program announcements. First of all, admission to the banquet tonight I am told is only by ticket given to you at the registration. No ticket, no chow. So bring it along. Those in the golf tournament which starts at 1:30, check tee times that are on the bulletin board outside. Some of them, I understand, have been changed. Double check them before you go out and try to show up at the clubhouse a little bit before the posted times because you have to pay before you leave.

Finally, the tennis tournament is at William and Mary. There are two sets of courts over there. You will have to find them yourself or find Dick Gallagher who knows where they are. You're also in charge of getting yourself out there.

We meet again at 7:00 o'clock for the reception. Until then, the conference is adjourned.

(The meeting was then adjourned.)

Tuesday, May 20, 1986

Juvenile Justice

JUDGE GREEN: This is the workshop on juvenile justice. We're delighted to see all of you this morning. We hope you are well fortified with coffee and imagination and ideas. And we will take questions and answers for just a very few moments at the end of our program. As you probably know we have to complete this sharply at ten-thirty this morning because there will be a half hour interruption and then you're all invited to go to the auditorium to hear another exciting matter about the surging caseload in the Court of Appeals. As a District Judge I shouldn't comment on that, should I?

As you probably know there are some two million juveniles who are processed annually through our juvenile court. Sometimes it seems that many of them come through the courts of the District of Columbia. The rate of juvenile crime by juveniles is double what it was twenty years ago. And as a matter of fact during the two most recent years offenders under eighteen years of age were arrested in connection with two thousand murders, seven thousand rapes, and over fifty thousand aggravated assaults.

Still it is a relatively small proportion of the juveniles who commit the violent crime. The vast majority are those who are not repeat or violent offenders. The courts teem with the daily agony of the juveniles who come to the court; their destroyed victims, their grieving families, both for the offender and for the victim, the police, the school authorities, the probation and social workers, the correctional personnel, lawyers, and judges.