THE IRONY OF PROVING DISCRIMINATION

by

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Presented to the Faculty of the Graduate School of

The University of Texas at Arlington in Partial Fulfillment

of the Requirements

for the Degree of

DOCTOR OF PHILOSOPHY

THE UNIVERSITY OF TEXAS AT ARLINGTON

May 2008

ACKNOWLEDGEMENTS

This dissertation could not have been written without Dr. Enid Arvidson who graciously took on the role of motivator and chair. Dr. Arvidson's encouragement to remain steadfast through times of uncertainty; and continued challenge to raise the bar and make a significant contribution to the field were paramount to the successful completion of this document. Also essential to the quality and valor of the context herein was the members of my dissertation committee: Dr. Cornehls and Dr. Casio. Their patience and candidacy while guiding me through the dissertation process coupled with their insistence on accepting nothing less than the best, proved to be the recipe for creating a quality manuscript. A special thanks is extended to Joyce Brown and Hyattye O. Simmons who never relented in pushing me to move from ABD to Ph.D. status.

May 8, 2008

ABSTRACT

THE IRONY OF PROVING DISCRIMINATION

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The University of Texas at Arlington, 2008

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Currently America courts require plaintiffs alleging discrimination to not only prove the existence of present day discrimination but to also prove the "discriminatory intent."[1] This dissertation contains two applications of the theory of unconscious discrimination as it reveals the difficulty of prevailing in discrimination cases. The assumption applied is that policy-makers use theories that dismiss or render invisible the presence of subtle discrimination. This perpetuates the problem and hinders its adequate address. Since so many people suffer because of discrimination's invisible-yet present existence, measures must be taken to unveil the remedy this subtler form of discrimination. In this dissertation, I attempt to pull together a variety of eclectic theories about racism (e.g. critical race theory (CRT), unconscious theory, the realist perspective, political economy/Marxism, transparency theory) into a single synthetic framework for the purpose of honing in on why policy makers are striking down affirmative action laws. My unique contribution to the literature is my attempt to synthesize the literature into the contextual, conceptual and subconscious typology to shed light on the interplay (and impact) of "unconscious theory" during the development of social policy. The central inquiries to be addressed in this dissertation are: (1) *What makes discrimination hard to see or acknowledge and* (2) *Why are*

[1] Discriminatory intent refers to a conscious desire to do harm (Flagg 1998, 43).

policy-makers seemingly blind to discrimination in spite of its presence? I attempt to answer these questions by: (1) drawing on existing literature to argue that there are prevailing economic, social, cultural and psychological factors that may contribute to policy-makers' blindness to the phenomenon called discrimination, (2) using *Concrete Works vs. the City and County of Denver* as a case study to illustrate the court's stance on what constitutes adequate proof of the existence of present day discrimination (Cohn 1999): and then using the Urban Institute and Department of Justices' *Nationwide Disparity Study*[2] to respond to criticisms and flaws of the Denver's. Disparity Study cited by the justices to have caused the negative judgment against the City and County of Denver, and (3) examining majority and dissenting opinions of Supreme Court Justices' rulings on six precedent-setting cases regarding affirmative action policy to explore value perspectives of the decision makers and check for the presence of the transparency phenomenon[3] to illustrate this blindness in setting anti-discrimination policy.

The research suggests that these questions can be answered by focusing on unconscious conditioning, a term borrowed from Richard Delgado (2001), which manifests from what I categorize in this dissertation as three points of influence—contextual, conceptual and subconscious actions. This dissertation hypothesis sets out to test one prevailing thought: Unconscious conditioning, which occurs throughout the life experiences of white Americans,[4] makes it more difficult to acknowledge the existence of discrimination. This inability to recognize

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[2] A Nationwide Disparity Study was conducted in 1997 by the Urban Institute, the Rockefeller Foundation and the United States Department of Justice to determine the existence and extent of discrimination in government contracting. Ninety-five separate disparity studies were used to provide a single measure of disparity in the use of minority-and –women-owned businesses in government procurement nationwide. This study will be used to respond to the criticisms and *Disparity Study* flaws cited by the Justices in the *Concrete Works vs. the City and County of Denver.* It is the position of this dissertation that no evidence presented to the Justices would have enabled these Justices to acknowledge the existence of discrimination. This, as hypothesized above, can be contributed to the decision-makers "unconscious conditioning."

[3] Flagg (1998) describes transparency phenomenon as transparently white criteria of decision making. The factors that differentiate a white-specific criterion are that (1) the criterion be associated with whites to a greater extent than with nonwhites, and (2) it be favorably regarded by whites.

[4] The use of the terminology "white America" is simply used herein to reference people of a different race than the once referenced during the decision-making process. "White" is used here because it has been referenced throughout this dissertation as the majority race with the most power to make decisions that significantly impact policy in America.

the persistence of discrimination, compromises some white American's ability to appreciate the need for or credibility of programs such as Affirmative Action policy. This coupled with the irrepressible nature of discrimination makes it very difficult to prove its existence.

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INTRODUCTION

> The problem of discrimination has been so intrinsic (cannot be denied), invidious (morally indefensible) pervasive (is everywhere), abstract (intangible and subtle), infinite (has no beginning or ending point) and intractable (very difficult to eradicate), it is very difficult to provide exact proof of its existence.
> Sselason 1999, 25

1.1 Discrimination Defined

The act of generating a false representation of a group of people, which is often times untrue and oversimplified, is known as stereotyping (e.g., blacks are good dancers, Chinese are bad drivers, Italians are passionate, women are emotional, men are insensitive). These inaccurate and disparaging assumptions allow one to prejudge a person's character, skills and abilities solely based on preconceived notions about their racial, physical or cultural traits. Individual differences or exceptions are ignored when stereotyping takes place. Stereotyping often leads to prejudice (Alberta Human Rights & Citizen Commission [AHRCC] 2007).

AHRCC (2007) defines prejudice as "an opinion or judgment, frequently unfavorable, based on irrelevant considerations, inadequate knowledge or inaccurate stereotyping." Prejudice is not based on authenticated facts; it is irrational and is often based on assumptions learned at an early age. Because people are sometimes unaware that these assumptions are based on inaccurate information, they are oblivious to the pain and discomfort those results from this prejudicial behavior. The perils of prejudicial behavior on American society are a basic denial of the right to live, work and play with dignity and respect for entire groups of individuals. According to the AHRCC, "prejudice behavior is dangerous because it often leads to discriminatory acts and decisions" (AHRCC 2007, 1).

AHRCC (2007) defines discrimination as "unjust practice or behavior, whether intentional or not, based on race, religious beliefs, color, gender, physical or mental disability,

marital status, family status, source of income, age, ancestry, place of origin or sexual orientation and which has a negative effect on any individual or group." The AHRCC argues, "Discriminatory behavior often leads to harassment and has a negative social and economic impact. It also leads to "unequal treatment, which in turn, creates problems within schools, the workplace and communities" (AHRCC 2007, 2).

Each day decisions are made that significantly impact the daily lives of American citizens. These decisions establish someone's ability to work, vote, acquire higher education, live in a certain area, socialize with a particular group, become a U.S. citizen, live under a bridge, invest in particular stocks, monopolize a particular industry, trade with a particular country. When policy-makers caste down decisions which result in discriminatory impacts, whether intended or unintended, these everyday decisions contribute to the perpetuation of complex societal issues of invisible inequality (AHRCC 2007).

"Unconscious conditioning influences everyday decision making" (Flagg 1995, 104) and is cultivated from numerous environments. One's political affiliation, social surroundings, media influences, economic atmosphere, cultural exposure, conservative/liberal nurturing, and societal pressures resulting from position obligations sets the foundation of how we internalize and process information received for decision making (Sears 1988). Flagg (1995) and Sears (1988) both agree that conditioning influences how we perceive, believe, and react to individuals and situations that are unfamiliar to us.

When unconscious conditioning hampers one's ability to be fair in their decision-making, unconscious discrimination occurs. Since we are unaware of the underlying biases that are programmed into our decision-making processes, we are stunned when we see how our decisions have devastated and victimized large segments of the population. This unconscious conditioning is invisible to the decision maker (Flagg 1998). Likewise, the discriminatory impacts of these decisions are not readily visible to American citizens due to a similar unconscious conditioning, which is largely brought about through three points of influence which I have

entitled: contextual, conceptual and subconscious actions/reactions. More importantly, this unconscious disposition in decision-makers makes it increasingly difficult to recognize the usefulness and benefits of leveling programs such as Affirmative Action.

Sigmund Freud offers a model that depicts how human consciousness evolves (see fig. 1.1). A brief explanation is necessary to understand the link between one's unconscious actions and discrimination.

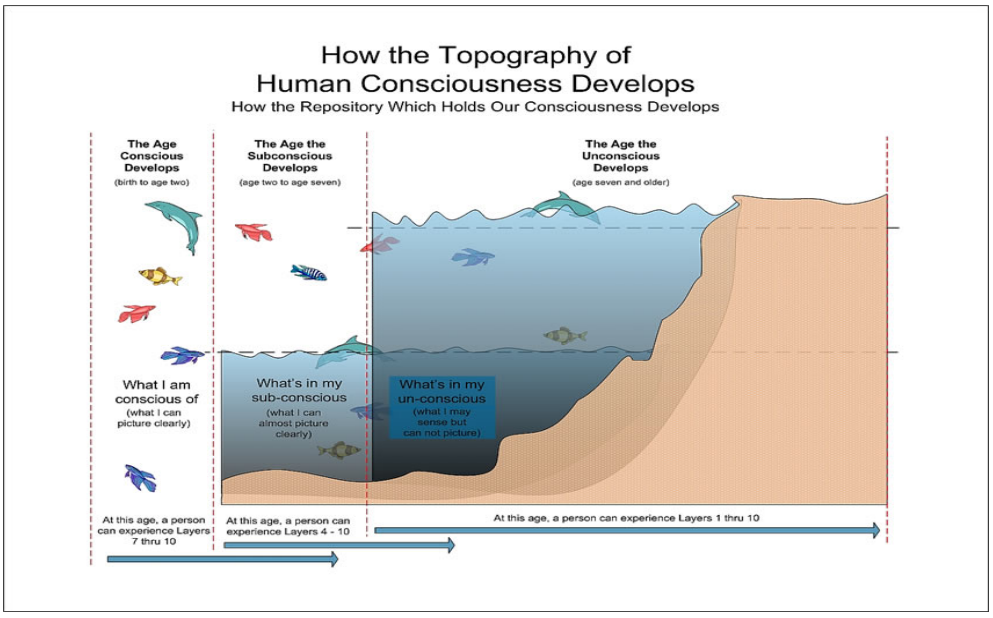

Figure 1.1 How the Topography of Human Consciousness Develops

Source: Paglierani, Steven (2005) The Conscious, Subconscious, Unconscious: A New Look at an Old Metaphor.

The first layer, consciousness, is the most important because it is the part of the mind that accepts and rejects information; it is often referred to as the *will*. Second, according to some experts in the field of psychology, the emotions, thoughts, ideas, habits, outlook, belief, and meaning occurs at the subconscious level. For example, the subconscious mind has internal filters that affect how decision-makers notice information (Paglierani 2005). The final layer, the unconscious, seems to be an area of considerable ambiguity and debate, but this could be crucial to understanding how discriminatory practices tend to be perpetuated, despite policy and court

rulings. The unconsciousness resides in the domain of automatisms. Accepting that consciousness is will, then the difference between conscious and unconscious could be taken as *wilful attention* (Pagliernai 2005). This concept will be elaborated on later.

1.2 Hypothesis

This dissertation attempts to show how discrimination is still present despite policy-makers' claims that it has been suppressed or surmounted. There is a process that still exists called discrimination. The invisible nature of discrimination makes it hard to reveal. The existence of discrimination is amply discussed in the existing literature and the history of affirmative action programs (i.e., *Affirmative Action Review: A Report to The President, 1998*); *Discrimination in Public Contracting* [LaNoue, 2001]; *The Social Capital Deficit* [2002]; *Angry White Guy for Affirmative Action* [Rockwell, 1997]; *The American Economic System and the Status of Minority Groups Today* [Long, 2001]). While at the same time, for a variety of reasons, there is a tendency in our society to deny that this process exists. Because of this tendency, many existing views of this process underestimate it, or erase or repress its existence. This will be illustrated later in the literature review. When policy-makers use theories that dismiss or render invisible something that is as present as discrimination, it can never be adequately addressed and remedied. This perpetuates the problem since so many people suffer because of discrimination's invisible-yet present existence. In this dissertation, I attempt to pull together a variety of eclectic theories about racism (e.g. critical race theory (CRT), unconscious theory, the realist perspective, political economy/Marxism, transparency theory) into a single synthetic framework for the purpose of honing in on why policy makers are striking down affirmative action laws. My unique contribution to the literature is my attempt to synthesize the literature into the contextual, conceptual and subconscious typology to shed light on the interplay (and impact) of "unconscious theory" during the development of social policy.

The central inquiries to be addressed in this dissertation are: (1) *What makes discrimination hard to see or acknowledge and* (2) *Why are policy-makers seemingly blind to discrimination in spite of its presence*? I attempt to answer these questions by: (1) drawing on

existing literature to argue that there are prevailing economic, social, cultural and psychological factors that may contribute to policy-makers' blindness to the phenomenon called discrimination: (2) using *Concrete Works vs. the City and County of Denver* as a case study to illustrate the court's stance on what constitutes adequate proof of the existence of present day discrimination (Cohn 1999): and then using the Urban Institute and Department of Justices' *Nationwide Disparity Study*[5] to respond to criticisms and flaws of the Denver's Disparity Study cited by the justices to have caused the negative judgment against the City and County of Denver: and (3) examining majority and dissenting opinions of Supreme Court Justices' rulings on six precedent-setting cases regarding affirmative action policy to explore value perspectives of the decision makers and check for the presence of the transparency phenomenon[6] to illustrate this blindness in setting anti-discrimination policy.

The research suggests that these questions can be answered by focusing on unconscious conditioning, a term borrowed from Richard Delgado (2001), which manifests from what I categorize in this dissertation as three points of influence—contextual, conceptual and subconscious actions.

1.3 Paradigm of Consciousness and the Unconscious

According to Freud as cited in Carfantan (2003), we are not conscious of everything. What one should point out is that there are degrees of consciousness; thus a content of consciousness (e.g. a thought) is either present inside the field of consciousness, or disappears

[5] A Nationwide Disparity Study was conducted in 1997 by the Urban Institute, the Rockefeller Foundation and the United States Department of Justice to determine the existence and extent of discrimination in government contracting. Ninety-five separate disparity studies were used to provide a single measure of disparity in the use of minority-and –women-owned businesses in government procurement nationwide. This study will be used to respond to the criticisms and *Disparity Study* flaws cited by the Justices in the *Concrete Works vs. the City and County of Denver.* It is the position of this dissertation that no evidence presented to the Justices would have enabled these Justices to acknowledge the existence of discrimination. This, as hypothesized above, can be contributed to the decision-makers "unconscious conditioning."

from the field of consciousness while being retained by memory. Carfantan contends that Leibniz' theory of small perceptions solves this difficulty. Perceptions comprise infinitesimal degrees. Once a threshold is reached, the object enters consciousness. If a noise is too weak it will not be noticed, and yet it has entered into the infinitesimal domain of sensation. If it reaches a sufficient threshold it will enter the realm of perception. Carfantan explains that what we call a conscious event is nothing other than the concurrence of small perceptions adding up to a conscious perception. What is present, but outside the field of consciousness, pertains to the unconscious. Therefore, it is a major source of error to believe that there are no perceptions in the soul other than those one notices. In other words, conscious experience emerges from condensations of unconscious perceptions. Carfantan adds that it would be naïve to believe that the only thing existing is that of which we are conscious. What we call a thought can have arisen in the unconscious. Carfantan posits that once the thought appears in our minds, we become aware of it.

According to Carfantan (2003), it is possible to equate the power of consciousness to that of the will and restrict the unconscious to the domain of automatisms. If we regard consciousness above all as will, then the difference between conscious and unconscious can be taken to be that of the willful attention, a reflective light on the objects of waking consciousness, and involuntary inattention, which feebly and distractedly slips into sub consciousness. Carfantan states that habits and mechanical reactions are unconscious, while a reflective and voluntary act is conscious. For example, in qualitative analysis, such as a case review, the notion of unconsciousness can be useful in identifying and explaining some sort of action that characterizes a particular political reality and judgments about the behavior of actors. In reviewing cases, it is not always obvious how individual decisions are reached. March and Olsen (1976) suggest that choices in most organizational settings are extremely ambiguous and at times almost unconscious.

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[6] Flagg (1998) describes transparency phenomenon as transparently white criteria of decision making. The factors that differentiate a white-specific criterion are that (1) the criterion be associated with

Figure 1.2. illustrates the flow of an experience as predicted by the dissertation hypothesis. Once the event is internalized, it goes through a process of unconscious filtering that is shaped by the decision-makers' unique set of influences, which I call contextual, conceptual and subconscious influences. This filtering significantly impacts how the decision-maker reacts to an experience and subsequently how tangent decisions are made.

whites to a greater extent than with nonwhites, and (2) it be favorably regarded by whites.

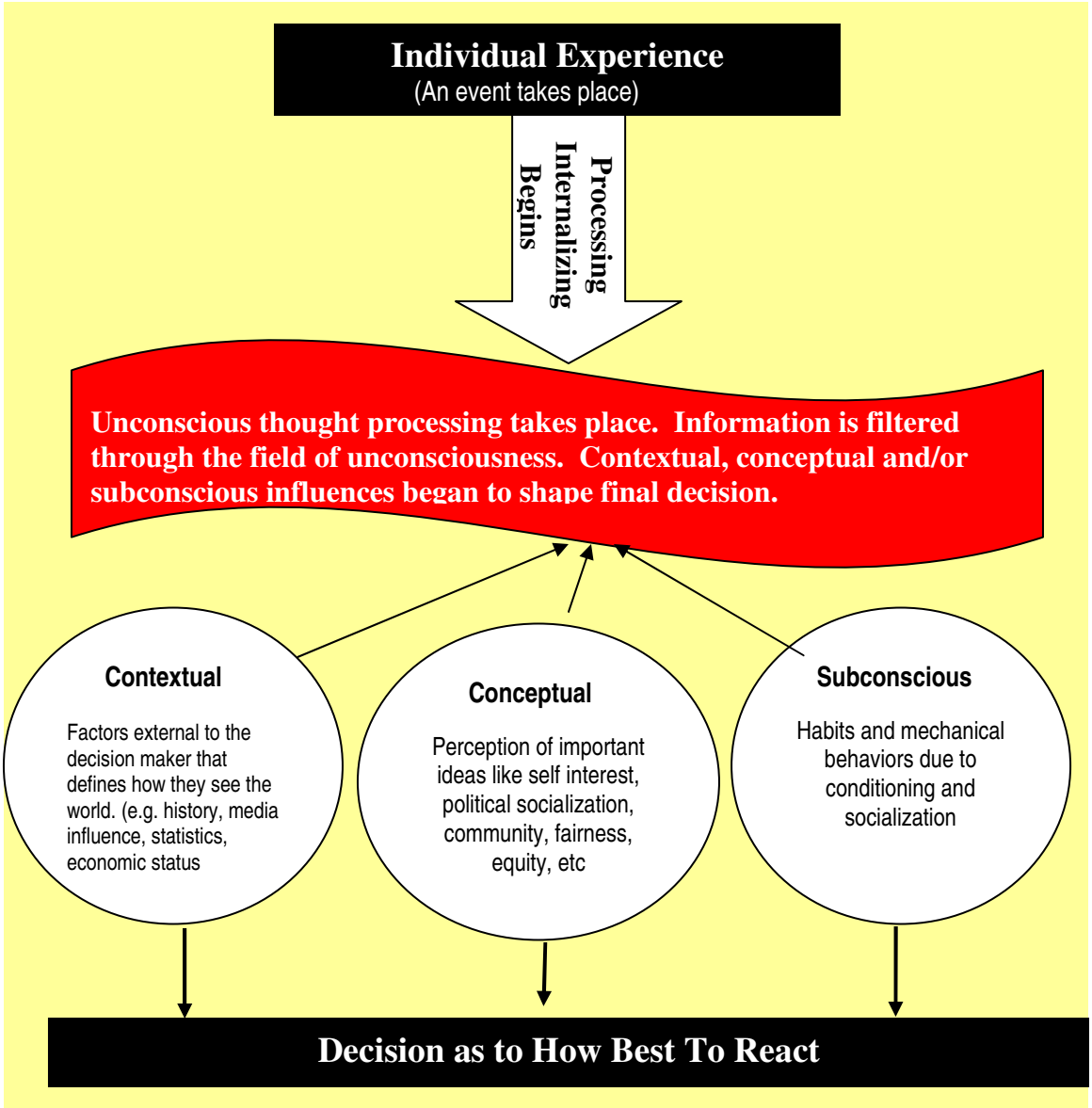

Figure 1.2 The Flow of an Experience

To help organize and understand the various influences on unconscious filtering that are discussed in the literature, I break these influences down into a three-fold typology. I argue that we can find in the discrimination literature, three broad types of factors that influence the continued existence of discrimination and policy-makers' lack of lack of awareness of this continuation. This typology consists of contextual, conceptual and subconscious factors, discussed as follows.

1.4 Contextual

Contextual factors are those factors external to the decision-maker that shape the arena of debate. Examples of contextual factors would include statistical data reflecting current day economic, educational, and social status of minorities and females; information regarding the increasing number of complaints and lawsuits filed alleging discrimination; and distorted negative perceptions of minorities resulting from media coverage illustrating a societal drain resulting from welfare dependency, drug usage, and the prison system population.

America's history is plagued with events that have negatively shaped opinions regarding the value, intelligence, status and worthiness placed on people of color. Discrimination and oppression are adjectives that are commonly used the describe African Americans' history. Ellison (1970) asserts that the true identity of African Americans remains a deep uncertainty to white America. This, according to Ellison, is largely due to the effects of historical oppression and mass media's continual portrayal of the status of people of color as second-class citizens. Taylor (1995, 1) adds "mass media have played and will continue to play a crucial role in the way white Americans perceive African Americans. As a result of the media's overwhelming focus on crime, drug use, gang violence, and other forms of anti-social behavior among African Americans, the media have fostered a distorted and pernicious public perception of African Americans."

Dedman and Doig (2005) suggest that the media would more positively portray African American life if there were more African Americans on the media staff. A commitment was made in 1978 by the Society of Newspaper Editors (ASNE) to hire more minorities on their staffs. The ASNE set a target to increase daily newspaper staffing levels to mirror to the percentage of minority persons within the national population by the year 2000. Twenty years later, in 1998, this target date was extended by 25 years due to ASNE's limited progress. By 1999, (21 years later), minorities constituted 11.6% of news staffs but 27.3% of the country's population (Cohn 1999). According to a study of newspaper employment from 1990 to 2005, (which was conducted the Knight Foundation) by 2005, newsroom diversity had declined at most daily newspapers in the U.S., including three-fourths of the largest papers. When surveying the employment statistics of

newsroom jobs of the 200 largest newspapers from 1990 to 2004, 73% reported employing fewer minorities as a share of the qualified available workers. Only 27% reported that their daily newspaper staffing levels mirrored the percentage of minority persons qualified to perform the job within the national population percentage as the year 2005 began (Dedman and Doig 2005).

In 2005, TV news staffs were slightly more diverse then in the 1990s, and magazines staffs were far less diverse. However, Dedman & Doid (2005, 2) explains, "few top news executives in any medium—the real decision makers—are minorities. This lack of diversity has consequences in terms of content and perception. A more important consequence is the narrow, distorting lens through which racial minorities are frequently portrayed in mainstream news." The National Association of Hispanic Journalist has commissioned several studies to determine the perception portrayed by the media on Latino life. A 2004 review of the 12,000 stories aired on the three network TV evening newscasts that year, only about 1% focus on Latinos or Latino issues, and roughly 80% of these stories portray Latinos negatively, often on subjects like crime, drugs and illegal' immigrants (Dedman and Doig 2005).

Johnson's (1991) classic study that covered 30 days of Boston's two largely black neighborhoods found that mainstream media focused overwhelmingly on "lights-and-sirens" stories involving violent crime or drugs. Eighty-five percent of these stories reinforced negative stereotypes of blacks. Conversely, black-owned media outlets reported the same events in these two neighborhoods in a less discrediting way. While these minority-owned outlets covered crime; they also covered local business, school successes and community cleanup campaigns. Fifty-seven percent of their stories suggested that while their communities contain areas of poor living conditions, which were being made worse due to bureaucratic neglect, there were also constant effort being made to advance educational advancement and encourage entrepreneurial achievement (Johnson 1987).

Cohn (1999, 1) explains, "Each individual story in mainstream news may not be false, but if that's basically the only kind of story presented, the total picture becomes a fiction." According to Cohn, for an American society that still inhabits largely segregated workplaces and

neighborhoods, the media are the main sources of information about people of other racial groups. “Therefore, the media deserves a share of the blame for the prevalence of **racist attitudes.** Publications like the *New York Times* and *The New Republic* helped to resurrect the pseudoscience of eugenics and racial inferiority through prominent, often credulous coverage of texts (e.g., *The Bell Curve*)” (Cohn 1999, 1). Cohn uses Malcolm Browne’s October 1994 *Times* review, which praised *The Bell Curve* for making a strong case of a smart, rich elite polarizing with an unintelligent, poor population as a blatant example to illustrate the media’s role in spreading negative minorities images to the public. Numerous studies have revealed that media significantly impacts public perception. Cohn (1999) cites a 1990 National Opinion Research Center survey which found that 53% of non-black respondents said that African Americans were less intelligent than whites, 56% said they were more violence prone, 62% said they were lazier, and 78% said they were more likely to prefer to live off welfare. According to Cohn, similar results were given when asked the same questions with regards to Latinos and Asian Americans.

1.5 Conceptualization

The second point of influence is the decision maker's conceptualization of important ideas (e.g., political socialization, community, self interest, equity and fairness). Sears (1988) used the term symbolic racism to describe these occurrences. Sears focused on unveiling the role of racism in mass white public political responses. A central contention of Sears' theory was that symbolic racism was replacing "old-fashioned"[7] racism as a determinant of whites' responses to political matters. Sears (1988) described old-fashion racism as open bigotry revolving around three specific contents: (1) pre-Civil War racial stereotypes, (2) restrictions on interracial social contacts (e.g., social distancing and segregation), and (3) opposition to equal access or equal opportunity for persons of all races. The concept of symbolic racism was developed as a part of a broader theory of symbolic politics. Symbolic politics posits that much adult political behavior results from symbolic predispositions acquired before full adulthood. This concept will be further explored in chapter 2.

1.6 Subconscious Reactions

The third, less accepted, point of influence is the decision makers' subconscious conditioning and socialization, which influences how (s)he perceives, believes and responds to people, things and events. "Although overt racism is still very present (we see it in racial profiling, acts of violence, and other obvious manifestations) a subtler form has emerged in the attitudes, words and behaviors of many people who would never consider themselves racist" (Katz 2003, 7). This can be exemplified by: (1) the

subconscious reaction of people watching black shoppers more closely than whites, randomly stopping black males, or grasping tightly to shopping bags when a black youth is in close proximity—because they are believed to be more deviate than whites, and (2) holding blacks to a lower standard, stating that black students require more attention and help from their instructors, or equating an "A" received by a black student from a minority school to that of an average or "C" student from a predominantly white school—because minority schools are presumed to be less

equipped to fully educate their students, and blacks (in general) are expected to be slower, less intelligent and underachievers. Chapter 6 describes this subconscious behavior during a discussion of Barbara Flagg's (2009) transparency theory.

1.6.1 Framework for Dissertation

Critical Race Theory (CRT) is cited in this dissertation as a primary reference. Delgado (2001) explains that CRT consists of individuals concerned with exploring the relationship among race, racism and power. Many of these CRT activist and scholars examine the same issues that conventional civil rights and ethnic studies discourses take up. However, CRT places these issues in a broader perspective that includes economic, history, context, group and self-interest, and even feelings and the unconscious. According to Delgado, "unlike traditional civil rights, which embraces incrementalism, and step-by-step progress, critical race theory questions the very foundations of the liberal order, including Critical Race Theory (CRT) is cited in this dissertation as a primary reference. Delgado (2001) explains that CRT consists of individuals concerned with exploring the relationship among race, racism and power. Many of these CRT activist and scholars examine the same issues that conventional civil rights and ethnic studies discourses take up. However, CRT places these issues in a broader perspective that includes economic, history, context, group and self-interest, and even feelings and the unconscious. According to Delgado, "unlike traditional civil rights, which embraces incrementalism, and step-by-step progress, critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law" (Delgada, Stenfancic, and Harris 2002, 12). A more in depth discussion of Critical Race Theory is found in chapter 2.

1.7 Contribution to the Field

Questions surrounding discrimination and affirmative action policy are much too global to be addressed in a single discussion. The dissertation concludes that contextual, conceptual, and

[7] Traditional racism – blatant and overt acts of prejudice.

subconscious reactions influence how individuals process information and make decisions. Because we are unaware that this processing is taking place, it serves as a barrier to one's acceptance of personal biases and unconscious conditioning. These phenomena make discrimination hard to acknowledge and even more difficult to prove, thereby contribute to its continued existence.

My discussion explores and analyzes the paradoxical actions of the U.S. government's efforts to eliminate discrimination. Discrimination has been found to be so destructive to society that it warrants direct government intervention. However, despite more than 145 years of debate, millions of dollars of research and countless evidence, and substantiation through judicial review of the continued existence of discrimination, public policy in the last 20 years has taken a 180 degree change in direction. The same legislation relied upon to enact policies and programs to eradicate discrimination, is now being used to dismantle them.

In the 1954 Brown v Board of Education case, the U.S. Supreme Court ruled that race-specific government conduct disadvantaging blacks violates the Equal Protection Clause. In 1971 Griggs v. Duke Power Company, the Supreme Court ruled that disparate impact alone, without proof of discriminatory intent, would be adequate to support a finding of a statutory violation of the Equal Protection Clause. In 1976, the Court clarified the circumstances under which a facially race-neutral government act or rule that has racially disparate effects would constitute a similar violation of the Equal Protection Clause (Flagg 1998). Recently, the Court has adopted a requirement of discriminatory intent.[8] Flagg (1998, 10) argues that "the requirement of discriminatory intent operates as an absolute barrier to recognition of unconscious discrimination, and also fails to provide any foothold for attacking the transparency phenomenon." Flagg explains that the discriminatory intent requirement alludes to the conscious use of race as a factor in decision-making is more blameworthy than its unconscious (subtler) use.

[4] Discriminatory intent is a judicially created rule that the accused bears a burden of justification with regards to a practice carrying racially disparate effects only when it can be shown that the practice was adopted with discriminatory intent.

This dissertation provides a framework for analyzing the difficulties in proving the common occurrence of subtle discrimination and it explores the correlation of the concept of the transparency phenomenon (white unconsciousness), value perspectives and the resulting verdicts of decision makers. This is illustrated through: (1) detailed analysis of a case study[9], *Concrete Works v. the City and County of Denver,* 36 F. 3d 1513 (10Th Circuit 1994), and (2) an examination of majority and dissenting opinions of Supreme Court Justices' rulings on policies regarding six precedent setting affirmative action cases[10]. The causes of action for these cases (*Bakke, Fullilove, Wygant, Croson, Metro Broadcastig,* & *Adarand)* are founded on claims of the unconstitutionality of affirmative action initiatives designed to increase minority and female participation. An analysis of precedent-setting court cases is an opportunity to explore value perspectives of the decision makers. More importantly, the binding legal decisions of these cases have set the tone for future public policy regarding equality and fairness for America's female and minority citizens.

1.8 Significance of the Study

A rhetorical question is one to which no answer is expected. This is because the answer is buried in the question, just as the question itself may be the answer. The current demand by America's courts to require plaintiffs alleging discrimination to not only prove the existence of present day discrimination but to also prove the "discriminatory intent"[11] of the actor is at best, a rhetorical request.

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[9] Although this case study has specificity to federal contracting, it highlights explicitly historical, political, social and economic aspects of the challenge presented when evaluating claims of discrimination.

[10] Bakke –a reverse discrimination centering on the constitutionality of the practice of using race to reserve places for minority candidates at the University of California's Medical School. Fullilove **–** questions the legality a minority business participation provision in order to contract with the public entity. Wygant **–** questions the legality of provision sis a collective bargaining agreement to extend preferential protection against layoffs to some employees because of their race or national l origin. Croson challenged the legality of a school board having a minority business utilization set-aside plan. Metro Broadcasting – challenges the legality of a minority ownership policies aimed at increasing radio and television diversity. Adarand vs. Pena the definition of "minority" was at issue in this case and the use of racial preference in awarding of government contracts. Strict scrutiny was held to be the new standard of constitutional review for federal affirmative action programs that use racial or ethnic classifications as the basis for decision-making.

This dissertation hypothesis sets out to test one prevailing thought: Unconscious conditioning, which occurs throughout the life experiences of white Americans,[12] makes it more difficult to acknowledge the existence of discrimination. This inability to recognize the persistence of discrimination, compromises some white American's ability to appreciate the need for or credibility of programs such as Affirmative Action policy. This coupled with the irrepressible nature of discrimination makes it very difficult to prove its existence. Additionally, notwithstanding the substance of the evidence presented, the perspective of the Justice(s) of the Court will shape the outcome of any case. Therefore, the heightened requirements necessary to prove present day discrimination erect a tremendous barrier to successful litigation.

Here is a simplified analogy that I have created to demonstrate the experience of black Americans' pursuit to prove discrimination:

> Imagine being in a court of law, trying to convince the Judge that the wind is blowing outside. You attempt to support your position by providing ample evidence of flags waving, leaves on trees shaking and debris moving throughout the streets. However, you are told that there are many logical explanations for such reactions. You may then take the Justice(s) by the hand and accompany them out of the door, letting them feel the breeze as the wind passes through their face, hair and clothes. Because this is a common occurrence for the Justice(s), and what you refer to as "wind", they call "air", your explanations are heard but not understood. You are challenged to produce direct evidence that there is not a huge invisible fan out there producing "man-made" air; and you are then told that it is highly probable that it is not "wind" that you are feeling.
>
> As time goes on, the calmness of the wind changes. The debris that was once blowing down the street has begun to make a circular pattern. The trees are uprooting, buildings are falling down, rooftops are flying off homes, people are running to safety, windows are breaking, and there is a heightened sense of unrest. You return to the Court and attempt to explain that as a result of the combination of the heat and moisture into the overlying atmosphere, a thermodynamic engine has formed. This combination of heat and energy mixed with an inward spiraling of the wind pattern was powerful enough to propel a hurricane. The winds are devastating and will cause much damage as they move along the city streets. Once again, you are asked to prove that this newly formed hurricane is the root cause of such disastrous results. After all, could it not be that the trunks of the trees all of a sudden decayed at the same time that faulty construction caused the collapse of buildings, and gaseous explosions are causing roof blowouts and window breakage. Everyone, according to the Justice(s), knows that fear is a normal reaction when facing such unexpected events and the citizens' fear is probably what is causing

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[11] Discriminatory intent refers to a conscious desire to do harm (Flagg, 1998, p. 43).

[12] The use of the terminology "white America" is simply used herein to reference people of a different race than the once referenced during the decision-making process. "White" is used here because it has been referenced throughout this dissertation as the majority race with the most power to make decisions that significantly impact policy in America.

the social unrest.

Mountains of statistics have been produced to demonstrate how the phenomenon of discrimination has resulted in the oppression of black Americans and the segregation from basic opportunities such as employment, secondary education, adequate resources for primary education, federal contracts, prime lending rates, and housing in premium neighborhood.

The development of a hurricane is frequently triggered by some pre-existing weather disturbance in the tropical circulation. For example, some of the largest and most destructive hurricanes originate from weather disturbance that form as squall lines over Western Africa and subsequently move westward off the coast and over warm water, where they gradually intensify into hurricanes.[13] Perhaps analogous to the perspective of the idealist position, the elements that trigger acts of discrimination are some pre-existing mindsets or societal occurrences, which altered the ability of one group to view the other as equal. Comparable to hurricane development, some of the largest and most destructive societal tribulations originate from acts of exclusion that formed perceptions of an inferior second-class citizenry and subsequently stimulated doubt, distrust and uncertainty, which gradually intensified into discrimination and oppression.

One difference between weather and people is that the later exhibits agency and can change. French sociologist Pierre Bourdieu developed methodological frameworks regarding the influence of structure and agency on human thought and behavior. The capacity of individual humans to act independently and to make their own free choices is referred to as "agency." Those factors such as social class, religion, gender, ethnicity, customs, etc. which have a capacity to limit or influence the opportunities that individuals have is known as "structure" (Wikipedia 2007). Bourdieu published numerous articles discussing his theory of practice on the separation of the dichotomical understanding of the relation between agency and structure, which began with his 1972 release of an article, entitled *An Outline of the Theory of Practice*. It was in

[13] *Hurricanes: How they work and what they do.* **http://kids.mtpe.hq.nasa.gov/archive/** hurricane/creation.

this publication where Bourdieu presented the concept of habitus[14]. Bourdieu's theory will be further discussed in Chapter 7.

The research herein suggests that the inability to satisfactorily prove acts of discrimination has diluted the impacts of social public policy aimed at assuring equality for people of color. This inability of social policy to combat discrimination has resulted in the denial of basic necessities for entire segments of American society and created a nihilistic state of hopelessness and despair. This, in turn, has created a "hurricanic" state of violence, self-hatred and destruction which has contributed to a concentration of black Americans in jails, on welfare, and failing to thrive in schooling, business and employment.

1.9 Organization of the Manuscript

This dissertation has two parts. Part one consists of four chapters, which set forth the foundation for understanding the dissertation's purpose. Chapter 1 gives a description of the research and identifies the research questions, highlights the significance of the topic and maps the organization of the study. Chapter 2 outlines the prevailing theories of discrimination and explains how subconscious, conceptual, and contextual influences are formed and linger into present day opinion. Implicit in the theoretical framework are notions that suggest the need for new policies and programs such as Affirmative Action to address discrimination perceived or actualized. Chapter 3 outlines the qualitative research methodology. Chapter 4 provides a brief overview of the two-pronged approach to test the dissertation hypothesis: (1) utilizing *Concrete Works v. City and County of Denver* lawsuit as a case study for this dissertation to illustrate the *ironic* nature of requiring the production of a disparity study to satisfy the requirement of strict scrutiny in order to prevail in present day discrimination cases, and (2) using six precedent setting court cases (*Bakke, Fullilove, Wygant, Croson, Metro Broadcasting* and *Adarand*) to examine the dissertation's theory of the presence of unconscious conditioning influences on policy-makers

[14] Bourdieu describes the concept of habitus on the individual level to refer to a system of attitudes and dispositions which are relatively permanent and transferred from one object to another. Simultaneously

who participated in decisions shaping the strict scrutiny standard that resulted in the 180-degree change that set the tone for future public policy regarding equality and fairness in contracting, education and employment. Here we focus on transparency theory's[15] posit that the facially neutral criteria of decisions are tainted when policy-makers adopt rules or make decisions that are neutral on their face but carry racially disparate effects (Flagg 1998).

Part two consists of four chapters that elaborates the tests the dissertation hypothesis begun in Chapter 4, discuss findings, offer remedies and set forth limitations of the study. Chapter 5 provides a background on the dilemma of defining and controlling discrimination by describing historical attempts to curtail impacts of discrimination. Chapter 6 discusses the Court's findings with regard to flaws in the disparity study presented in the test case, *Concrete Works v. the City and County of Denver,* 36 F. 3d 1513 (10Th Circuit 1994). Drawing from previous research sponsored by the Urban Institute, the Rockefeller Foundation and the U.S. Department of Justice (Enchautegui, Fix, Loprest, der Lippe, & Wissoker 1997), an aggregate of quantitative evidence on disparity is collected from 58 studies to provide a national picture of disparity. This aggregated data is used to test the dissertation hypothesis that no disparity study could have withstood the scrutiny of the Justices of *Concrete Works vs. the City and County of Denver*. The study hypothesis is tested by examining whether:

1. There are indications that regardless of the degree of statistical proof presented to substantiate evidence of discrimination, the ability of the Justices to acknowledge the existence of discrimination is impacted by their value-shaped perspectives. This is determined by comparing the questions and criticisms of the Justices with the points of influence described in this chapter to sway decision making. The three points of influence I categorize as shaping one's value perspective once again are: (a) contextual factors external to the decision maker that shape the area of debate; (b) conceptual factors which consist of the decision maker's conceptualization of important ideas like political socialization, community, self interest, equity and fairness; and (c) subconscious factors such as conditioning and socialization, which influence how decision-makers perceive, believe and respond to people, things and events.

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these attitudes and dispositions integrate all the previous experiences of an individuals' ways to see and value things and act. (Philosophical Perspective of Open Learning, 1999)

[15] According to Flagg (1998), "the most striking characteristic of whites' consciousness of whiteness is that most of the time they don't have any". She refers to this as the transparency phenomenon: "the tendency of whites not to think about whiteness". Instead, Flagg argues that white people externalize race. Whites' consciousness of whiteness is predominantly unconsciousness of whiteness.

2. The results from the national disparity study would have satisfied the questions, criticisms and requirement of the 10th Circuit Justices to provide sufficient proof of current day discrimination.

3. The very nature of the questions and criticisms of the disparity study (although seemingly a neutral criteria of decision), resulted in an absolute barrier to the recognition of the impact of historical exclusionary policy, in an attempt to uphold the tenets of the equal protection laws.

Chapter 7 emphasizes the less accepted point of influence—the decision-maker's unconscious conditioning which influences how they perceive, believe and respond to people, things and events. This emphasis is accomplished through an examination of the disposition of Supreme Court cases involving claims of discrimination. Transparency theory and discourse analysis are used to determine if they can explain the failure of Justices to provide remedies to correct past public policy failures to detect and deter societal discrimination. The language and discourse used by the Supreme Court Justices to defend their positions are considered to be approximations and manifestations of their value-shaped presuppositions and internal or personal beliefs that influence their decision making with regards to issues of discrimination. Majority and dissenting opinions are enlisted to measure presence of transparency theory by addressing the following questions:

1. Does the Justice's opinion eschew heightened scrutiny for racially disparate effect absent proof of discriminatory intent[16]? (*Conceptual Influence*)

2. Does the Justice's opinion legitimate unconscious race discrimination by reinforcing the "popular white story[17]" about progress in race relations? (*Contextual Influence*)

3. Does the dissent suggest that overt discrimination is the only justifiable blameworthy form of race discrimination; thereby, ignoring the destructive nature of unconscious (subtle) discrimination? (*Subconscious Influence*)

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[16] Flagg (2001) explains that the discriminatory intent rule recreates transparency theory in that it affords a presumption of race neutrality to facially neutral criteria of decision without regard to the possibility that those criteria in fact reflect white-specific characteristics, attitudes or experiences.

[17] Flagg (1998) asserts that "the central theme of the 'popular white story' is that our society has an unfortunate history of race discrimination that is largely behind us. In the past, the story goes, some unenlightened individuals practiced slavery and other forms of overt oppression of black people, but the belief in the inferiority of blacks upon which those practices were premised has almost entirely disappeared today. We, aside from the exceptional few who remain out of step with the times, think of blacks as the equals of whites and thus no longer accept race as a permissible basis for different treatment."

The underlying premise is that the difficulty of proving discrimination is amplified by historical (contextual influence), perceptional (conceptual influence) and psychological (subconscious influence) barriers to acceptance of personal biases and unconscious contributions to its continued existence. These biases have contributed to the Supreme Court's shifting requisites to substantiate the existence of discrimination. Value-shaped perspectives are shaped by three points of influence-contextual, conceptual or subconscious reactions. These three points of influence serve as visual blinders to discrimination. The value-shaped perspectives of the Justices have the potential to impact their ability to internalize the existence and externalities of discrimination. The higher the degree of existence of the contextual, conceptual or subconscious reaction influences, the lower the visibility of discrimination to the decision maker. The difficulty of proving discrimination has resulted in a backlash on the public policies intended to combat discrimination. This is highly visible when litigating cases involving affirmative action programs.

Chapter 8 provides the scope and limitations of the study.

CHAPTER 2

LITERATURE REVIEW

2.1 Theories of Discrimination

Discrimination is a symptom of racism. Economic oppression is created and maintained through discriminatory actions.

> One view, which defines discrimination as a personified culpable actor—one that is malevolently motivated—reinforces a perpetrator perspective that sees discrimination as a series of isolated actions. This is also referred to as the micro-founded view. An alternative view sees discrimination as an integrated system that elevates one group at the expense of another.
> Delgado 2001, 2282-2283

This is known as the macro-founded view. The first view ignores the notion that race is an established institution of American life, not a blameworthy exception of individuals, and how it serves as a mechanism for maintaining and replicating social relations (Delgado). The second view obscures or hides the ways in which secular ideologies are linked to larger civilization ways of life and struggle (West 1999).

> The concept of discrimination appears in many forms. There is a long laundry list of words and phrases to describe discriminatory acts: racism, prejudice, preferences, tastes, biases, segregation, different treatment, and exclusion. While historical acts of discrimination were overt and blatant, present day discrimination is more often insidious and less obvious. Protection against subtle discrimination—a decipherable yet less explicit kind of racism—and the expectation of enforcing statutory rights aimed to yield equality are fundamentally at variance if courts and policymakers fail to understand how subtle discrimination functions in society and how it impacts the lives of minorities.

When attempting to define the concept of discrimination, one finds two distinctly different ideologies. Delgado (2001) explains that one camp, referred to as the *idealists*, holds that "racism and discrimination are matters of thinking, attitude, categorization, and discourse." According to idealist thinkers, "race is a social construction, not a biological reality" (2282). Delgado states that we may erase discrimination by purging the system of its underlying images, words, and attitudes that convey the message that certain people are less worthy, less virtuous, and less American

than others. The idealist thinkers align with what I have called contextual factor influencing decision making (see figure 2.1).

The contrasting school, which Delgado (2001) refers to as the *racial realist* or *economic determinists*, holds that "although attitudes are important, racism is much more than having an unfavorable attitude toward members of other groups; material factors are necessary to the analysis of racial discrimination" (2282). For realists, racism, through acts of discrimination, is a means by which society allocates privilege, status and wealth. Racial hierarchies determine who receives tangible benefits, including the best jobs, the best schools, live in the best neighborhoods and who receive invitations to parties in people's homes. According to Delgado, members of this group point out that the genesis of slavery brought forth the advent of prejudice. The racial realist school aligns with what I have termed conceptual factors influencing decision making (see figure 2.1).

Lawrence (1987) identifies a third ideology known as *unconscious theory*. While unconscious theory adopts the idealist's view—that race is a social construction—it also aligns with the realist perspective that states that acts of discrimination (intended or unintended) influence the allocation of privilege, status and wealth in America. Lawrence asserts that the source of much racism lies in the subconscious mind. "Individuals raised in a racist culture, without knowing it, absorb attitudes and stereotypes that reside deep in their psyches and influence their behavior in unconscious, and sometimes—pernicious ways" (Lawrence 1987, 757). Lawrence writes, "racism is a disease" (757). Treating racism's symptoms (i.e., discrimination) without attending to the forces that create and maintain it (i.e., economic oppression) inhibits understanding and postpones the moment when we will develop effective strategies for resisting it (Delgado 2001).

Lawrence (1987, 324) asserts, "When such behavior takes the form of racial discrimination and the cultural meaning of the behavior is plain, the law should expand to encompass this subtler, more unconscious form of discrimination." This expansion, according to Lawrence, will bring law into conformity "with the learning of the twentieth century psychology and

enable it to tap the considerable [and] well respected body of knowledge and empirical research concerning the workings of the human psyche and the unconscious" (Lawrence 1987, 329).

Lawrence's (1987) idea of unconscious ideology is also visible in research from the American Psychological Association (APA). According to testimony given by the APA in 1997 on H.R 1909, the APA's aggregated data offer the best opportunity to detect a subtler, but no less discriminatory, pattern of bias—contemporary racism. *Aversive* and *symbolic* racism has been identified by social psychologists as two types of contemporary racism that has sparked the need for organizations broader their efforts to contend with discrimination. (APA Testimony 1998).

Aversive racism (which aligns with the racial realist perspective) has been defined as "negative feelings towards other groups that lead to avoidance, but are likely to be justified by some other reasons" (APA Testimony 1988, 3) (e.g., We should not hire foreign speaking employees as customer service agents because the customers can not understand them, or, It is best to hire a male executive because females are likely to get pregnant and leave their positions after the company has invested lots of time and money in grooming them). These biases are rationalized by the aversive racist such that they do not think of themselves as racist and do not threaten their image as being prejudice. Their actions are therefore expressed in a subtler and meandering way. "Aversive racists do not intend to be racist; they express their prejudice not by endorsement of negative stereotypes about females and minorities, but rather through expressions of preference for members of their own group" (APA Testimony 1998, 3).

On the other hand, symbolic racism is akin to what I referred to in Chapter one as the subconscious factors (see figure 1.2). It refers to negative feelings toward other groups that develop early in life and persist into adulthood. (APA Testimony, 1998) (e.g., a fear of black males because they are often portrayed in the media as violent and dangerous; perceiving a female police officer as less capable than her male partner to apprehend a male suspect; perceiving an Asian applicant with the same experience and background as other non-Asian applicants more qualified to work in a technology position based purely on his appearance). These feelings are connected to beliefs that are not released openly; rather they are shown in

more subtle actions and expressed symbolically. While the less common examples of traditional racism, such as stiffer penalties and punishment for hate crimes, receive the greatest media visibility. Unlike traditional racism, symbolic racism can only be detected by comparing accumulated data on the inclusion of target groups with reasonable institutional goals (APA Testimony, 1998). The idea of symbolic racism thus supports the dissertation's postulate that discrimination is often invisible to an outsider and therefore difficult to prove.

Symbolic racism is a bi-product of the broader theory that Sears (1988) refers to as symbolic politics. This theory holds that much adult political behavior results from symbolic predispositions acquired before full adulthood. As with the idealist perspective, this predisposition is viewed as being learned and as reflecting the dominating norms of the individual's informational environment. The general symbolic politics approach is depicted below in figure 2.1.

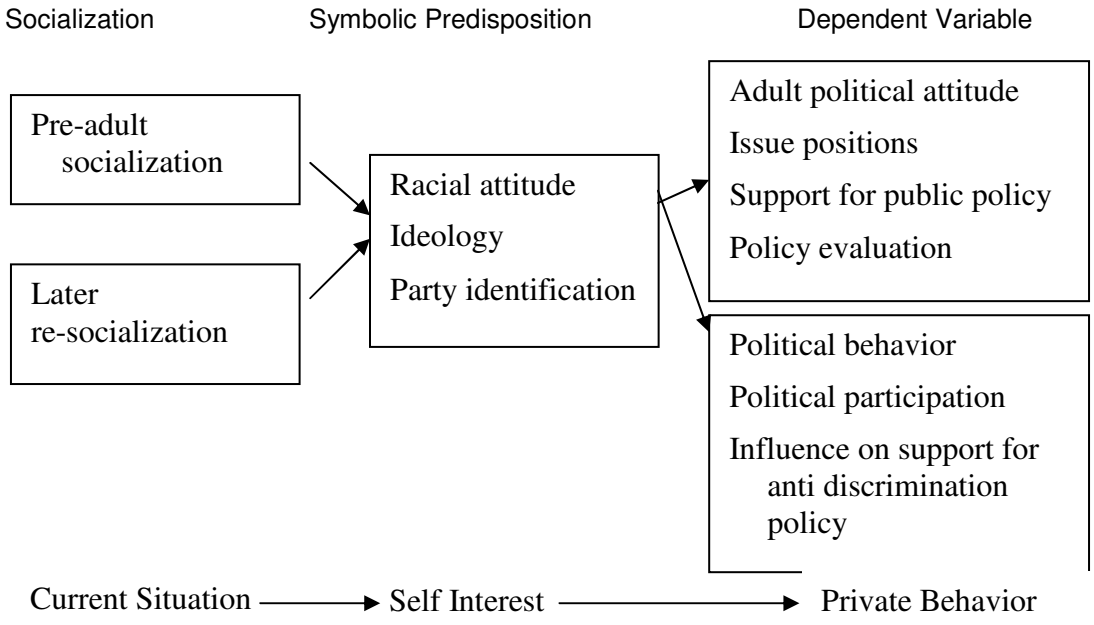

Figure 2.1 Symbolic Politics Theory

Source: Sear, David (1988) Symbolic Racism in Katz, P. and Taylor, D. Eliminating Racism. New York: Pelnum Press

Figure 2.1 suggests that when one conceives of human motivation primarily in terms of living in predisposition acquired through early, pre-adult socialization, this has clear

consequences for preference formation. According to Sears (1993), from a socialization perspective, it is assumed that individuals react instinctively to cognitive cues or affects. People follow established traditions and conform to social norms in a relatively reflexive fashion; they do not calculate costs and benefits. March and Olsen (1989) explain that the centrality of socialization means that individuals show considerable loyalty to internalized norms, practices or preferences. Individuals hold on to these, even when they cease to serve their own interest. They ask, "Who am I?", "What group am I a part of?", and "So what is the proper thing to do?" March and Olsen refer to this as *logic of appropriateness*. Many times these individuals do not adjust easily to changing circumstances; rather, they have a tendency to integrate new political objects or situations into familiar value systems. This suggestion of decision makers reverting to one's familiar values system is also quite visible in Flagg's (1995) *Transparency Theory* and Bourdieu's (1999) *Theory of Habitus* which are further discuss in chapter 7.

In an effort to eradicate discrimination and provide equal opportunity in federal employment and federally funded contracts, the public policy of affirmative action was initiated in 1965. Ironically, 40 years later the very qualifying event (discrimination through preferential treatment) that served as the foundation for the inauguration of affirmative action policy now serves as the disqualifier to support the disbandment of affirmative action programs. The courts demand strict proof that discrimination still exists, despite the fact that the same evidence that prompted government intervention in 1964 is still apparent today, (e.g., in 1965 black men's wages were 69% of white men's wages and 38 years later in 2003, only 73% of white men's wages) (U.S. Department of Labor Statistics 2003).

Patrick (1988) aligns with both the idealist and racial realist perspectives as they relate to unconscious influences of discrimination as he theorizes that "perspective is key to understanding the national debate on affirmative action" (231). Patrick adopts the idealist position as he explains that "perspective is not just distance from your subject but a different angle, a different lighting, a different way of viewing it. The more you can vary your perspective through life experiences and the passage of time, the deeper your understanding will be" (232). According to Patrick, if you

don't understand something, the reason may likely be that you are simply standing in the wrong place. From the perspective of many of America's minorities, they feel less of a sense of opportunity, less assured of equality, and less confident of fair treatment. If you ask any African American man or woman from the most accomplished to the least about personal experiences with discrimination, you will hear tale, after heartbreaking tale, of racially motivated unfairness, hostility, or even violence (Patrick 1998).

Patrick (1998) identifies with the racial realist view as he asserts that many opponents of affirmative action hold a quite different perspective. "They feel that they are either being forced to pay for others' past sins, that affirmative action unfairly gives preferences to minority groups, or that we should simply declare ourselves a color-blind society in which neither whites nor members of minorities receive benefits or burdens on account of their race" (233). These individuals are *unconscious* of the impact that race and gender has on social and economic opportunities and of the fact that their unconsciousness of these impacts contributes to the continuation of subtle discrimination. This postulate is further examined in chapter 7 with a discussion on transparency theory. Patrick notes that the interesting thing about this color blind society perspective is that while it has a surreal quality to it, and minorities are said to have overcome slavery, racism and discrimination and are receiving undeserved special privileges, it has been found that hardly a single white person would willingly trade places with an African American today.

2.2 Special Presidential Report on Discrimination

Although arguments against discrimination are often preceded by a tale of the plight of African Americans, similar tales can be made of our nation regarding women and other minorities as inferiors and relegating them to subordinate castes. Formal laws and informal customs drastically limited and made a mockery of merit-based opportunity. According to the 1995 Special Report to President Clinton, the Federal government's affirmative action programs "for much of this century, laws in many states discriminated against women by barring them from entering

entire occupations—mining, fire fighting, bartending, law, and medicine" (Affirmative Action Review 1995, 633). The report goes on to explain that as few as 35 years ago, newspapers divided employment want-ads into men on one side and women on the other. Even when the jobs were identical, the wages and benefits were not. With the exception of the few that became superstars in "acceptable" occupations such as sports or entertainment, discrimination in the form of segregation forced American Indians, African Americans and Latinos into low-wage, dead-end jobs. African Americans, even if they were college educated, worked as bellboys, porters and domestics, unless they could get a scarce teaching position in an all-black college. "Laws prohibited Asian Americans from owning land and often forced them to work fields to which they could not hold title" (Affirmative Action Review 1995, 633-635).

The 1995 report also notes that "a mere 35 years ago you could walk through most cities in the United States and never see a woman or a minority dressed in business clothes. Universities, colleges, and professional schools often systematically excluded women, or channeled them into very few professions like teaching or nursing well into the 1970's. Rigid barriers still precluded African Americans, American Indians, Asian Americans and Latinos from attending certain schools. When laws did allow attendance, residential segregation, educational policies, and social practices typically limited minorities to the poorest-funded schools and to various vocational tracks, all far away from where their talents might well, with support, lead them" (Affirmative Action Review 1995, 636).

Throughout this dissertation, the plight of African American (black) citizens will tend to be prominently utilized for illustrative purposes. This does not discount the damage and impact that discrimination has on females and other minority groups. Nor does it imply that these groups are of any less importance or relevance to the research set forth herein.

2.3 Lingering Presence of Discrimination

Almost 50 years after enacting fundamental reforms that would guarantee equality to all citizens, the U.S. still finds itself telling very different stories about race and about the prevalence

of racism. People of different races and ethnicities tend to read race and racism in ways that are crucially at odds (Gutierrez-Jones 2001).

The famous O.J. Simpson criminal and civil trials can be used to demonstrate this point. Shortly after the civil trial, a nationwide poll conducted by the *Los Angeles Times* in 1997 revealed that 76% of the whites agreed with the civil trial verdict that found Simpson guilty of the killings of Nicole Simpson and Ronald Goldman; while only16% of whites disagreed. The same poll indicated that only 25% of blacks agreed with the verdict while 67% of blacks disagreed. Underscoring the conflict, the polls also showed that most respondents held their views strongly (Lauter in Gutierrez-Jones, 2001).

Steadfast contrasting views, split along the race and ethnicity line, are visible in numerous areas regarding the treatment of American minorities and their access to basic necessity (i.e., equality in housing, education, employment, the judicial system) (Guiterrez-Jones 2001). There is a further lessoning of minority faith in America's sincerity in assuring equality as they witness how issues of ill treatment are handled. Take for example the Rodney King[18] and Amadou Diallo cases[19] where the jury acquittal decisions that resulted from the changes in venue

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18 On March 3, 1991, while driving a car in Los Angeles, Rodney King failed to stop when signaled by a police car behind him, and increased his speed. When police delivered 56 baton blows and six kicks to King, in a period of two minutes, after stopping his car, producing 11 skull fractures, brain damage, and kidney damage. A bystander who videotaped the incident from the balcony of a nearby building, gave the tape to Los Angeles TV channel 5. Within hours, the video was being broadcast by TV stations worldwide. The police officers filed inaccurate reports, not mentioning the fact that Rodney King was left with head wounds. On March 15, 1991, four police officers were arraigned on charges of assault with a deadly weapon and use of excessive force. The four police officers plead not guilty on March 26. On a defense motion, the trial of the police officers was relocated from Los Angeles to the suburb of Simi Valley, in Ventura County, despite objections by the prosecution that the two communities have "different demographics." The jury was selected from a neighborhood in which many people have friends or family members who are police officers, but the likelihood of pro-police bias was not viewed by the court as a form of prejudice to justify dismissing prospective jurors. Almost a year passed between indictment and the start of the trial. Testimony began March 5, 1992. On April 29, the jury acquitted the four defendants. Thousands of people in South Central Los Angeles responded to the verdict with several days of rioting. The violence spread to other parts of Los Angeles County. Federal troops and the California National Guard were mobilized to quell the riots. In six days of rioting, 54 people were killed, 2,383 were known to have been injured, and 13,212 people were arrested. There was an estimated $700 million in property damage in Los Angeles County.

19 In February 1999, Amado Diallo, a West African male, was approached by four undercover police officers who stated that they believed he was acting suspiciously as he stood in the entranceway of his home looking up and down the street. According to the officers, they identified themselves and then shouted to Diallo to make his hands visible. (Witnesses at the scene stated that there were no such shouts from the police.) Diallo hesitated and then reached for his wallet. The officers shot Diallo 41 times (19 shots entered Diallo's body as it was falling to the ground). The officer's attorneys claimed that we can

of these high profile cases left feeling of helplessness and dismay in the minds and hearts of many African Americans. The judge moved the trial of the police officers who beat Rodney King from Los Angeles to the "white-flight" suburbs of Simi-Valley and shifted the trial of the officers who killed Amadao Diallo from the Bronx (30% black, 48% Latino and 18.9% white) to Albany (9.2% black and 86% white) (Gutierrez-Jones 2001). Gutierrez-Jones points out that the changes of venue in these instances are not so much about how many minorities end up in the jury box, but about the receptiveness that jurors have about certain types of narrative tactics, and the caution they may exercise towards other kinds.

Given these patterns of systematic neglect, minority faith in the formal equality of the law may be strained if not broken. According to Gutierrez-Jones (2001):

> "In an important sense, the riots that followed the King verdict were a statement about the racially defined failure of the criminal justice system. With few exceptions, that statement was lost as minority protesters were rewoven into narratives that understood them first and foremost as intrinsically dangerous criminals. In this way, the riots could be used to confirm what defense lawyers for the police officers had been suggesting throughout their frame by frame analysis of the videotape that captured King's beating: 'A minority body, in any position, is a threat.' In fact, the defense was so persuasive that one juror announced in a post trail interview that Rodney King had actually been in complete control of the officers throughout the entire beating" (2).

2.4 Critical Race Theory

Critical Race Theory evolved as a response to the need for new strategies and theories to combat the subtler forms of racism that were silently gaining grounds as advances of the 1960s civil rights era had stalled. Writers such as Derrick Bell, Alan Freeman and Richard Delgado were pioneers of the CRT movement. According to Delgado (2001) "Critical Race Theory consists of a collection of activist and scholars interested in studying and transforming the relationship among race, racism and power. The movement considers many of the same issues

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only fully understand Diallo's shooting by approaching critically the assumptions that the officers carried with them as they confronted Diallo. In this interpretation, Diallo's presumed guilt set in motion a chain of events which was lessened the focus of any right held by Diallo, but provided a smoke screen for the officers that killed him. The defense argued that the only way to judge the officers was to view their actions as a split-second, life or death decision. The fact that Diallo was at home and did not have a gun was claimed to be "besides the point and constituted Monday morning quarterbacking" by the defense

that conventional civil rights and ethnic studies discourses take up, but places them in a broader perspective that includes economics, history, context, group and self interest and even feelings and unconsciousness. However, unlike traditional civil rights, which embraces incrementalism and step-by-step progress, critical race theory questions the very foundation of the liberal order, including equality theory, legal reasoning, enlightenment rationalism, and neutral practices of constitutional law" (2282).

Delgado (2001) summarizes that most critical race theorists would agree on the following four propositions:

1. The idea that racism is ordinary, not aberrational—"normal science," the usual way society does business, the common, everyday experience of most people of color in this country. This ordinariness feature means that racism is difficult to cure. Rules that insist only in the same treatment of citizens across the board, such as color-blindness or the formal conceptions of equality, can remedy only the most blatant forms of discrimination that do not stand out and attract our attention.

2. The proposition that our system of white-over-color ascendancy serves important purposes, both psychic and material. Because racism advances the interests of both white elites (materially) and the working class people (psychically), large segments of society have little incentive to eradicate it. This is sometimes referred to as "interest convergence" or "material determinism."

3. The concept that race and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality, rather, races are categories that society invents, manipulates or retires when convenient. Delgado refers to idea as social construction.

4. The notion of a unique voice of color. Minority status brings with it a presumed competence to speak about race and racism. The voice of color thesis holds that because of their different histories and experiences with oppression, Black, Indian, Asian and Latino/a writers and thinkers may be able to communicate to their white counterparts matters that whites are unlikely to know" (7).

2.5 Prevailing Theories of Discrimination

In order to understand the views, perceptions and theories of discrimination, one must have some background knowledge of the significant moments in America's history of racial privilege for whites and color-based subordination of blacks. This would include a perspective of

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attorney. This tactic effectively evacuated Diallo as a person; Diallo was significant only in the terms of the police officers' projection of him as a threat.

the historical origins of racial classifications in the U.S., including the racial attitudes of whites toward blacks during the colonial period and the codification of slavery.

When examining theories of discrimination, a brief look at the early views (superior/inferior person), conservative views (neoclassical economics) and liberal views (sociologist/psychological perspective) is warranted. These perspectives of discrimination focus on two terrains—*discrimination in the marketplace* and *judgments made in the mind of individuals*. The early theories view government intervention as ineffective and a waste of time. Until the 1930s white scholars viewed blacks as innately inferior (Jones 1998). Even today, black inferiority is a recurring theme. Conservative theorists such as Hernstein and Murray (1996), Jenson (1969) and Hernstein (1971) suggest that blacks have a lower IQ than whites and are limited in their ability to achieve.

Cornel West's (1999) "Race and Social Theory" published in his showcase of intellectual writings entitled *The Cornel West Reader,* provides a theoretical framework for explaining the complex phenomena of racism and discrimination. He uses a Marxists' view of African American oppression to map existing theories, incorporate their insights, and discard their shortcomings. West suggests that there are three basic versions of the conservative views of discrimination against African Americans: (1) the market version, which holds that racist behavior is an extraneous factor mitigating against market rationality, (2) the socio-biologist version, which challenges the inherent intelligence of blacks, and (3) the culturalist version, which advocates that the cultural habits of blacks prohibit their advancement. West (1999) argues that the three versions differ among themselves, but they also all share certain common assumptions. First, they view market rationality (or marginal productivity calculations) as the sole standard for understanding the discriminatory actions of white employers and workers. Second, this market rationality presupposes an unarticulated psychological egoistic model that holds self-interest to be the dominant motivation of human action. (This is similar to the micro-founded view discussed previously). Third, this calculus or model is linked to a neoclassical economic perspective that focuses principally upon individuals and market mechanisms, with little concern about the

institutional structure and power relations of the market and limited attention to social and historical structures. Lastly, all agree that government intervention in the marketplace to enhance the opportunity of African Americans does more harm than good.

Akin to the macro-founded view, the liberal focus on discrimination in the marketplace includes a consideration of institutional barriers in the marketplace and historical impediments. West (1999, 254) explains that "market liberals such as Gunnar Myrdal and Paul Samuelson suggest that black oppression can be alleviated if the government intervenes into racist structures and ensures the use of fair criteria." According to West (1999, 325), other theorists, such as William Julius Wilson and Robert Merton "acknowledge the crucial structural social constraints of blacks and conceptualize these constraints in terms of groups competing for prestige, status and power over scarce resources." From the liberal perspective, we evolve into the sociological concept of discrimination as a group-level phenomenon. This leads us into a discussion on the theory of disparate impact.

2.5.1 Early Views

Jones (1998, 42) explains "before the development of more humanistic and scientific views of the relationship between races of humans, there existed categorical differences such as the division between 'superiors and the inferiors.' The early Greek philosopher Aristole claimed that inferiors were destined to be slaves and would best benefit by living under the rule of the superior masters." Social Darwinism was one of the cornerstones of this scholarly approach.

The socio-biologist versions put forward by Arthur Jenson (1969) and Richard Herrnstein (1971) follow this philosophical logic. They suggest "the prevailing evidence leads to the conclusion that blacks are, in some sense, genetically inferior. Black IQ performance, which allegedly measures intelligence (i.e., the capacity for acquiring knowledge and solving problems) is such that racist tastes of white employers and workers may be justified—not on the basis of aversion to Blacks, but due to group performance attainment" (42-44) Jensen and Herrnstein (1971, 44) consider "the racist tastes of white employees and workers as rational choices made

on scientific grounds. In this way African American oppression is not a changeable and eradicable phenomenon, but rather part of the natural order of things." These theories on black intelligence have had far-reaching social implications. It has led to the attachment of black behavior to social deviance, (Murray, 1998), the perception of Blacks as inferior beings Bouchard & Dorfman (1995), and the classification of Blacks as underachievers (Ellison 1998). The conclusion it forms is that Blacks are a burden on American society.

2.5.2 Economic Theory of Discrimination

West argues "the classical school of economic theory began with the publication in 1776 of Adam Smith's monumental work, *The Wealth of Nations*. This book identified land, labor, and capital as the three factors of production and the major contribution to a nation's wealth. In Smith's view, the ideal economy is a self-regulating market system that automatically satisfies the economic needs of the populace. Smith described the market mechanism as an invisible hand that leads all individuals, in pursuit of their own self-interests, to produce the greatest benefit for society as a whole. Smith's economic principles are noticeable in the conservative outlook of discrimination" (West 1993, 253).

Conservative perspectives on discrimination against blacks illustrate a tendency to valorize neoclassical economics and utilitarian psychology (West 1993). West explains that the basic claim is that differential treatment of black people is motivated by the "tastes" of white employees and white workers. Such tastes, for instance, aversion to black people, may indeed be bad and undesirable, that is, if it can be shown that such tastes are based on faulty evidence, unconvincing arguments or irrational impulse. However, it is possible that such tastes may be deemed rational choices made by white people owing to evidence regarding the inferior capacities or performance of Blacks. This phenomenon is known as an economic theory of discrimination.

Farley (2000) describes Gary Becker's theory as the first effort to construct this economic theory of discrimination. According to Farley, "Becker's theory draws from social psychology and

functionalism. Becker argues that some people have a taste for discrimination. This discrimination progresses into choices made about whom to hire for good jobs and promotion. Becker states that this kind of discrimination is dysfunctional for both the employer and for society. By hiring based on race and not quality, productivity is hampered. This harms the employer in terms of profit, and it harms the minority who is not hired. It might be argued that even the less qualified white worker is harmed, as well, through the loss of productivity in the system. Becker contends that in a complex industrial society, discrimination will disappear. Arguably, the firms that discriminate will be less productive than those firms that do not discriminate. Logically, therefore, the discriminating firms should eventually go out of business" (Farley 2000, 295-297).

Becker (1971) has developed a discrimination coefficient, which he contends represents the given tastes that economic agents have for discrimination. Within this framework, the product and labor market are assumed competitive, with discriminatory tastes able to influence the wage rate. Following the standard neoclassical labor theory, "the white worker's wage rate (W_w) is initially equal to his marginal product (MP_w). However, if the employer decides to hire some black worker, the white worker reacts as if his wage has declined to $W_w(1-d_b)$, where d_b is the discrimination coefficient of the white worker. With the perceived wage having declined, the White worker finds that:

$$MP_w > (W_w (1-d_b)$$

Since black workers do not have similar discriminatory attitudes, it follows that to retain the white worker, the firm must pay him $W_w d_b$ more than the black worker's wage rate, otherwise the worker will quit and find employment elsewhere" (Becker 1971, 78).

A principal weakness in the Beckerian model is that if the labor market is truly competitive, discriminatory employees would be fired and replaced by non-racist workers. Thus within the medium/long-run, the outcome would result in zero employee discrimination. According to Fraley (2005), "a criticism of the neo-classical theory of discrimination within a competitive labor market structure is that firms could merely segregate the workforce into non-whites and

whites, thus removing the discrimination coefficient and any racial differential" (Farley 2005, 265-266).

The economic theory is exemplified through its impact on the marketplace. West (1999) suggests that Milton Friedman's (1962) classic *Capitalism and Freedom* and his student Gary Becker (1957) best represent the market version. Friedman and Becker hold that it is not in the economic interest of white employers and workers to oppose black employment opportunities. They suggest that such racist behavior or "bad tastes" flies in the face of or is an extraneous factor mitigating against market rationality (i.e., the maximizing of profits). In this way, both understand racist tastes as the irrational choice of white employers and workers that sidetrack market rationality in determining the best economic outcomes. The practical policy that results from this market perspective is to educate and persuade white employers and workers to be more rational and attuned to their own self-interests. The underlying assumption here is that pure market mechanisms (as opposed to government intervention) will undermine racist tastes. This is the basis for opposing regulations and policies that mitigate discrimination. Another basic presupposition here is that market rationality, along with undermining racist tastes is in the interest of white employers and white and black people (West 1993).

2.5.2.1 Split Market Theory

Another economic theory of discrimination is Bonacich's (2001) Split Market Theory. Integrated in Bonacich's theory is the notion of ethnicity as a status group designation organized around the political mobilization of resources to achieve certain economic goals within a framework of capitalist labor market relations. The political basis of this theory lies in a group competition due to a split labor market. To be split, according to Bonacich, a labor market must contain at least two groups of workers whose price of labor differs for the same work, or would differ if they did the same work. When the two competitive groups are divided along ethnic lines, racial antagonism is likely to occur. Resolution to such racial aggression becomes political in

nature due to the development of political organization within competition groups as well as the political outcomes (exclusion and caste) that can result from such ethnic rivalry (Bonacich 2001).

Farley (2000) discusses the split-labor market theory's relevance to discrimination analysis. He argues that "the central hypothesis of the split market theory is that discrimination resides within macro-functional (or social structures) and not within micro-functional (or individual preference)" (Farley 2000, 85). Additionally, he explains, "Split market is a conflict theory in that it holds that discrimination results from competing interest groups. It posits that there would be little sense for business owners to discriminate because it results in a dysfunctional market. According to the split market ideology, owners do not have a taste to discriminate; they discriminate because another interest group that benefits from discrimination forces them to (i.e., white laborers). Discrimination is in the interest of white laborers because it insulates them from potential competition from a minority group. The white laborers, when they are powerful enough, demand the exclusion of minority workers from the most desirable jobs. In a split-laborer market, white labor costs more than minority labor. Logically, this is a good reason for employers not to discriminate. This is largely why highly paid white workers demand discrimination. Without it wages would fall" (Farley 2005, 85).

According to Farley (2000), exclusion from acquiring the education or additional skills necessary to perform a task, prohibition for a given territory, prevention from participating in certain activities (e.g. not letting minorities join the union) are examples of ways that discrimination can be imposed on minorities. In an effort to discounted the effectiveness of these exclusionary actions, Farley surmised that "in the short term such strategies worked, but as black laborers were antagonized by the system, they began to act as strike breakers. This in turn, had the effect of weakening the unions designated to support workers' rights in the first place" (Farley 2005, 265).

2.5.2.2 Capital Class Theory

West (1999) introduces Capital Class Theory as he explains that left liberals have a different theoretical position because of the added sense of historical perspective they bring.

According to West, this historical consciousness makes them suspicious of abstract neoclassical economic perspectives and sensitive to the role of complex political struggle in determining the predominant economic perspective of the day. In other words, left liberals recognize that classical economic views shifted to neoclassical ones from Adam Smith (Heilbroner 1986) to David Racardo (Hollander 1910) to Alfred Marshall (Wagner 1891) and to Stanley Jevons (Bagehot 1875), not only because better arguments emerged, but also because those arguments were about changing realities of nineteenth century industrial capitalism and inseparable from clashing political groups in the middle of these changing realities (West 1999). Similarly the versions of market liberalism associated with Franklin Roosevelt in regard to state-economy relations and John Kennedy in regard to state economy race relations were transformations of neoclassicism in the face of the Depression, the rise of organized labor and the struggles of Southern blacks under evolving capitalist conditions. According to West, left liberals view discrimination against blacks as an ever changing historical phenomenon and a present day reality. They locate the racist tastes of white employers and workers and the racist institutional barriers of American society within the historical contexts of over 200 years of slavery and subsequent decades of Jim Crow laws, peonage, tenancy, lynching and second class citizenship.

West (1999) makes the case that left liberals remain in dialogue with Marxist historical and social analysis. The major theoretical models they adopt and apply are not those of neoclassical economics, but rather structural-functionalist sociology. West contends that left liberals tend to borrow insights from conservative (for instance, a stress on black self-reliance and the need to acquire efficacious habits for black upward mobility) and from liberals (for instance, the necessity for government action to regulate employment practices and enhance social constraints upon African Americans). Like Weber, West conceptualizes these constraints in terms of groups competing for prestige, status, and power over scarce economic resources. “Left liberals support public policies that focus on full employment, public works programs, disadvantaged business programs and certain forms of affirmative action to alleviate African American discrimination” (256).

West (1999) distinguishes the left liberal view from the Marxist theoretical view of African American oppression, which begins with two starting points:

> First, the principle of historical specificity impels us to examine the various conditions under which African American oppression emerged, the ever changing structural constraints under which African Americans have accommodated and resisted multiple forms of discrimination, and the crucial conjunctural opportunities that African Americans have either missed or seized. The historicizing approach entails that we highlight economic, political, cultural and psychosexual conflicts over resources, power, images, language and identities between Black and other people as among Black people themselves (257).

West (1999) describes the principle of materiality of structural social practices over time and space as the second starting point for Marxist theory:

> This principle maintains that extra-discursive formations such as modes of production, state apparatuses and bureaucracies and discursive operations such as religions, philosophies, art objects and laws not only shape social actions of individuals and groups, but possess historical potency and effectivity in relation to, but not reducible to, each other (257).

To the degree that it attempts to understand and explain forms of oppression, Marxist theory is materialist and historical. According to West, this relation is viewed by Classical Marxist in terms of a more or less determining base and a more or less determined superstructure,[20] whereas neo-Marxists understand this relation as the mutual setting of limits and pressures, extra-discursive formations, and discursive operations (i.e., establishing with precision the nature of determination). This problem remains unresolved in the Marxist tradition, while the most impressive efforts remain those enacted in the best of Marx's own textual practices.

West argues that explaining racism is neither micro-foundational nor macro-foundational but rather it is dialectical as he concludes:

> Marx's own effort to account for determination highlights the multileveled interplay between historically situated subjects who act and materially grounded structures that circumscribe, that is, enable and constrain, such action. This human action constitutes structured social practices that are reducible neither to context-free discrete acts of individuals nor to objective structures unaffected by human agency. The dialectical character of Marxist theory resides precisely in the methodological effort to view the interplay of subject and structure in terms of dynamic social practices during a particular

[20] This is the economic determinist view previously discussed.

> time and in a specific space. The aim of Marxist theory is to view each historical moment as a multi-dimensional transaction between subjects shaped by antecedent structures and traditions and prevailing structures and traditions transformed by struggling subjects.
>
> Marxist conceptions of African American oppression reject the "bad tastes" starting point of conservatives, the "racist institutional barriers" starting point of liberals and the Weberian views about the economic sphere- "stress on the strata and status"-of left liberals. There remains considerable controversy among Marxist theorists about how to construe the economic sphere, whether as a mode of production, as merely the forces of production, or as primarily a mode of surplus extraction or form of appropriation of surplus value. Consensus has been reached only insofar as all hold that the economic sphere is constituted by conflict-ridden classes characterized by their relation (ownership, effective control or lack thereof) to the means of production (West 1999, 257-258).

The Marxist theory is a conflict-situation theory. While the split market theory argues that it is the worker who gains from discrimination, the Marxist theory contends that the true beneficiaries of discrimination are the capitalists. Under this postulate, discrimination cause a racial division in the labor force which in turn weakens the labor movement (Aronowits, 1981). Strike breaking in the early twentieth century would serve as an example of this occurrence. Black employees were used as strike breakers. In anger, unions began excluding Blacks from joining union. This resulted in a weakening of unions and a loss of wages for both blacks and whites. Eventually, under Franklin D. Roosevelt, unions realized the impact of their exclusionary treatment on white members and began to oppose discrimination (West 1999).

Robert Reich (1991) in Farley (2000) argues that this failure to recognize common self-interests is precisely what is happening today between the black and white working class when they oppose things like school desegregation and neighborhood integration. They are unable to collectively influence the political process and protect themselves against the interest of the wealthy elite because they have come to see each other as the enemy.

West (1999) asserts that both conservatives and liberals subscribe to the market rationality as the primary standard for understanding and alleviating African American oppression. Both groups assume that if black productivity is given its rightful due (e.g., a close parity in black and white income), a rough justice between black and white Americans can be achieved. According to West, at the level of public policy, the important difference is that liberals believe this rough justice cannot be achieved without state intervention to erase racist institutional barriers.

Conservatives, on the other hand, believe that pure market mechanisms (as opposed to government intervention) will undermine discrimination.

2.5.3 Culturalist Theory

According to West (1999), some of the same neoclassical perspective and egoistic models found in the conservative perspective of discrimination are also visible in the liberal viewpoint. However, dissimilar to the conservative, liberals draw attention to racist institutional barriers that result from the racist tastes of white employers and workers. They reject mere persuasion to change those tastes and attack genetic inferiority claims as unwarranted and arbitrary. Liberals instead focus on two domains: *racist institutional barriers in the marketplace* (i.e., racist structures of employment and procurement practices*)* and *inhibiting impediments in African American culture* (i.e., inferior educational opportunities resulting inferior preparedness for higher educational opportunities) West (1999).

West (1999) classifies those liberals who stress racist institutional barriers in the marketplace as market liberals (e.g., Gunnar Myrdal and Paul Samuelson). They claim that discrimination against blacks can be alleviated if the state intervenes into racist structures of employment practices and thereby ensures, coercively if necessary, that fair criteria are utilized in hiring and firing black people. What constitutes "fair criteria" can range from race-free standards to race-conscious ones. West labels as culturalist liberals those who stress inhibiting impediments in African American culture. He identifies followers of contemporary Weberian theory as culturalist liberals.

The culturalist theorists hold that the racist tastes of white employers and workers can be justified on cultural rather than biological grounds. This perspective can be seen in the works of Edward Banfield's (1970) *The Unheavenly City* and Thomas Sowell's (1975) *Race and Economics.* They argue that Black people are less equipped to compete in American society (in education, the labor force or business) largely due cultural flaws. Banfield and Sowell believe that the necessary cultural requisites for success—habits if hard work, patience, deferred gratification

and persistence—are underdeveloped among African Americans. African American oppression, therefore, will be overcome only when those habits become more widely adopted by black people.

Hechter (2001) provides clarity on culturalist ideology through his theory of cultural division of labor. He identifies with the Weberian influence as he advocates Weber's distinction between class and status situations, and the utilization of status groups as a unit of analysis. For Weber, the class situation is related to life chances conditioned by the possession of goods and opportunities to earn income within a community or labor market. Hechter illustrates the sociologist conception of class as he defines classes as groups with antagonistic interests. He states that "ethnic groups are composed of individuals sharing one or more cultural markers [and] the most important cultural markers are language, religion and skin color" (Hechter 2001, 298). Hechter's theory attempts to specify conditions under which racial group formation occurs, and he does this through the vehicle of cultural division of labor. According to Hechter, hierarchy and segmentation in the division of labor can impede development of solidarity among racial groups. He concludes that "to the degree that the cultural division of labor is hierarchical, stratification between racial groups will be maximized; to the degree that it is segmental, interaction within ethnic groups will be maximized" (Hechter 2001, 299).

School integration is part of this culturalist position that dates back several decades to the gallant efforts of the NAACP. Culturalist liberals such as Thomas Pettigrew (1998) argue that government programs should be established to prepare people, especially blacks, for jobs. These programs can range from direct training and hiring similar to that found in the Job Corps projects to educational efforts such as Head Start (West 1999). Policies that arise from this perspective support the ideals associated with the welfare state (i.e., a high level of government intervention in the economy, provision of extensive social services and a degree of national economic planning). The welfare state is said to be a distinct type of political regime, formed in societies that have experienced major changes in their economic systems, social relationships and cultural orientations (Bottomore 1993).

2.5.4 Sociological versus Liberal Legal Understanding

Antonovky (1960) aligns with the institutional discrimination point of view as he explains that sociologists define discrimination as an inherently group-level phenomenon. It is negative behavior directed towards individuals solely based on their perceived identity with a minority group relative to identity with that of the of majority group. Antonovky further surmises that sociologists have long understood that discrimination involves a "system of social relations, not an isolated individual act. Similarly, they have understood that although discrimination may be motivated by prejudice, discriminatory acts may stem not from racial animus but from action oriented to, or constrained by, institutional behavior patterns (Merton 1976). "Diverse social settings, practices and institutions facilitate or inhibit the growth and expression of unintentional cognitive biases, racial and gender stereotypes, and race and gender prejudice and hostility" (Stryker 2001, 13). Institutionalized practices often perpetuate discriminatory patterns established in the past even when race or gender animus is absent (Reskin 1998).

Holzer (1996) agrees with this logic as he cites a simple example of discrimination resulting from institutionalized practices that involves an employer recruiting through referrals by current employees. If an employer's workforce is all white due to past employment discrimination, and current employees' relatives, friends and neighbors are likewise all white due to past and continuing trends towards growth from within and from residential segregation, then recruitment through employee referrals will discriminate against minorities. This is so even though the recruitment practice is not intended to discriminate but to produce qualified employees (Holzer). Without conscious societal intervention to alter such discriminatory patterns, results of past discrimination in some institutional spheres (e.g., trade organizations, schools) continue in these spheres and as well as other institutional spheres (e.g., labor market, because minorities lack educational credentials), contributing to what Peter Blau and Otis Dudley Duncan (1967) referred to over 30 years ago as cumulative disadvantage.

From the idea that discrimination is a group-level phenomenon and the probability that discrimination exists despite racial animus on the part of some who practice it, it is not a long leap

to the concept of institutional racism. Carmichael and Hamilton (1967) define institutional racism in contrast to individual racism. Individual racism consists of overt acts by individuals that cause death, injury, or destruction of property, while institutional racism consists of acts by the total white community against the black community. Institutional racism comes from the operation of established and respected forces in the society. It is less obvious than individual racism—far more subtle, and less identifiable, but no less destructive (Carmichael and Hamilton 1976).

According to Featherman and Hauser (1976), a sociological concept of discrimination as a group-level institutionally patterned phenomenon is conducive to statistical models of possible or probable discrimination in schools, work facilities, and labor markets. They further state:

> Regression models of race and gender inequalities in occupational and income attainments include as many "nondiscriminatory" reasons for these differences as possible, so that the remaining differences in direct effects of race and gender on rewards could be interpreted as possible discrimination. In models recognizing interaction effects, differences in return to individual-level human capital variables for blacks and whites (or men and women), are interpreted as signaling discrimination, as were differences in income returns to occupational attainments controlling for human capital (462).

When sociologists measure and model effects of factors such as ability and educational attainment that they presume will capture meritocratic employment practices, they tend to assume that the remaining direct effects of ascriptive factors on attainment probably represented discrimination. Labor market sociologists also generally assume that differences in returns to human capital by race or sex represent discrimination, as they assume that differences in job pay associated with the race or gender composition of jobs, net of job-required human capital, constitute discrimination.

Donahue (1994) advocates from the institutional racism camp. Institutional racism, defined as any institutional practice that systematically creates or perpetuates racial advantage or disadvantage, is most often visible through racially skewed effects of institutional practices. Donahue explains that with Title VII implementation, sociologists began to focus on institutional subordination of minority to majority groups. In contrast, the major legal interpretation of nondiscrimination as a constitutional or statutory right circa 1964 focuses on deliberately chosen

discriminatory acts of some individuals against other individuals. The Civil Rights Act of 1964 does not explicitly define employment discrimination, but both those who favor and those who abhor later interpretations of Title VII, agree that the Act classifies discrimination as acts disadvantaging individuals on account of factors such as race and gender (Donahue 1994).

Donahue (1994) asserts that Congressional debates prior to Title VII approval provide substantial evidence that Congress understood race discrimination in employment to be intentional unequal treatment of individuals based on race. For example, Senators Joseph S. Clark (D-Pennsylvania) and Clifford P. Case (R-New Jersey), bipartisan co-sponsors of Title VII, explain:

> It has been suggested that the concept of discrimination is vague. In fact, it is clear and simple and has no hidden meaning. To discriminate is to make a distinction, to make a difference in treatment. . .based on any of the five forbidden criteria: race, color, national origin, creed, religion. . . . [21]

Other statements indicate that members of Congress understood discriminatory unequal treatment to involve deliberate motive. Representative Emanuel Celler (D-New York) stated:

> [Title VII] involves a question as to whether or not there has been discrimination based upon color…If it can be said that she is qualified and that the employer deliberately refused to accept her because of the color of her skin, then there would be discrimination covered by this act. [22]

The fact that discrimination requires intent is made explicit in the remedies section of Title VII. Section 706(g) states that if the court finds an employer to have intentionally engaged in an unlawful employment practice, the court could enjoin the action and order such equitable relief as it found appropriate. Debate over the Title VII implication for employment testing and seniority systems shows that even when contemplating recognized institutional practices, Congress envisioned a legal concept of discrimination that requires intent (Donahue 1994).

Donahue (1994) explains that in making this contrast between institutional-sociological- and liberal- legal concepts of discrimination, he was not suggesting that all sociologists embrace a group-oriented, institutional practice concept of discrimination, while all legal scholars embrace

[21] Congr. Rec. 88th Cong., 1st Session, 1964, vol 110, pt. 2:2579 (emphasis added)
[22] Congr. Rec. 88th Cong., 1st Session, 1964, vol 110, pt. 2:2579.

an individualistic, intent-oriented concept. Albeit stressing group-referenced behavioral results, sociology clearly has room for varied definitions. Meanwhile, much of Title VII enforcement revolves around contesting legal definitions of discrimination. A definition that simultaneously focuses on intent and individual perpetrators and victims marked only one of Title VII's major enforcement routes (Donahue 1994).

Eventually, in Title VII enforcement, the institutional-sociological and liberal-legal definitions of discrimination come together to forge three legally accepted causes of action for discrimination (Stryker 2001). This is the birth of disparate impact theory.

2.5.5 Disparate Impact Theory

Congress initially structured the Equal Employment Opportunity Commission (EEOC) on an individual complaint-processing model. It was to investigate and, upon a finding that reasonable cause existed, to believe that discrimination charges were true, try to conciliate claims with employers on a case-by-case basis. If conciliation failed, the individual complainant could bring suit in federal court. Angered at an agency they believed hopelessly weak, civil rights groups complained about dealing with a systematic problem on a case-by-case basis. They argued that the EEOC should proactively prosecute patterns of discrimination in large companies, industries and unions.[23]

As a result of a shortage of staff and resources, the EEOC agreed that it would be more efficient and effective to target widespread industrial practices affecting large numbers of minorities. The EEOC decided to use the concept of discrimination as a group-oriented and institutionalized phenomenon to promote aggressive Title VII enforcement (Blumrosen 1971). Attorneys for the EEOC agency sought a principle to address broad employment practices that created negative effects for minorities as a group. This was consistent with a view of legal interpretation that avoids reliance on exact statutory language or narrow construction of congressional intent in favor of broad leeway for expert agencies to act so as to best further the

general policies enacted by Congress. The principle invented by the EEOC and civil rights organizations became known as the disparate impact theory of discrimination. Disparate impact embodies the group-referenced and institutional features of sociologists' orientations, and many legal scholars explicitly consider it as a sociological approach to Title VII (Graham 1990).

Disparate impact theory requires showing systematic practices that have a negative effect on minority employment, but it does not require showing that these practices stem from bad motives. Disparate impact has developed alongside two intent-oriented causes of action for discrimination—the first captures liberal-legal emphasis on the individual and the second recognizes systematic behavior patterns promoting inferior treatment of minorities as a group. It still maintains the requirement to show deliberate intent (Graham 1990).

Player (1988) explains that the role for statistical evidence in substantiating the two types of discrimination claims is different. Law can incorporate social science in ways that produce oxymoronic synthesis of formal-legal and scientific-technical elements. According to Player, for social scientists and statisticians, statistics does not prove anything. Rather, quantitative analyses are used to test whether hypotheses can be rejected or falsified according to a set of statistical conventions. However, even if the hypotheses can not be proven false, it does not mean that they have been proven true or correct. On the contrary, in law, statistics does prove things. They do so by providing evidence that legally requires or allows judgments for one side or the other, assuming that the relevant criteria for type and weight of evidence are met.

Current debate about disparate impact and the role of statistical evidence is rooted in the 1971 Supreme Court decision in *Griggs v Duke Power Company*. In Griggs, a unanimous Supreme Court endorsed disparate impact, also known as adverse impact, adverse effects, disproportionate effects, and the effects test of discrimination (Graham 1990). Norton (1990) explains that eventually law provides a much larger role for statistical evidence in the more sociological, more likely won, and more consequential pattern or practice disparate treatment

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[23] Graham, H. D. (1990). *The Civil Rights era: Origins and development of national policy, 1960-1972*. New York: Oxford University Press.

cases. While, statistical evidence played a minor role in individual disparate treatment cases, disparity studies were employed to trace statistical under-utilization and validate group-level disparate treatment impact and institutional discrimination.

2.6 Difficulty Proving Discrimination

In the 1995 *Adarand Constructors, Inc v. Pena* decision, the United States Supreme Court ruled that "federal racial classifications should receive strict scrutiny, thereby making it more difficult for attempts to prove discrimination to pass constitutional muster. In an opinion authored by Justice O'Connor, the Court majority argued that there is a similarity between federal affirmative action programs employing racial classification for the benefits of minorities and invidious racial classifications excluding African Americans from equal employment opportunities" (115 S. Ct. 1995, 2097, 2102-4). Brody (2002) argues that this ruling discounted to intent of federal affirmative action programs which were emanated in Title VI and Title VII of the Civil Rights Act of 1964 in an effort to alleviate discrimination against minorities and women (Brody 2002).

According to Brody (2002), the requirement to meet the constitutional standard of strict scrutiny (which is the most difficult standard to meet) in discrimination cases is of particular significance in the Adarand decision. The Supreme Court's ruling that it would make no distinction between acts that were subtle and not intended to discriminate against minorities with those that are maliciously intended to discriminate against individuals significantly reduced the effects of social policy efforts to eradicate discrimination. In effect, the Adarand ruling set precedence that in order for an individual to prove wrongful discrimination had occurred, there must be proof of an "intent" to discriminate (Brody 2002).

Brody (2002) explains that at the heart of the strict scrutiny standard is a heightened burden to prove that discrimination still exists. The troubling aspect about *Adarand* is the enormous effort that will now have to be spent litigating discrimination cases, reviewing

affirmative action programs and gathering data to confirm what Congress already knows from its own experiences.

One possible explanation for the shifting requisite for determining the proper method for verifying the existence of discrimination is the lack of understanding by the decision-makers as to why these social attitudes, which are the foundation of the discriminatory behavior, survives. Decision-makers are puzzled by the question: How can responsible, law-abiding citizens who show no other signs of deceitfulness be guilty of a dishonorable act like discrimination? The answer lies in the explanation of conscious versus unconscious acts of discrimination. Another disquieting facet of this dilemma is that regardless of the intent (rather conscious or unconscious by the perpetrator), the consequences of discrimination on the victim remain the same.

The difficulty of determining whether actions are intentional or unintentional adds complexity to the challenge of proving discrimination. For example, hostility toward, or dislike of, persons of another race is a widely recognized conception of racism. Additionally, individuals who regard persons of another race as inferior, or who believe that their own culture is superior to that of other races are also known as racist. These social attitudes could be conscious or unconscious.

Devine (1989) explains this possibility by differentiating between the terms prejudice and stereotyping. Prejudice, according to Devine, is consistent with conscious beliefs, propositions that an individual knowingly and intentionally accepts as true. In contrast, stereotypes consist of attitudes acquired early in life and generally function outside one's conscious control. Devine uses the example of a person from the deep South reporting that they feel squeamish when touching the hand of a black person, even though they harbor no conscious ill will towards blacks to illustrate unconscious stereotyping (Devine). This definition of stereotypes sharply differs from the common understanding (as outlined earlier in this chapter when describing the idealist perspective), that recognizes the existence of conscious generalizations about racial groups as labels of stereotypes. Social scientists further suggest that unconscious negative attitudes toward individuals of other races exist relatively independently of conscious racial beliefs. This feature of

individual racism has implications for the ways racism may be combated and controlled (Devine et al. 1991).

Similar to racist actions, Flagg (1998) observes that “institutional racism—racially skewed effects of institutional actions—are difficult to pinpoint and prove. Institutional racism operates in defense of racial advantage, but superficially endorses racial equality. It is often times erroneously referred to as race-neutral decision making” (28). Examples of this would be a job requirement of a high school diploma, being adopted in an era and a location in which almost no blacks attained a high school diploma, and the job functions do not necessitate such an attainment (such as a floor sweeper) would function to disadvantage blacks while appearing to rest on a nonracial conception of job qualifications. Flagg points out that “individual participants in racist institutions may be located at any point on the continuum of individual racism” (28). In the case of an institution that is superficially egalitarian, individual participation might be the consequence of disguised or undisguised hostility or prejudice, but it might equally be the product of inattention, indifference, or ignorance (Flagg 1998).

2.7 Constitutional Requirement of Discriminatory Intent

The U.S. Constitution proscribes race discrimination. The Equal Protection Clause found in the Fourteenth Amendment mandates that “no State shall. . .deny to any person within its jurisdiction the equal protection of the laws.” The Supreme Court has held that, through the Fifth Amendment, the Equal Protection Clause also applies to the federal government. However, as disclosed in the discussion in chapter 5 on the *Pre-Affirmative Action Era*, the constitutional guarantee of equal protection did not encompass the discriminatory conduct of private actors.

The U.S. Supreme court first ruled that race-specific government conduct disadvantaging blacks violated the Equal Protection Clause in the infamous 1954 *Brown vs.*

Board of Education[24] case. After *Brown*, between 1955 and 1968, America faced a constitutional crisis centered on discrimination. Numerous states and local authorities pronounced *Brown* unconstitutional and pledged to close their schools before they would desegregate them (Fair 1997). It was not until 1976, in the *Washington vs. Davis*[25] case, that the Supreme Court clarified that discrimination could also result from a facially race-neutral government act or rule that has racially disparate effects (Flagg 1998).

In *Washington vs. Davis*, the constitutionality of Test 21 was addressed. Test 21 was a written examination developed by the U.S. Civil Service Commission and administered to applicants for positions as officers in the Metropolitan Police Department in the District of Columbia. Two rejected black applicants argued that the test was racially biased and was four times more likely to disqualify black applicants than whites. The plaintiffs did not allege intentional discrimination. The challengers lost in District Court but were successful after appealing to the Court of Appeals for the D.C. Circuit."[26]

The Court of Appeals for the D.C. Circuit ruled:

The applicable constitutional standard should be borrowed from the 1971 Title VII *Griggs vs. Duke Power Company*[27] precedent. In Griggs, the Supreme Court ruled that disparate

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[24] 347 U.S. 483 (1954) In 1896 in *Plessy vs. Ferguson*, the Supreme Court upheld the constitutionality of state laws mandating racial separation. Homer Plessy challenged the constitutionality of a Louisiana statute requiring separate railway cars for whites and blacks, on the ground that it violated the Thirteenth and Fourteenth Amendments. Plessy alleged that since he was seven-eights Caucasian and only one-eight Negro, he was entitled to every right, privilege, and immunity that applied to white citizens. The Court rejected his claim. The 1954 Court of *Brown vs. Board of Education* repudiated the *Plessy* opinion. The *Brown* Court agreed that segregated public schools were unconstitutional, notwithstanding the separate-but-equal doctrine of *Plessy*. The Court gave notice that segregation in public affairs would end.

[25] 426 U.S. 229 (1976).

[26] *Davis*, 426 U.S. at 238 in Flagg (1998)

[27] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was a court case argued before the United States Supreme Court on December 14, 1970. It concerned employment discrimination and was decided on March 8, 1971. Prior to the passing of the Civil Rights Act, Duke Power had openly used methos=ds of segregating its employees according to race; specifically, at its Dan River plant, blacks were only allowed to work in its Labor department, which constituted the lowest-paying positions in the company. After the Civil Rights Act of 1964 was passed, the company changed its policies, expanding its requirement of a high school diploma for positions in areas other than the Labor department, which eliminated a large number of black applicants for those positions. The Court ruled against a procedure used by the company when selecting employees for internal transfer and promotion to certain positions, namely requiring a high school education and certain scores on broad aptitude tests. African American applicants, less likely to hold a high school diploma and averaging lower scores on the aptitude tests, were selected at a much lower rate for

> impact alone, without proof of discriminatory intent, would be adequate to support a finding of a statutory violation absent proof by the employer that the facially neutral criterion in question was related to job performance. (Flagg 1988, 40)

"The Supreme Court sent the case back to the lower court claiming that the lower court's reliance on Griggs was a plain error. According to the Supreme Court, the constitutional rule is that 'the invidious quality of law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." The court reversed the decision of the D.C. Court of Appeals on grounds that while it may have been true that Test 21 had the effect of removing a greater number of black than white applicants, the test did not have a discriminatory purpose. The Court found that the Court of Appeals had erroneously assumed that the stricter, effect-based standard of Title VII of the Civil Rights Act of 1964 also applied to the constitutional Equal Protection Clause" (Flagg 1988, 41).

"In essence, the Court found that under Title VII of the Civil Rights Act of 1964, if such tests disparately impact ethnic minority groups, businesses must demonstrate that such tests are reasonably related to the job for which the test is required. Because Title VII is passed pursuant to Congress's power under the Commerce Clause of the Constitution, the disparate impact test later articulated by the Supreme Court in Washington v. Davis, 426 US 229 (1976) is inapplicable" (Wikipedia, 2007). If there were an assertion that a statute with racially disparate effects was enacted because of a racially discriminatory motive, the strict judicial scrutiny of the enactment would be applied. This implies that the statute would only be upheld if, and only if, the state could show that it had a compelling reason for adopting the legislation, and that the chosen means was necessary to achieve that objective (Flagg 1988)

Flagg (1988) notes that in race discrimination cases, strict scrutiny generally equates to fatal in fact."[28] According to Flagg, it is especially unlikely that a challenged statute could survive strict scrutiny in disparate effects cases because under the Davis rule, strict scrutiny is applied

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these positions compared to white candidates. The Court found that under Title VII of the Civil Rights Act of 1964, if such tests disparately impact ethnic minority groups, businesses must demonstrate that such tests are "reasonably related" to the job for which the test is required.

only if the constitutional challenger already has shown that the legislation in question was adopted with a discriminatory intent, which is an impermissible purpose under any standard of review.

Flagg (1998) asserts that the dissent from the majority opinion of the *Davis* Court set precedence for the intent requirement on two principal arguments: 1) a rejection of the group rights approach to race discrimination, and 2) a concern that a strict scrutiny mandate in all disparate treatment cases would result in far-reaching economic redistribution. According to the Court, "the failure rate of blacks as a group was irrelevant. Individual black applicants who failed the facially neutral test could no more successfully claim that the test denied them equal protection than could white applicants who also failed" (*Davis*, 426 U.S. at 246). The Court then turned to the question of the application of strict scrutiny. Such a rule, according to the Court, "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes that may be more burdensome to the poor and to the average black than the more affluent white" (*Davis*, 426 U.S. at 248).

The *Davis* rule was not limited to employment discrimination cases. The strict scrutiny standard was later applied to federal contracting affirmative action cases in *Croson* and *Adarand*. The irony of the *Davis* opinion is that while attempting to address impacts of discrimination, the judgment itself resulted in discriminatory impacts (Flagg 1998). As such, it is difficult to determine if the discriminatory impact resulting from the majority decision was unconscious and unintentional; or simply a blatant conscious intent to maintain the status quo. It is this impasse—the challenge of knowing the actors' intentions and whether the actors knew that their actions would negatively impact other—that makes proving discrimination an infinite task.

[28] A term meaning that it is extremely difficult to provide the verifications necessary to prevail.

2.8 White Unconsciousness of Discrimination

> Ask a fish what water is and you'll get no answer. Even if the fish were capable of speech, they would likely have no explanation for the element they swim in every minute of every day of their lives. Water simply is. Fish take it for granted**.** (Wise, 2003, 1)

Wise (2003), Rockwell (1997), and Flagg (1998) support the racial realist angle as they explain the correlation of white privilege with unconscious discrimination. Wise uses the metaphoric illustration of a fish's dependence on water to symbolize white male reliance on racial preference. Although the fish doesn't conceptualize what water is, its continued existence depends on water being available. Similarly, discrimination (by way of white preference) continues to contribute to the advantages given to white males. According to Wise, many whites seem to believe that the notion of racial preferences began with invent of affirmative action programs intended to expand opportunities for minorities. However, Wise reasons that racial preferences has actually had a long and very white history.

Rockwell (2003) adds "the first heated arguments over preferential programs took place over 25 years ago in the teach-ins about the war in Vietnam. In the 1960s, the first big affirmative action debate was not about minority programs, it was about college students who were getting draft deferments during the Indochina war. Minorities, according to Rockwell, were overrepresented on the involuntary battlefields of Asia. Black and brown kids from working class neighborhoods were being sent to die abroad, while primarily white college youth were building their own careers through one form of affirmative action, namely college draft deferments" (Rockwell 2003, 1).

Both Wise (2003) and Rockwell (1998) contend that social engineering has been an integral part of American politics for the last 50 years. However, contrary to what is publicized in the media, the vast majority of direct beneficiaries of preferential social policies (commonly referred to as affirmative action when referring to minorities) are white males. According to Wise and Rockwell, as a result of the enormous social crisis (e.g. unemployment, poverty of senior citizens, re-entry needs of veterans and GIs, farmers needing price supports), President Franklin Roosevelt embarked upon a massive affirmative action approach using preferential treatment by

way of planned social engineering. This was known as the 'New Deal'. Rockwell (1998) adds that blacks were excluded from most of these benefits, and the New Deal concepts became unpopular only after they were applied to the crisis of segregation. Rockwell (2003) argues, it is not affirmative action itself, but the extension of affirmative action to minorities and women, that causes backlash and anger. Rockwell stress that there is a normal tendency for most whites to overlook the social props, the network of special benefits on which they and their families depend:

> "Ask a white male applicant if he was wronged when he failed to receive an offer on an employment opportunity wherein the selected individual was another white male that also met the minimum qualifications, but had fewer years of actual experience than he; more times than not, the answer would be "no." However, ask the same applicant if he was wronged when a black male received the offer (still meeting the minimum qualifications) but having fewer actual years of experience than the applicant, and he would likely claim that he was a victim of 'reverse' discrimination" (Rockwell 1998, 1).

According to Flagg (1998), "for many whites, most of the time, to think or speak about race is to think or speak about people of color… White consciousness of *whiteness* is predominantly unconsciousness of *whiteness*. The social dominance of whites allows them to regulate racial specificity to the realm of subconscious. Whiteness is the social norm. In this culture, the black person, not the white, is the one who is different" (Flagg 1998, 1-2). Flagg explains that whiteness is always a salient personal characteristic, but once identified, it fades almost instantaneously from white consciousness into transparency.

To further illustrate Flagg's (1988) point, consider the following example: A *white* associate is describing an individual whom they are referring for a job opportunity to a white decision maker: "He is a tall gentlemen, with brown eyes and dark hair, he possesses a doctoratal degree, is highly respected in his field and extremely well-spoken." The common assumption (for a white individual) would be that the associate is describing a white male. On the day of the meeting, a black male enters the room and identifies himself as the friend of the associate. After getting over the initial shock that the individual is African American, a myriad of other concerns may surface. These may be: Can he really perform at the level indicated by his previous job titles? The last African American that we hired didn't work out, why should I waste time hiring another?, How will he fit in with the current staff?, Was his academic achievement

based truly on merit or was it simply because of affirmative action?, and Am I setting the organization up for a discrimination claim?

This individual will have an uphill battle as he tries to convince the decision maker that he is: an exception to the preconceived image of African Americans, has conformed to white norms; and will not cause trouble. Once this is accomplished, a greater challenge is faced as the individual engages in a detailed discussion which typically includes: (1) testing the individual's competency level and knowledge of current changes in the field and (2) challenging the individual's ability to perform responsibilities included in the job description. Singularly, each step described above could be defined as predictable of an interview process. However, collectively the events of the interview showed signs of subtle discrimination.

On the other hand, if on the day of the meeting, a white male enters the room and makes the same introduction, the conversation may begin with some small talk in an effort to find common interests (sports, golf, the stock market). The last few minutes of the meeting may include a brief discussion of the last position that the individual held and a quick summary of his qualification. Words of encouragement are likely to be offered at the close of the interview with a comment that the referring associate is a highly respected employee and his recommendation of the individual would be held in the uppermost regard. Although quite different from the first interview illustrated above, this could also be described as a typical interview process. However, as Flagg (1998) points out, once the salient personal characteristic of whiteness is identified, it fades almost instantaneously into transparency. Since the individual was white, race did not enter the mind of the decision maker. The only time that race becomes a factor is when the individual is not white.

Flagg (1998) develops her philosophy by looking at the flip side of the equation, namely, white privilege. According to Flagg, white privilege—that collection of favors, courtesies, exceptions, and other benefits that accrue to Euro-Americans on account of their whiteness—accounts for much of the unequal distribution of wealth, status, and wellbeing in society (Delgado 2001). White privilege had other names in earlier history, such as the Manifest Destiny, the

Monroe Doctrine, noblesse oblige and the good old boy network. All these systems merely illustrate the same attitude, taking different forms throughout history (Flagg 1998). She explains that although each may have been accompanied by attitudes such as elitism or favoritism toward one's own, they were primarily aspects of a larger system of imperialist economics and class exploitation. The commonality is that all interlocking structures of privilege that benefit a few at the expense of the rest must be confronted. As such, the realists' school would argue that their redress requires much more than introspection, a change of attitudes, or a resolution to be inclusive (Flagg 1998).

While concerted attempts have been made to address disparities resulting from white privilege, these efforts have been confronted by claims of reverse discrimination (Wise 2003). "Reverse discrimination refers to the perception of a dominant or majority group that they experience discrimination that results from policies established to correct discrimination against members of a minority or disadvantaged group" (Farley 2000, 493). Pincus (1999) cites a 1990 public opinion poll whites reports that between one-half and three-fourths of whites believe that, as a group, they are routinely discriminated against. This is controversial perspectives is largely held by white males and is significant in their feelings against affirmative action policy.

Kitano (1985), asking rhetorically "Can minorities and women do what white men have done to them? For if reverse discrimination were actually to occur, white males would have to be brutalized, degraded, and dehumanized to the same extent that racial minorities and women have been, which is not likely to occur" (Kitano 1985, 56). Flagg (1998) argues against the concept of reverse discrimination. She contends that race is primarily a social phenomenon, and only secondarily a biological fact. According to Flagg, three lines of argument converge to support this conclusion:

> First, there no longer are (if there ever were) clear lines of descent to ground a biological conception of race. Second, racial categories exhibit extreme variability across cultures. Third, racial categories shift rapidly within cultures (20).

Flagg goes on to explain that much scientific evidence indicates that there is no such thing as racial purity. Everyone carries a different mixture of genetic material traceable to several racial

groups; therefore, no one can claim an unequivocal racial identity. Since race cannot be logically linked to genetic composition, it is often times defined by racial characteristics consistent with appearance or identity.

Recognizing race as a social construction, Flagg (1998) directs her audience toward the idealist point of thinking and contests the suppositions of the color-blind theorist. Flagg posits that in this society, one's social status depends in part on his/her racial identity. Race, from Flagg's perspective, is independent from other stratifying characteristics such as sex, wealth, age, religion, sexual orientation, physical disability, education, or national origin.

It is an indisputable fact that, in America—even after applying appropriate controls for educational attainment, experience, wealth, gender—whites occupy the uppermost positions on the racial dimension of social stratification. This lends credence to the notion that whiteness brings with it an unexplained power and a social privilege. Flagg (1998) further surmises that in order for one to discriminate, they have to sit in a seat of having decision-making power. The only group in America's history that has held this degree of decision-making power is white males.

"The existing laws embody too narrow a concept of race discrimination to include non-obvious forms of subtle and institutional discrimination. Consequently, race discrimination law does not currently provide any legal remedy for discrimination that takes the form of transparently white decision making" (Flagg 1998, 9). She concludes that transparency theory validates the presence of unconscious discrimination by whites. Because the transparency phenomenon concerns discretionary decision-making, it has a significantly greater impact on the lives of minorities than laws that focus solely on overt acts of racism.

Flagg contends that unique features of transparency include:

- white decision-making that consists of the unconscious use of criteria of decisions are more strongly associated with whites than nonwhites[29]
- criteria used for decision-making systematically favor whites[30]

[29] Unconscious discrimination calls for nonwhites to assimilate to white norms. According to Flagg, this assimilationist position rests on a false dichotomy between race and individual choice. Sometimes the two are intertwined. Therefore, the "choice" is to retain your racial identity or to renounce it.

- decisions that claim a race-neutral intent but ignore historical realities[31]
- decisions based on the assumption that discrimination is a thing of the past and no longer accepts race as a permissible basis for different treatment[32]

[30] Institutions that rely on ostensibly race-neutral criteria that systematically favor whites afford substantial advantages to whites over nonwhites even when the decision makers intend to effect substantive racial justice.

[31] Race-neutral decisions based on the assumption that the impacts, barriers and failure to redress years of historical discrimination against minorities have no bearing on current day realities.

[32] The Court's discriminatory intent rule contributes to this assumption insofar as it treats as blameworthy the form of race discrimination most common in the past (overt) but refuses to regard with suspicion the unconscious (subtle) discrimination which is the dominant cause of discrimination against minorities today.

CHAPTER 3

RESEARCH METHODOLOGY

This chapter will discuss the methodology that is utilized during the course of the investigation. The chapter opens with an introduction of case study research. It continues with an explanation of why this study is suited to a qualitative design and the specific methodology employed. A foundation is built to support the rationale for my use of the case study approach. The intended research goal of testing the extension of theory into new contexts is introduced ending with a sketch of what the end product will look like.

3.1 Case Study Methodology

Case studies have become one of the most common ways to do qualitative inquiry. According to Stake (2000, 435), "case studies are not a methodological choice but a choice of what is to be studied." He explains that as a form of research, case study is defined by interest in individual cases, not by the method of inquiry. Stake stresses that case studies are neither new nor essentially qualitative. To illustrate this suggestion, he cites the example of a physician and a social worker studying a child:

> The physician may study the child because the child is ill. The child's symptoms are both qualitative and quantitative. The physician's record is more quantitative than qualitative. A social worker may study the child because the child is neglected. The symptoms of neglect are both qualitative and quantitative. The formal records the social worker keeps is more qualitative than quantitative. (435)

In comparison to that of experimental or quasi-experimental research, Yin (1994) describes the body of literature in case study research as primitive and limited. In some

instances, the requirements and inflexibility of experimental or quasi-experimental research makes case studies the only viable alternative. “It is a fact that case studies do not need to have a minimum number of cases, or to randomly select cases. The researcher is called upon to work within the situation that presents itself in each case” (Tellis 1997, 3).

Yin (1994, 4) describes a case study as "an empirical analysis that investigates contemporary events when the delineations between the occurrences and context are not readily apparent.” According to Yin, case studies are the most appropriate approach when the following criteria are present:

1. “how” or “why” questions are being asked,
2. the focus is contemporary as opposed to historical, or
3. the researcher has little control over events.

Although, case studies often contain a mixture of qualitative and quantitative evidence, they are considered a form of qualitative research (Stake 2000). Tellis (1997) explains that researchers using the case study method seek to describe, understand and explain an event. Direct observation as a data source is common, but is not always used.

“A case may be simple or complex; functional or dysfunctional; rational or irrational. Regardless of its unique characteristics, it is a bounded system of integrated working parts with a patterned behavior” (Stake 2000, 436). Tellis (1997, 2) describes three common types of case studies—exploratory, explanatory, and descriptive. “Explanatory case studies are frequently conducted prior to the definition of research and hypotheses. The framework of the research is always constructed first. These pilot endeavors are useful in deciding which protocols will be used in the final product. Explanatory studies are suitable when the existing knowledge and the available literature are limited or a major component of the study is uncertain.” Yin (1994) notes that when the researcher to sets out to identify patterns and to relate systematically one observed variation to another, explanatory case studies are appropriate. Questions related to “how” and “why” are most likely to encourage an explanatory case study. Yin (1994) compares descriptive and explanatory case studies. According to Yin, “descriptive case studies begin with a

descriptive theory that covers the depth and scope of the case being studied. The use of pattern matching in descriptive case studies is relevant as long as the predicted pattern of variables is defined before data are collected." In addition, both descriptive and explanatory case studies are able to communicate research-based information about an event to individuals outside the field of study" (Yin 1994, 24-25).

Stake (2000) also identifies three types of case studies—intrinsic, instrumental and collective. A case study is described as intrinsic if it is undertaken because, first and last, the researcher wants a better understanding of this particular case. The case is not undertaken primarily because the case represents other cases or that it illustrates a particular trait or problem, but because, in all its particularity and ordinariness, the case itself is of interest. Regarding instrumental case studies, Stake states that:

> a case study is described as instrumental if a particular case is examined mainly to provide insight into an issue or redraw a generalization. The case is of secondary interest, it plays a supportive role and it facilitates our understanding of something else. The case is still looked at in depth, its context scrutinized, its ordinary activities detailed, but all because this helps the researcher to pursue the external interest. (437)

Stakes defines a collective case study as one wherein the researcher jointly studies a number of cases in order to investigate a phenomenon, population or general condition. This is an instrumental study extended to several cases. The case may or may not be selected in advance of the research. They are chosen because the researcher believes that understanding them will lead to a better understanding of a larger collection of cases.

When designing a case study, the researcher should consider five components of the process: (1) study question, (2) study proposition, (3) unit of analysis, (4) linking data to the proposition, and (5) criteria for interpreting results (Yin, 1994). What is sought by the researcher is what is common and what is particular about the case. However, the end result should portray something of the uncommon, drawing from the following:

- The nature of the case
- The case's historical background
- The physical setting

- Other contexts (e.g., economic, political, legal and aesthetic)
- Other cases through which this case is recognized
- Those informants through whom the case can be known (Stake 2000)

3.2 Case Study Description

The difficulty of proving discrimination has resulted in a backlash on the public policies of affirmative action. Up to now, a great deal of research on affirmative action has been undertaken from numerous perspectives. While there has been quite impressive analysis on the subject, they have all centered on the rightness and or wrongness of the government to enact policies that benefits a selective group of people. The critical component that has been overlooked is that if one does not understand the intrinsic, invidious, pervasive, abstract, infinite and intractable nature of discrimination, they will be unable to design effective public policies to combat its existence.

This research implies that history, politics, misinformation and competition for rival and excludable resources contribute to the inability to penetrate a clear understanding of the extent and impact of present day discrimination. These factors (individually and collectively) serve as blinders to acts of unconscious, unintended, institutional and subtle forms of discrimination. These blinders have negatively interfered with the advancement of equality among minorities, females, and white males.

This research offers a way to examine the potential barriers to policymaker's ability to visualize, validate and accept personal responsibility for the role that they play in the continuation of discrimination in America. The dissertation hypothesis attempts to contribute to the discussions that the higher the degree of presence of unconscious discrimination (which is manifest from what I have categorized as contextual, conceptual and subconscious influences), the less likely the decision maker will be able to conceive or believe that discrimination exists.

This dissertation provides a framework for analyzing the difficulties in proving the common occurrence of subtle discrimination, and it explores the qualitative correlation between the concept of the transparency phenomenon (white unconsciousness) with the value perception of decision makers. For purposes of this dissertation, I refer to U.S. Court Judges and Justices as

decision makers. The U.S. legal system (District, Court of Appeals, and Supreme Courts) is one part of a set of social, political, economical and cultural processes that shape and direct the development of society. The decisions that come from these courts govern and dictate human behavior.

The U.S. Constitution gives the U.S. Supreme Court a pivotal decision-making role in the government system. The Supreme Court has the power to review decisions made by the President and is the final judge in all cases involving Congress and the Constitution (Scholastic.com 1989). Scholastic.com (1989, 1) gives the analogy of the Supreme Court and a referee on a football field: "Congress, the President, the state police, and other government officials are the players. Some can pass laws, and others can enforce laws. But all exercise power within certain boundaries. These boundaries are set by the Constitution. As the referee in the U.S. system of government, it is the Supreme Court's job to say when government officials step out of bounds." The U.S. Supreme Court consists of nine justices. Of the approximate 5,000 requests for hearings received each year, the Supreme Court will hear about 150 cases.

The dissertation hypothesis is evaluated in two venues by using a combination of what Yin (1994) referred to as a descriptive case study and what Stake (2000) coined as an instrumental case study. First, I will use *Concrete Works vs. the City and County of Denver* as a case study to illustrate the shift in the Court's stance on what constitutes adequate proof of the existence of present day discrimination in disparity studies.[33] I will then use the Urban Institute and Department of Justices' Nationwide Disparity Study to respond to criticisms and flaws of the Denver's Disparity Study cited by the Judge to have caused the negative judgment against the City and County of Denver.[34]

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[33] The Justices in Concrete Works vs. The City and County of Denver ruled that the Denver's Disparity Study was fundamental flawed and did not prove by statistical evidence present day existence of discrimination. Therefore the disparity study did not support preferential use of race, ethnicity and/or gender.

[34] A Nationwide Disparity Study was conducted in 1997 by the Urban Institute, the Rockefeller Foundation and the United States Department of Justice to determine the existence and extent of discrimination in government contracting. Ninety-five separate disparity studies were used to provide a single measure of disparity in the use of minority-and –women-owned businesses in government

In 1993, Chief Justice Finesilver found Denver's affirmative action program to be constitutionally valid. Upon appeal, this decision was reversed and remanded back to the District Court. In March 2000 Senior Judge Matsch issued an 80-page opinion holding that Denver's affirmative action program was unconstitutional and barred its further use. The Court's findings with regard to flaws in the disparity study presented in this test case is examined to illustrate the interplay of what I have categorized as contextual, conceptual and subconscious factors that help shape the value perspective of decision-makers. The examination of this case attempts to explore and to help understand unconscious behaviors and value perspectives of decision makers (in this case, Justices).

Next, I will conduct a review of six precedent-setting court cases decided from 1978 to 2003: Bakke, Fullilove, Wygant, Croson, Metro Broadcasting, and Adarand. The issues include: (1) student body diversity in a medical school (Bakke), (2) subcontracting under a grant program (Fullilove), (3) layoff provision in a collective bargaining agreement (Wygant), (4 and 5) a city's subcontracting provision (Croson and Adarand), and (6) radio and television broadcasting diversity policies (Metro Broadcasting). At first glance, these cases seem to have very little in common. However, upon closer look, it is readily noted that each of the supporting cases can be grouped under the broad term of affirmative action. Additionally, each case can be linked based on the three distinct issues: (1) race or ethnic origin classification, (2) United States Constitution Equal Protection issues, and (3) the change in Supreme Court membership and their respective viewpoints.

This change in perspective of the Supreme Court Justices lends an opportunity to examine the dissertation's theory of the presence of unconscious conditioning influences in policymakers. The Supreme Court justices examine and interpret the Constitution from their own viewpoint and life experiences. The changes in Supreme Court Justices from 1978 to 2003

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procurement nationwide. This study will be used to respond to the criticisms and Disparity *Study* flaws cited by the Justices in the *Concrete Works vs. the City and County of Denver.* It is the position of this dissertation the no evidence presented to the Justices would have enabled these Justices to acknowledge the

resulted in a 180-degree change in the standard of scrutiny used in cases to remedy effects of past discrimination. The new strict scrutiny standard has significant implications for future public policy regarding equality and fairness in contracting, education, and employment.

3.3 Data Analysis

Tellis (1997, 5) contends that "striving toward a holistic understanding of cultural systems of action is a quintessential characteristic of case studies. Cultural systems of action refer to sets of interrelated activities engaged in by the actors in a social situation." According to Tellis, "when analyzing case studies, the researcher considers not just the voice and perspective of the actors, but also of the relevant groups of actors and the interaction between them" (Tellis 1997, 6). The study cases, the Urban Institute Disparity Study, and the majority and dissenting opinions of the Justices will represent the cultural systems of action in this research.

3.4 Verification and Interpretation

There is an ethical need to confirm the validity of case study processes; researchers employ various procedures to reduce the likelihood of misinterpretation (Stake 1995). Two of the most common techniques are redundancy of data gathering and procedural challenges to explanations. In qualitative casework, these procedures are generally called triangulation. Triangulation has been defined as "a process of using multiple perceptions to clarify meaning verifying the repeatability of understanding of an observation or interpretation" (Stake 1995, 443).

Construct validity has been a source of criticism in case study research because of potential investigator subjectivity. Yin (Tellis 1997) proposes three remedies to counteract this challenge: (1) using multiple sources of evidence, (2) establishing a chain of evidence, and (3) having a draft case study report reviewed by key informants. Pattern-matching is a major mode of analysis that can be used to increase validity. Pattern-matching is a useful technique for comparing several pieces of information from the same case to some related theoretical

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existence of discrimination. This, as hypothesized above, can be contributed to the decision-makers "unconscious conditioning."

proposition. This logic of comparing an empirical pattern with a predicted one enhances internal validity when the pattern coincides (Tellis 1997). If the case is a descriptive study, then the predicted pattern must be defined prior to data collection.

The dissertation research follows both Stake (2000) and Yin's (1994) suggestions to enhance validity. There is a redundancy of data gathering using an Urban Institute Study of 95 disparity studies to present one national picture of disparity. The study results are then used for a procedural challenge to explanations offered by the Justices to discount the validity of the present day existence of discrimination presented as evidenced by the City and County of Denver.

The second part of the research involves using multiple sources of evidence (six court decisions dealing with the application of the "strict scrutiny" standard to uphold affirmative action policy) and establishing a chain of evidence (by using multiple questions to examine presence of unconscious discrimination). White privilege through race-neutral criteria is tested by comparing several pieces of information from these cases to Flagg's (2009) theoretical proposition of transparency theory. Using the above described approach, the dissertation hypothesis that the value-shaped perspectives of decision makers impact their ability to acknowledge that discrimination exists is tested for construct and internal validity.

CHAPTER 4

RESEARCH CASE STUDIES

4.1 Concrete Works v. City and County of Denver

In 1990, the City of Denver established participation goals for minority- and women-owned contractors on certain city construction and design projects under a newly developed affirmative action ordinance. The ordinance also established a Mayor's Office of Contract Compliance (MOCC) to enforce the ordinance and to set participation goals for individuals and projects. The ordinance set standards for project participation goals or demonstration of sufficient good faith efforts for prime contractors and subcontractors interested in bidding on city contracts. Two subsequent ordinances modified participation goals and other details of the original ordinance (U.S.C.A. Tenth Circuit, No. 001145 1994).

Concrete Works, a Colorado based non-minority owned firm, lost three contracts with the city because it did not comply with the 1990 Ordinance. In 1992, Concrete Works challenged the constitutionality of the ordinance in federal court seeking damages and injunctive relief. Concrete Works alleged that the ordinance violated the 14th Amendment of the U.S. Constitution. On February 26, 1993, the district court granted a summary judgment in favor of the City of Denver (823 F. Supp. 821 D. Colorado 1993). "The court held that Denver's program satisfied the strict scrutiny standard set forth in City of Richmond v. J. A. Croson, 488 U.S. 469 (1989), because Denver's statistical and anecdotal evidence demonstrated a compelling interest and the program was narrowly tailored to further that interest." (Brief for the United States As Amicus, U.S.C.A, Tenth Circuit, No. 001145, 2003) On September 23, 1994, the 10th Circuit reversed the decision and remanded the case for trial. The 10th Circuit concluded that "although Denver met its initial burden with regard to establishing a strong basis in evidence for its remedial program by offering several statistical studies showing an underutilization of minority-and-women owned business on

the basis of their absolute numbers in the local marketplace, Concrete Works raised several issues of fact that warranted a trial. While Denver's studies support its remedial program, Concrete Works identified issues about the accuracy of Denver's data." (U.S.C.A, Tenth Circuit, No. 001145 2003). Denver filed a petition requesting that the Supreme Court review the decision of the 10Th Circuit Court (*writ of certiorari*). [35] Their request was denied.

In 1999, a three-week bench trial, presided on by Chief Judge Richard Matsch, was held to determine the constitutionality of the Denver's ordinance. Denver presented historical, anecdotal, and statistical evidence at trial to support its program. On March 7, 2000, the District Court held that Denver's Ordinance was unconstitutional. "In an 80-page opinion, the District Court concluded that Denver's statistical studies did not account for important variables and that they did not generate a fair inference that there are discriminatory barriers to participation in the construction industry. The district court rejected the disparity studies and anecdotal evidence citing that they did not address actual qualifications and capacities of the minority- and women-owned businesses, did not take account of a firm's specialization, it's experience, prequalification status, and the number of certified minority-and-women-owned businesses. The Court also concluded that the program was not narrowly tailored" (U.S.C.A, Tenth Circuit, No. 001145 2003). The Court enjoined Denver from enforcing the ordinance, therefore, halting the affirmative action contracting program.

Denver appealed to the U.S. Court of Appeals. On March 13, 2001, oral arguments were held, following full briefings by both parties and the filing of *amici curiae*[36] briefs. The 10th Circuit

[35] Order by the appellate Court which is used when the Court has discretion of whether or not to hear an appeal. If the writ is denied, then the court refuses to hear the appeal and in effect the judgment from the Court below stands unchanged. If the writ is granted then it has the effect of ordering the lower court to certify the records and send it up to the higher court which has used its discretion to hear the appeal.

[36] Amici curiae means "friend of the court". A person with strong interest in or views on the subject matter of an action may petition the court for permission to file a brief ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such briefs are commonly filed in appeals concerning matters of a broad public interest such as civil rights cases. Such may be filed by private persons or the government and appeals to the US Court of Appeals briefs may be filed only if accompanied by written consent of all parties or by leave of court granted on motion or at the request of the

briefly stayed the case pending a ruling in *Adarand v. Mineta* (see Adarand VIII in table A.20, Appendix A). The stay was lifted on December 5, 2001. In February 2003, the 10th Circuit Court of Appeals overturned the 2000 ruling and upheld Denver's program (U.S.C.A, Tenth Circuit, No. 001145, 2003). The victory was significant for affirmative action programs and was watched closely by the United States government and other major metropolitan areas. On May 12 Concrete Works filed a petition for *writ of certiorari* seeking U.S. Supreme Court review. On July 14, 2003, the City and County of Denver filed its opposition. Several entities filed *amici curiae* briefs in support of Concrete Works. On August 1, 2003, Concrete Works filed its reply brief. The Supreme Court was scheduled to announce whether it agreed to hear Concrete Works appeal on September 29, 2003. In November 2003 the U. S. Supreme Court decided not to hear the Concrete Works appeal. Denver spent over $2.5 million defending its program. Concrete Works, on the other hand, spent nothing and had all of its legal fees and costs donated to them (Mountain States Legal Foundation 2003). Figure 4.1, below gives a visual illustration of movement of the Concrete Works case within the judicial system for the over 11 years.[37]

court except as consent or leave shall not be required if the brief is submitted by United States or an officer or agency thereof.

[37] Figure 4.1 is displayed in a circular patter to illustrate the 360 degree shift from the initial finding in favor of Denver in 1993 to the reversal and finding in favor of Concrete Works in 2000 to the Appeal and final finding in favor of Denver in 2003.

Figure 4.1 Concrete Works vs. City and County of Denver

Colorado District Court Trial

During the 1999 bench trial, in addition to historical and anecdotal evidence of discrimination, the trial hinged largely on statistical evidence used to determine the degree of participation of Minority Business Enterprises (MBE) and Disadvantaged Business Enterprises (DBE) in city projects. Denver had commissioned several disparity studies that assessed the propriety of the program goals. The first, conducted in 1990, examined the availability and utilization of MBE and WBE construction and design firms and showed large disparities in their utilization on projects undertaken in the Denver Metropolitan Statistical Area (Denver MSA) and on city bond projects from the 1970s and 1980s. The 1991 study analyzed MBE and WBE utilization in the goods, services and remodeling industries. A third disparity study, conducted in 1995, used Census Bureau data to examine M/WBE utilization in the Denver construction industry and also found disparities. The 1995 study also showed that African Americans and Hispanics had lower rates of self-employment than whites; and women had lower rates of self-employment than men (U.S.C.A, 10th Circuit No. 001145 2003).

In 1997, Denver retained National Economic Research Associates (NERA) to study the availability of MBEs and WBEs; and to determine whether race and gender discrimination limited their participation in typical city construction projects. The 10th Circuit Court stated "the NERA study used a more sophisticated method to calculate availability than the 1990 and 1995 studies. NERA identified the construction specialties and geographic areas in which the city spent most of its construction funds and used Standard Industrial Classification (SIC) code data to summarize the city's construction expenditures by project type and geographic area and calculate M/WBE availability. The NERA study found disparities in the utilization of minority and women owned businesses in Colorado construction" (U.S.C.A, 10th Circuit, No. 001145 2003, 7-18).

NERA also concluded that African Americans, Hispanics and Native Americans working in construction were less likely to be self-employed than similarly situated whites. The NERA study established that the potential availability exceeded the actual availability of MBEs in Denver. The study showed disparities in the earnings of self-employed women, African

Americans, Hispanics, and Native Americans. NERA offered additional evidence from a survey it conducted revealing a showing of disparate treatment in business activities, such as applying for commercial loans and bidding on public or private contracts.

The District Court dismissed all of this evidence on grounds that none of it addressed six questions that the District Court had posited as the legal framework for analyzing the city's disparity study and cited six additional criticisms of the evidence presented by Denver. The six questions articulated by the District Court Justice that a disparity Study[38] should answer were as follows:

1. "Is there persuasive race, ethnic and gender discrimination through all aspects of the construction and professional design industry in the six county Denver MSA? (Or is the problem much more limited, which would make the Denver MWBE program not narrowly targeted?)

2. Does the discrimination equally affect all the racial and ethnic groups designated for preference by the Denver MWBE program and all women? (Or is the Denver program over inclusive in its beneficiaries?)

3. Does such discrimination result from policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity and gender? (Or are discriminatory acts contrary to policy and unknown to firm owners?)

4. Would Denver's use of those discriminating firms without requiring them to give work to certified MBEs and WBEs in the required percentage of each project make Denver guilty of prohibited discrimination? (Or has Denver been a passive participant in discrimination.)

5. Is the compelled use of certified MBEs and WBEs in the prescribed percentages on a particular project likely to change the discriminatory policies and programs that taint the industry? (Or is Denver's program an effective remedy for the discrimination that does exist?)

[38] A disparity study is an analysis performed to determine the existence of discrimination based on race or gender in the awarding of contracting opportunities

6. Is the burden of compliance with Denver's preferential program a reasonable one fairly placed on those who are justly accountable for the proven discrimination? (Or does the Denver MWBE program punish the right people)" (F.3d 1145, 10th Cir. 2000).

> According to Adversity-net (2001), the Court further stated:
> "The Denver studies do almost nothing to answer these questions because the consultant designing them made no effort to address them. As it relates to compelling interest. . .the most fundamental flaw in the effort to support Denver's preferential use of race, ethnicity and gender by statistical evidence is that no objective criteria define who is entitled to the benefits of the program and who is excluded from those benefits" (Adversity Net 2001, 4-6).

The Court concluded that Denver's use of presumptive eligibility (which is the same concept with the same definition used in federal programs) was unacceptable.

After examining the definition of African American, Hispanic, Asian-American, and Native American, the court noted: "One group was defined by race, another by culture, another by country of origin and another by blood. While all of these classifications may be considered immutable in that they are not within an individual's control, the aggregation of them as equally victimized by discrimination and equally entitled to preferential remedies is particularly problematical for the Fourteenth Amendment equality analysis. Denver has no justification for the equal inclusion of all these racial and ethnic groups. Denver has failed to identify any difference among the protected groups as to their relative need for this remedy. *It is contrary to common sense to believe that racial prejudice affects all racial and ethnic groups equally* or that all those who are certified will be free from bias or prejudice against other racial groups" (Adversity Net 2001, 5).

Concrete Works claimed that the disparities in Denver's studies could be attributed to firm size and experience rather than discrimination. The NERA study produced evidence that MBEs and WBEs, like most construction firms, have the ability to expand by hiring additional employees or subcontractors, but even so, that size and experience are not race- and gender-neutral variables. In other words, M/WBEs tend to be smaller and less experienced firms. Thus, when Concrete Works says that disparity arises based on size and experience rather than race and gender, this still leads to discrimination. This fact was further emphasized in NERA's lending discrimination and business formation studies. Denver's expert, NERA Vice President, Dr. David Evans and NERA Special consultant, David Blanchflower, testified that discrimination by banks or bonding companies reduces a firm's revenue and the number of employees it could hire (U.S.C.A, 10th Circuit, No. 001145 2003).

Concrete Works also argued that industry specialization by M/WBE firms explain the observed disparities, but did not produce any evidence that this was indeed the case. In contrast, NERA's experts testified that MWBEs were represented across virtually all industry specializations. The NERA Study, which controlled for SIC codes specialty yet still showed disparities, supported Denver's argument that firm specialization cannot explain the disparities (U.S.C.A, 10th Circuit, No. 001145 2003).

The 10th Circuit disagreed with the District Court and ruled that the District Court's questions misstated the law by placing the ultimate burden on Denver to prove that discrimination exists. The 10th Circuit concluded that Denver's statistical and anecdotal evidence was not only relevant but also essential to the city's claim that it had been an indirect participant in private sector discrimination (U.S.C.A, 10th Circuit, No. 001145 2003, 7-18).

4.1.1 Design Specification and Data Collection

The *City of Richmond v. Croson* decision established a new constitutional requirement for those state and local governments that desired to distribute public contracts more widely. In order to implement a race specific program, a local government must either show specific evidence of past local discrimination or prove a significant statistical disparity between, on the one hand, the number of qualified minority contractors willing and able to perform the services and, on the other, the number actually employed (488 U.S. 469 1989). "Since the *Croson* decision, more than $65 million have been spent by more than 145 state and local jurisdictions for commissioned disparity studies to determine whether there is sufficient evidentiary basis to initiate, maintain, or expand MBE programs" (La Noue 2001, 21).

Using the *Concrete Works of Colorado v. City and County of Denver* case as a point of reference, the basic analytic strategy of this dissertation is to utilize the Urban Institute Disparity Study as a response to the six questions articulated by Chief Judge Richard Matsch of the 2000

Colorado District Court that a disparity study[39] should answer. This analogy will be used to determine if the national standard of disparity would satisfy the criterion required by the Justice.

The 1997, study, co-sponsored by the Urban Institute, the Rockefeller Foundation, and the U.S. Department of Justice, included a listing of 95 studies that were furnished by the Department of Justice through its efforts to collect all existing state and local contracting disparity studies conducted after the Croson decision. The research for this report was conducted by Maria E. Enchautegui, Michael Fox, Pamela Loprest, Sarah C. der Lippe and Douglas Wissoker. From the 95 reports reviewed by Enchauteguia et al. 58 reports were analyzed to produce one aggregate disparity study to give an *overall* national picture. The objective was to assess the existence and extent of discrimination in government contracting. "These studies were used to provide a single measure of disparity in the use of minority- and women-owned businesses in government procurement nationwide" (Enchauteguia et al. 1997, 2).

The Urban Institute made a concerted effort to ensure consistency in the methodology used by the authors of the various disparity studies. "Although there were differences across studies in the sources of data used and the definition of available firms, each of the studies reported on the same outcomes (i.e., the percentage of government contract dollars awarded to minority-owned firms compared to the percentage of all available firms that are minority owned)" (Enchauteguia et al. 1997, 3). All 58 studies utilized in the Urban Institute study:

1. presented their findings as disparity ratios or provided the data necessary to calculate disparity ratios. A disparity ratio defines the degree of difference in the treatment of similarly situated individuals or entities. For example, a disparity ratio of 0.3 indicates that minority owned businesses received only 30 cents of every dollar expected to be allocated to minority firms based on their availability;
2. reported findings separately by industry categories
3. reported the statistical significance of each disparity finding; and

[39] A disparity study is an analysis performed to determine the existence of discrimination based

4. had more than 80 contracts for all years of the study period combined

"This method seeks to limit any potential bias and overcome data deficiencies of the underlying individual studies. This ensured a basic level of consistency and reliability across studies, thus enabling aggregation of the findings" (Enchauteguia et al. 1997, 3-6).

The Urban Institute report documented a nationwide pattern of disparity in minority contracting at the state and local government levels. It noted, "Minority-owned businesses win only 57 cents of every dollar that they would be expected to win based on the share of all firms they represent." (Enchauteguia et al. 1997, 7). According to Enchautegui et al. (1997), "almost two-thirds of the jurisdictions included in this study reported substantial disparity (a disparity ratio below 0.8) in government dollars going to minority-owned businesses. Moreover, these low utilization rates occurred despite the limited number (or availability) of minority firms. Although the disparities appeared across all minority groups, particular emphasis was made to the aggregate data which suggested that women only received 29 cents of every dollar they would be expected to receive based on the share of firms they represent." (Enchautegui et al. 1997, 7-10).

The results of the disparity ratios from the Urban Institute's 58 studies is used as a standard by which to evaluate the Concrete Works case to test the dissertation claim that any disparity study presented to Chief Judge Richard Matsch of the 2000 Colorado District Court *Concrete Works v. City and County of Denver* case would have failed to withstand the scrutiny of the Court.

Table A.1, (see Appendix A) depicts a complete list of 58 Disparity Studies included in the Urban Institute analysis. Table A.2, (see Appendix A) details a listing of the disparity studies that were excluded from the Urban Institute Analysis and the reason for the exclusion. The actual disparity findings on which the analyses were based are reported in tables A.3 through A.11 in Appendix A. These tables list percentage availability, disparity ratios, and statistical significance for African Americans, Latinos, Asians, Native Americans, all minorities and women. These tables

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on race or gender in the awarding of contracting opportunities.

also include the jurisdiction of the study, the type of availability measure used, the number of contracts included, and the years examined.

The average and median disparity ratios from the Urban Institute study are used for dissertation case study comparative purposes. "When studies presented several different measures of disparity, the Urban Institute study took the median of these measures to provide one disparity ratio per study for each industry/minority group. When calculating the average disparity ratio for the construction industry, a slightly different approach was taken. The disparity ratio is intended to reflect the share of dollars received by minority, or women owned businesses as either prime- or subcontractors. Some of the individual studies allocated all contract dollars awarded by race/ethnicity of the prime contractor, ignoring payments to the subcontractor. For those studies allocating all contract dollars awarded by race/ethnicity of the prime contractor, if separate data on subcontracts were available, the average of all the disparity ratios for the prime and subcontractor utilization was used to calculate the average disparity ratio. If the subcontractor data was not available, the Urban Institute study averaged the data for the prime contractor alone" (Enchautegui et al. 1997, 7-10).

To obtain the overall disparity ratio for a set of studies, the Urban Institute study calculated the median of the average disparity ratios. The median was used because while the disparity ratio cannot fall below zero, there is no limit to how high it could be. This means that the measures of under-utilization are limited to a range between 0 and 1, but over-utilization is unlimited. This aspect of the disparity ratio means that simple averages can give disproportionate weight to measures of over-utilization (Enchautegui et al. 1997).

4.1.2 Data Analysis

The results from the systematic collection of data from the Urban Institute disparity studies is used to dissect the opinion handed down by the Colorado District Court Judge. Specifically, in Chapter 6, I will address the following criticisms that were cited by the Colorado

District Court Justice (Chief Judge Richard Matsch) to have contributed to the favorable ruling for Concrete Works in 2000:

1. "The census data relied upon is suspect because it uses a different definition of MWBE than that found in the Denver certification program and was believed to overstate the number of MWBEs.

2. Data offered by Denver did not distinguish the degree and specificity of the type of discrimination suffered by each group. According to the Justices, "It is contrary to common sense to believe that racial prejudice affects all racial/ethnic groups equally."

3. There was a lack of adjustment for size of firms, construction specialties or whether the firm worked mainly as a prime or subcontractor.

4. There was a failure to limit surveys on anecdotal discrimination to Denver, to follow-up on any allegation or to ask white men about discrimination against them.

5. Doubt was cast on the validity of disparity studies because of the inherent limitations in attempting to collect and measure useful information about the construction industry because of the nearly infinite number of variables affecting the fate of firms. In short, the sentiment was that the construction industry is varied and complex; therefore, there are many non-discriminatory reasons why a firm might chose to work consistently with a small set of subcontractors.

6. The aggregation of all the MBEs and WBEs in estimating availability without regard for the size of the business or the particular type of service or work in which they specialize was a serious flaw in the methodology and impairs the values of the results.

7. The District Court Justices ruled that Denver's disparity study was seriously flawed because of its failure to address the following six questions. I will take up these six questions again in the empirical section of this dissertation:

a. Is there persuasive race, ethnic and gender discrimination through all aspects of the construction and professional design industry in the six county Denver MSA? (Or is the problem much more limited which would make the Denver MWBE program not narrowly targeted?)

b. Does the discrimination equally affect all the racial and ethnic groups designated for preference by the Denver MWBE program and all women? (Or is the Denver program over inclusive in its beneficiaries?)

c. Does such discrimination result from policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity and gender? (Or are discriminatory acts contrary to policy and unknown to firm owners?)

d. Would Denver's use of those discriminating firms without requiring them to give work to certified MBEs and WBEs in the required percentage of each project make Denver guilty of prohibited discrimination? (Or has Denver been a passive participant in discrimination.)

e. Is the compelled use of certified MBEs and WBEs in the prescribed percentages on a particular project likely to change the discriminatory policies and programs that taint the industry? (Or is Denver's program an effective remedy for the discrimination that does exist?)

f. Is the burden of compliance with Denver's preferential program a reasonable one fairly placed on those who are justly accountable for the proven discrimination? (Or does the Denver MWBE program punish the right people" (F.3d 1145, 10th Cir. 2000).

The Urban Report further advocated that wide spread disparities did not necessarily translate into proof of discrimination on the part of the state or local governments, but the findings did suggest that barriers to minority firm participation in the government contracting process remain on a national level and that ignoring race by introducing race-neutral policies could simply perpetuate current patterns of disparity that are observed in the receipt of government procurement (Urban Institute Study 1997). This supports the dissertation premise that race is a transparent reality in any decision making endeavor.

4.2 Precedent Setting Cases Impacting Affirmative Action Policy

An analysis of court cases setting precedence on required evidence to prevail in discrimination claims is an opportunity to explore value perspectives of these decision makers.

Towards this end, I conduct an examination of majority and dissenting opinions of Supreme Court Justices' rulings on policies regarding affirmative action policy.

Transparency theory and discourse analysis are used to determine if they can explain the failure of Justices to provide remedies to correct past public policy failures to detect and deter societal discrimination. The language and discourse used by the Supreme Court Justices to defend their positions are considered to be approximations and manifestations of their value-shaped presuppositions and internal or personal beliefs that influence their decision making with regards to issues of discrimination. Stake (2000) referred to this form of case study as a collective case study. The cases are chosen for review because it is believed that understanding them will lead to better understanding and theorizing about a larger collection of cases.

The *Bakke, Fullilove, Wygant, Croson, Metro Broadcasting* and *Adarand* cases can be tied together by three key issues: (1) race or ethnic origin classifications, (2) United States Constitution Equal Protection issues, and (3) the change in Supreme Court membership and their viewpoints (Antonio 2003). They can also be categorized under the broad term of affirmative action policy. Antonio explains that many people believe that the key concern in an affirmative action program is whether there is a goal or a quote. Justice Powell brought this issue to rest in *Bakke* when he stated:

> *The parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a 'goal' of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota. This semantic distinction is beside the point: the special admission program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status. (Regents of the University of California v. Bakke 1978, 438 U.S. 265).*

Antonio (2003) asserts that the Supreme Court views cases that deal with the use of racial or ethnic classifications as suspect (Antonio 2003), thus requiring a careful evaluation of their review. According to Antonio, a justice's opinion may be affected by the justice's life experience but it will be carefully analyzed (Antonio 2003). The six supporting decisions used as

case study cases in this dissertation vividly show how the Supreme Court justices view and interpret the Constitution from their own viewpoints and life experiences. Antonio explains "Justices Brennan, Marshall and Blackmun first fight it out with Justices Powell and Rehnquist and then with Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy. Antonio states that the basic contest deals with the standard of review to apply to affirmative action programs. To remedy the effects of past discrimination, Justices Brennan, Marshall, and Blackmun proposed the intermediate standard of scrutiny. Justices Powell, Rehnquist, O'Connor, Scalia and Kennedy favor strict scrutiny" (Antonio 2003, 4-5).

Justices Brennan, Marshall and Blackmun, joined by justices White and Stevens, issued the pivotal Supreme Court's majority opinion in Metro Broadcasting in June, 1990. Shortly thereafter these Justices began retiring from the court; Justice Brennan left in July 1990, Justice Marshall left in October 1991 and Justice Blackmun left in August 1994. The replacement Justices brought different viewpoints and perspectives to the Court (Antonio 2003).

4.2.1 The Regents of the University of California v. Bakke (1978)

The University of California at Davis is a medical school that opened in 1968 with an entering class of 50 students. The entering class contained three Asians, but no African Americans, Mexican Americans or American Indians. Within the next three years, the entering class had doubled in size. During this same time period, in an effort to increase the representation of "disadvantaged" students in each Medical School class, the faculty developed an affirmative action program. This program consisted of a separate admissions system operating in coordination with the regular admission process (Antonio 2003).

The regular admissions procedure consisted of a committee that screened each application and selected candidates for further consideration. About 1 out of 6 applicants were invited for a personal interview. A separate committee sat on the special admission program. Candidates were asked whether they wished to be considered as members of a minority group, (e.g., African Americans, Hispanics, Asians, and American Indians). If the applicant answered yes

to this question, the application was forwarded to the special admissions committee. The applicants in the special admissions program were rated similarly to those in the regular admission program except they did not have to meet the 2.5 grade point average as required by those applicants that were in the regular admissions program. When the entering class size was 100, the prescribed number reserved for special admissions was 16 (Antonio 2003).

Both in 1973 and in 1974, Allan Bakke, a white male, applied to the Davis Medical School. In both years, Bakke received an invitation for a personal interview. However, Bakke's application was rejected despite seats remaining available in the special admissions program and applicants were admitted under this program with grade point averages and overall rating scores lower than Bakke's. Bakke sued the Medical School (Antonio 2003).

Table 4.4 depicts the Supreme Court Justices that rendered the judgment in this case.

Table 4.4 Supreme Justice of the Bakke Decision

Decision: Swing vote by Justice Powell to apply judicial strict scrutiny to racial and ethnic classification cases. However, ruling that the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions.					
Name	Service Dates	Birth Place	Political Party	Nominating President	Views[40]
William Brennan	1956-1990	New Jersey	Republican	Eisenhower	Liberal
Potter Stewart	1958-1981	Michigan	Republican	Eisenhower	Conservative
Byron White	1962-1993	Colorado	Democrat	Kennedy	Liberal
Thurgood Marshall	1967-1991	Maryland	Democrat	Johnson	Liberal
Warren Burger	1969-1986	Minnesota	Republican	Nixon	Conservative
Harry Blackmun	1970-1994	Illinois	Republican	Nixon	Liberal[41]
Lewis Powell	1972-1987	Virginia	Republican	Nixon	Moderate[42]

[40] Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

[41] Blackmun, a lifelong Republican, was generally expected to adhere to a conservative interpretation of the constitution. The Court's Chief Justice at the time, Warren Burger, who had been a long-time friend of Blackmun's and for whom Blackmun served as best man at his wedding, had recommended Blackmun for the job to President Richard M. Nixon. The two were often referred to as the "Minnesota Twins" (a reference to the baseball team, the Minnesota Twins) because of their common history in Minnesota and because they so often voted together. A turning point came in 1973 with the Roe vs. Wade decision. Blackmun became a passionate advocate for abortion rights. Burger and Blackmun drifted apart, and as the years passed, their lifelong friendship degenerated into a hostile and contentious relationship. In Burger's last year on the court, he and Blackmun voted together in about 50% of the cases while Blackmun voted with Justices Brennon and Marshal over 90% of the time. By the time Justice Blackmun retired, he was considered the most liberal Justice on the Court. http://en.wikipedia.org/wiki/Harry_Blackmun

[42] Justice Powell developed a reputation as a judicial moderate, and was known as a master of compromise and consensus-building; thus cultivating a reputation as a swing vote with a penchant for compromise. For example, his opinion in *Regents of the University of California v. Bake* (1978) joined by no other justice,

Table 4.4-Continued

William Rehnquist	1986-2005	Wisconsin	Republican	Reagan	Conservative
John Paul Stevens	1975-now	Illinois	Republican	Ford	Moderate
Source: Infoplease. http://www.infoplease.com/ipa/A0101281.html					

The question before the Court was "whether the special admissions program operated to exclude Bakke from the school on the basis of race, in violation of his rights under the Equal Protection Clause of the 14th Amendment of the California Constitution and under Title VI of the Civil Rights Act of 1964" (Antonio 2003, 8).

4.2.2 Fullilove et al. v. Klutznick, Secretary of Commerce et al. (1980)

The Public Works Employment Act of 1977 authorized $4 billion for federal grants to state and local governmental entities for use in local public work projects. One feature of the act was a minority business enterprise (MBE) provision that stated that:

> "no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance. . .that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises" (Antonio 2003, 11-12).

According to the MBE provisions, "A waiver for the 10% requirement was provided if it was not possible to utilize an MBE due to lack of available minority business enterprises located in the project area. ….Grantees and their private prime contractors were required, to the extent feasible, in fulfilling the 10% MBE requirement, to seek out all available, qualified, bona fide MBEs, to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of other sources for assisting MBEs in obtaining required working capital, and to give guidance through the intricacies of the bidding process" (448 U.S. 448, 100 S.Ct. 2758 1980).

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represented a compromise between the opinions of Justice William J. Brennan, who, joined by three other justices, would have upheld affirmative action programs under a lenient judicial test, and the opinion of John Paul Stevens, also joined by three justices, who would have struck down the affirmative action program at issue in the case under the Civil Rights Act of 1964. Powell's opinion striking down the law urged that "strict scrutiny" be applied to affirmative action programs, while hinting that some affirmative action programs might pass Constitutional muster. http://en.wikipedia.org/wiki/Lewis Powell.

The program anticipated that MBEs with higher bids may be awarded contracts. However, this was rationalized as inflated cost brought about as a result of the present effects of prior disadvantage and discrimination. Grantees was allowed to file applications for administrative waiver of the 10% MBE requirement on a case-by-case basis if infeasibility was demonstrated by a showing that, despite affirmative efforts, such level of participation cannot be achieved without departing from the program's objectives. "Administrative mechanism provisions to ensure that only bona fide MBEs are encompassed by the program, and to prevent unjust participation by minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination were also present" (448 U.S. 448, 100 S.Ct. 2758 1980).

Following the enactment of the Public Works Employment Act of 1977, "several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation, and air conditioning work, filed suit for declaratory and injunctive relief in Federal District Court, alleging that they had sustained economic injury due to enforcement of the MBE requirement and that the MBE provision on its face, violated the Equal Protection Clause of the 14th Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment" (448 U.S. 448, 100 S.Ct. 2758 (1980).

Table 4.5 Depicts the Supreme Court Justices of the Fullilove Decision

Table 4.5 Supreme Justice of the Fullilove Decision

Decision: The MBE provision of the Public Works Employment Act of 1977 did not violate the Constitution					
Name	Service Dates	Birth Place	Political Party	Nominating President	Views[43]
William Brennan	1956-1990	New Jersey	Republican	Eisenhower	Liberal
Potter Stewart	1958-1981	Michigan	Republican	Eisenhower	Conservative
Byron White	1962-1993	Colorado	Democrat	Kennedy	Liberal
Thurgood Marshall	1967-1991	Maryland	Democrat	Johnson	Liberal
Warren Burger	1969-1986	Minnesota	Republican	Nixon	Conservative
Harry Blackmun	1970-1994	Illinois	Republican	Nixon	Liberal
Lewis Powell	1972-1987	Virginia	Republican	Nixon	Moderate
William Rehnquist	1986-2005	Wisconsin	Republican	Reagan	Conservative

Table 4.5-Continued

John Paul Stevens	1975- now	Illinois	Republican	Ford	Moderate[44]
Source: Data from Infoplease. http://www.infoplease.com/ipa/A0101281.html					

The issue before the Court was whether the Public Works Employment Act of 1977 violated the equal protection component of the Due Process Clause of the 5th Amendment.

4.2.3 Wygant et al. v. Jackson Board of Education et al. (1986)

Because of racial tension in the community, in their 1972 Collective Bargaining Agreement, the Jackson Board of Education and the Jackson Education Association (Union) agreed to a new layoff provision. The new provision stated:

> "In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number of given notices of possible layoffs be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he/she is certified maintaining the above minority balance" (Antonio 2003, 11-16).

In 1974, the contracting bargaining agreement resulted in the layoff of tenured non-minority teachers while minority teachers on probationary status were retained. Faced with this dilemma, the Board of Directors voted to retain the tenured teachers and lay off probationary minority personnel that existed at the time of the layoff. This prompted a complaint filed in state court by union and the two minority teachers. The state court found that the Board had breached its contract with the Union. The Board adhered to the contracting bargaining agreement (Antonio 2003, 16).

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[43] Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

[44] On the Seventh Circuit Court of Appeals, Justice Stevens had a moderately conservative record. Early in his tenure on the Supreme Court, Justice Stevens had a moderate voting record. He voted to reinstate capital punishment in the United States and opposed the affirmative action program at issue in *Regents of the University of California v. Bakke*. But on the more conservative Rehnquist Court, Stevens tended to side with the more liberal-leaning Justices. His Segal-Cover score, a measure of liberalism/conservatism of Court members, places him squarely in the ideological center of the Court. A 2003 statistical analysis of Supreme Court voting patterns, however, found Stevens the most liberal member of the Court. Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

Non-minority teachers were laid off during the 1976-1977 and 1981–1982 school years while minority teachers with less seniority were retained. A suit was filed and the federal court held that racial preferences granted by the Board were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing role models for minority schoolchildren. The federal courts decision was upheld on appeal.

Table 4.6 depicts the Supreme Court Justices that rendered the judgment in this case.

Table 4.6 Supreme Justice of the Wygant Decision

Decision: Justices Powell, Burger, Rehnquist and O'Connor used terminology to describe a strict scrutiny review. Justices Marshall, Brennan and Blackmun noted differences in the standard of scrutiny applied in past cases and felt that the case should be sent back to the district court for a development of the facts. Justice Stevens questioned whether the program provided benefits for the future.

Name	Service Dates	Birth Place	Political Party	Nominating President	Views[45]
William Brennan	1956-1990	New Jersey	Republican	Eisenhower	Liberal
Byron White	1962-1993	Colorado	Democrat	Kennedy	Liberal
Thurgood Marshall	1967-1991	Maryland	Democrat	Johnson	Liberal
Warren Burger	1969-1986	Minnesota	Republican	Nixon	Conservative
Harry Blackmun	1970-1994	Illinois	Republican	Nixon	Liberal
Lewis Powell	1972-1987	Virginia	Republican	Nixon	Moderate
William Rehnquist	1986-2005	Wisconsin	Republican	Reagan	Conservative
John Paul Stevens	1975- now	Illinois	Republican	Ford	Mderate
Sandra O'Connor	1981- 2006	Texas	Republican	Reagan	Conservative

Source: Data from Infoplease. http://www.infoplease.com/ipa/A0101281.html

"The issue before the court was whether the contracting bargaining agreement violated the Equal Protection Clause of the 14th Amendment because: (1) the Board of Education did not convincingly show that it had engaged in discriminatory hiring practices against minorities and (2) the layoff provision was not sufficiently narrowly tailored" (Antonio 2003, 16).

[45] Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

4.2.4 City of Richmond v.
J. A. Croson (1989)

A Minority Business Utilization Plan that required prime contractors in the construction industry to subcontract at least 30% of the dollar amount of a contract to one or more Minority Business Enterprises as approved by the Richmond City Council. The Council was informed that the Plan was necessary if the Richmond was to promote participation by minority business enterprises in the construction of public projects. The plan was enacted on April 11, 1983 and was to expire on June 30, 1988. Partial or complete waiver of the MBE requirement was not permitted other than in exceptional circumstances. In order to justify a waiver, the prime contractor must show that every feasible attempt had been made to comply, and it must be demonstrated that sufficient, relevant, qualified MBEs were unavailable or unwilling to participate in the contract to enable meeting the MBE goal (Antonio 2003, 7).

Richmond issued. On September 30, 1983, Croson Company received an invitation to bid for the installation of stainless steel urinals and water closets in the city jails. Croson Company responded to the bid and proceeded to contact several MBEs that were potential suppliers of the fixtures, however, no MBEs expressed interest. On October 12, 1983, Croson contacted a local MBE who expressed an interest, and requested a price quote from an agent of one of the two manufacturers of the specified fixtures. The agent was not familiar with the local MBE and indicated that a credit check was required which would take at least 30 days to complete (Antonio 2003).

The bids were due back to the City of Richmond October 13, 1983. The Croson Company was the only bidder on the contract. The MBE informed Croson of the expected delay in obtaining credit approval at the bid opening. Croson waited for seven days but had still had not received a bid from the MBE. Croson requested a waiver of the MBE requirement from the city of Richmond. After learning of the waiver request, the MBE requested a price quote for a different manufacturer. The local MBE was eventually able to secure a price quote for an alternative manufacturer. With the added bonding and insurance, if Croson used the local MBE, it would

have to raise its bid for the project by 7% or $7,663.16. The city denied Croson's waiver request on November 2, 1983 and gave Croson 10 days to submit an MBE Commitment Form. Croson was warned that failure to submit the form could result in their bid being considered unresponsive. On two occasions, Croson wrote the city explaining that the MBE had submitted its bid 21 days after the prime bid was due and laid out the additional cost that using the MBE to supply the fixtures would entail. Croson requested permission to raise the contract price. The city denied both Croton's requests for a waiver and permission to raise the contract price, Corson was informed that the project would be rabid (Antonio 2003).

Table 4.7 depicts the Supreme Court Justices that rendered the judgment in this case.

Table 4.7 Supreme Justice of the Croson Decision

Decision: Justices Rehnquist, Stevens, O'Connor, Scalia and Kennedy joined to hand down a finding that the Richmond Plan violated the constitution because it was not justified by a compelling interest and the 30 percent set-aside was not narrowly tailored to accomplish a remedial purpose.					
Name	Service Dates	Birth Place	Political Party	Nominating President	Views[46]
William Brennan	1956-1990	New Jersey	Republican	Eisenhower	Liberal
Byron White	1962-1993	Colorado	Democrat	Kennedy	Liberal
Thurgood Marshall	1967-1991	Maryland	Democrat	Johnson	Liberal
Harry Blackmun	1970-1994	Illinois	Republican	Nixon	Liberal
William Rehnquist	1986-2005	Wisconsin	Republican	Reagan	Conservative
John Paul Stevens	1975- now	Illinois	Republican	Ford	Moderate
Sandra O'Connor	1981- 2006	Texas	Republican	Reagan	Conservative
Antonin Scalia	1986- now	New Jersey	Republican	Reagan	Conservative
Anthony Kennedy	1988 - now	California	Republican	Reagan	Conservative
Source: Data from Infoplease. http://www.infoplease.com/ipa/A0101281.html					

The issue before the court was whether the Richmond Plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause.

[46] Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

4.2.5 Metro Broadcasting, Inc. v. Federal Communications Commission (1990)

The Federal Communications Commission (FCC) grants licenses to persons wishing to construct and operate radio and television station based on public convenience, interest, or necessity. FCC held a belief that the views of minorities had been inadequately represented. However, despite efforts to the contrary, FCC noticed a continuous lack of diversity of broadcast content.

American minorities constitute at least one-fifth of the U.S. population; yet, during very few members of minority groups have held broadcast licenses. “In 1971, minorities owned only 10 of the approximately 7,500 radio stations in the country, and none of the more than 1,000 television stations. In 1978, minorities owned less than 1% of the nation’s radio and television stations and in 1986, they owned just 2.1% of the more than 11,000 radio and television stations in this country. Since FCC considered this lack of diversity to be detrimental to the minority audience and the entire viewing and listening public, FCC adopted two minority ownership policies” (497 U.S. 547 (1990) 497 U.S. 547) .

“The first policy pledged to consider minority ownership as one factor in comparative proceedings for new licenses. Minority ownership and participation in management would be considered in a comparative hearing as a plus to be weighed together with other relevant factors. The second policy adopted a plan to increase opportunities for minorities to receive reassigned and transferred licenses through a distress sale policy. This would allow a broadcaster whose license had been designated for a revocation hearing, or whose renewal application had been designated for a hearing, to assign the license to an FCC-approved minority enterprise” (497 U.S. 547 (1990) 497 U.S. 547).

The Metro Broadcasting case involved two decisions. The first case challenged FCC’s decision to award minority preference to an applicant in its review because it was 90 percent Hispanic owned. The second case involved a minority distress sale. An applicant for a new

station in the same geographical area challenged the distress sale. This applicant requested that FCC deny the distress sale and set up a comparative hearing to examine the applicant's application for a television station (Antonio 2003).

Table 4.8 depicts the Supreme Court Justices that rendered the judgment in this case.

Table 4.8 Supreme Court Justice of the Metro Broadcasting Decision

Decision: The Court, in a 5-to-4 decision, held that the FCC's minority preference policies were constitutional because they provided appropriate remedies for discrimination victims and were aimed at the advancement of legitimate congressional objectives for program diversity. The decision includes a majority opinion with a new level of scrutiny and a minority opinion completely against the majority opinion. Justices Brennan, White, Marshall, Blackmun and Stevens support intermediate scrutiny. Chief Justice Rehnquist, and Justices Scalia and Kennedy dissented stating that strict scrutiny standard applies to all reviews of racial classification.					
Name	Service Dates	Birth Place	Political Party	Nominating President	Views[47]
William Brennan	1956-1990	New Jersey	Republican	Eisenhower	Liberal
Byron White	1962-1993	Colorado	Democrat	Kennedy	Liberal
Thurgood Marshall	1967-1991	Maryland	Democrat	Johnson	Liberal
Harry Blackmun	1970-1994	Illinois	Republican	Nixon	Liberal
William Rehnquist	1986-2005	Wisconsin	Republican	Reagan	Conservative
John Paul Stevens	1975- now	Illinois	Republican	Ford	Moderate
Sandra O'Connor	1981- 2006	Texas	Republican	Reagan	Conservative
Antonin Scalia	1986- now	New Jersey	Republican	Reagan	Conservative
Anthony Kennedy	1988 - now	California	Republican	Reagan	Conservative
Source: Data from Infoplease. http://www.infoplease.com/ipa/A0101281.html					

The issues before the court was whether the two minority ownership policies violate the equal protection component of the Fifth Amendment.

4.2.6 Adarand Construction, Inc. v. Pena, (1995)

Prime contract for highway construction project in Colorado were awarded by the U.S. Department of Transportation's (DOTs) Central Federal Lands Highway Division (CFLHD). In 1989 the contract was given to Mountain Gravel and Construction Company. Mountain Gravel solicited bids from subcontractors for the guardrail portion of the contract. Adarand Construction

[47] Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

responded to the solicitation and submitted the low bid. Gonzales Construction also submitted a bid (115 S. Ct. 2097 (1995).

According to the DOT contract, Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals. Adarand was not certified as such a business; Gonzales was small businesses controlled by socially and economically disadvantaged individuals. Although Adarand's submitted the lowest bid, Mountain Gravel awarded the subcontract to Gonzales. "Mountain Gravel's Chief Estimator submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead" (115 S. Ct. 1995, 2097, 2102-4).

Federal law requires that a subcontracting clause similar to the one used in the Adarand case must appear in most federal agency contracts, and it also requires the clause to state that "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act" (115 S. Ct. 2097, 2102-4 (1995).

Adarand claimed "the presumption set forth in the federal statute discriminates on the basis of race in violation of the 5th Amendment obligation not to deny anyone equal protection of the laws" (Antonio 2003, 27). (see chapter 5 for a full discussion of the Adarand decisions.)

Table 4.9 depicts the Supreme Court Justices that rendered the judgment in this case.

Table 4.9 Supreme Court Justice of the Adarand III Decision

Decision: The decision includes a majority opinion with a new level of scrutiny and a minority opinion completely against the majority opinion. Justices Brennan, White, Marshall, Blackmu					
Name	Service Dates	Birth Place	Political Party	Nominating President	Views[48]
William Rehnquist	1986-2005	Wisconsin	Republican	Reagan	Conservative
John Paul Stevens	1975- now	Illinois	Republican	Ford	Moderate
Sandra O'Connor	1981- 2006	Texas	Republican	Reagan	Conservative
Antonin Scalia	1986- now	New Jersey	Republican	Reagan	Conservative
Anthony Kennedy	1988 - now	California	Republican	Reagan	Conservative
David Souter	1990-now	Massachusetts	Republican	Bush	Converted to Liberal[49] in 1992
Clarence Thomas	1991 - now	Georgia	Republican	Bush	Conservative
Ruth Ginsburg	1993 - now	New York	Democrat	Clinton	Liberal
Stephen Breyer	1994 - now	California	Democrat	Clinton	Liberal
Source: Data from Infoplease. http://www.infoplease.com/ipa/A0101281.html					

The issue before the court was whether the Federal statute violated the equal protection component of the 5th Amendment's Due Process clause.

[48] Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

[49] From 1990-1993, Justice Souter tended to be a conservative-learning Justice, although more in the mold of Justice Kennedy, Scalia, Rehnquist. In his first year, Justice Souter and Scalia voted alike close to 85 percent of the time. Justice Souter voted with Kennedy and O'Connor about 97 percent of the time. This changed in 1992 in the Planned Parenthood v. Casey case in which the Court reaffirmed the essential holding in Roe v. Wade. Justice Souter and Kennedy each considered overturning Roe and upholding all the restrictions at issue in Casey. After consulting with O'Connor, however, the three (who came to be known as the "troika") developed a joint opinion which upheld all the restrictions in the Casey case except for the mandatory notification of a husband while asserting the essentials holding of Roe, that a right to an abortion is protected by the Constitution Roe was decided by a 7 to 2 vote, though Casey was 5 to 4. Although appointed by a Republican President, thus expected to be conservative, Justice Souter is usually associated with the Liberal wing of the Court.

CHAPTER 5

BACKGROUND OF AFFIRMATIVE ACTION

5.1 Definition of Affirmative Action

In contemporary debate, affirmative action is considered an umbrella term referring to a broad array of gender, race, national origin, ethnicity or race-conscious programs. The most basic and comprehensive understanding of affirmative action is that it occurs whenever an organization aggressively employ strategies and initiatives to ensure that there is no discrimination against minorities, females, people with disabilities and veterans.

Affirmative Action embodies proactive programs aimed at specific groups usually involving the notification of education, employment and contracting opportunities. It also includes programs to include—among similar candidates, all of who are otherwise qualified and are members of historically subordinated and still underrepresented groups.

Sselason (1999) defines Affirmative action as:

1. "*an umbrella term for activities that executive, judicial, and legislative bodies at all levels of government have mandated*". Here, affirmative action is a social policy that statutes and regulations set forth and enforce. Their purpose is to increase equity and opportunity. However, affirmative action so defined embodies two, conflicting strategies for the achievement of these goals. One is to reach out and enable historically disadvantaged groups (primarily the men of racial minorities and the women of all races) to compete equitably. The second is to permit race and/or gender to become a preference in contracting, admissions, and financial aid in the belief that preference will remedy past discrimination; and

2. *an umbrella term for a broader set of activities that public and private institutions have voluntarily undertaken in order to increase diversity, equity, and opportunity".* Here, affirmative action is an institutional policy and spirit

3. *"Affirmative action so defined also embodies two strategies for the achievement of its goals*". One is to erase inequities for example, to fund both men's and women's athletics fully, without cavil. The second is to create a community that prizes diversity and differences." (Ssekasozi 1999, 20)

The main arguments related to affirmative action, regardless of which definition or definitions are applied, are serious and sometimes profound. Proponents of affirmative action

insistently claim that it is an essential tool for the pulling down the walls of discrimination and the building up the shield of justice. Conversely, its opponents argue that affirmative action is a misguided, even immoral, piece of social engineering that will, perversely, perpetuate discrimination in the name of ending it (Stimson 1995).

The problem here is rooted in the understanding of the coverage and limitations of affirmative action policy. When an organization takes additional measure to ensure that non-veteran, able-bodied white males are not discriminated against, their efforts (while applauded) are not labeled as affirmative action. Similarly, if an organization does not intentionally discriminate, but its policies and practices place barriers to equal opportunities, we do not see this as problematic. Crosby and Van deVeer (2003) give the following example to make clear these principles (emphasis added):

> Imagine that there are three companies: A, B, and C. Company A is a horrid place where prejudiced white managers go out of their way to block opportunities of black people while promoting their own white associates who have less talent than the black workers. In Company B, such behavior is not tolerated. In company B if a black worker comes to management with a complaint of race discrimination, the complaint is taken seriously and investigated. Company C does not wait for the workers to come forward with a complaint. In Company C, one of the managers tracks the progress of all workers and takes notice of whether black workers and white workers are advancing in equal proportions and equal rates (based on availability). In Company C, if the vigilant manager notices that, say black workers are not promoted as rapidly as similar white workers, an investigation into the reasons is begun even without anyone lodging a complaint. Company C is the affirmative action organization, while company A and B is not. But note that company B desires fairness as much as Company C and they both wish for racial justice much more than Company A. (3-4).

In the example cited above, institutional and subtle acts of discrimination are not addressed at Companies B and A. In employment, affirmative action today can take on a few forms. The most common form is to monitor hiring and promotion in a manner similar to what is depicted in Company C. Another form of affirmative action concerns construction work. In some locations, municipalities, counties or states set aside a percentage of the money budgeted for specific work and award the set-aside money to contracts reserved for minority-owned businesses, even when those businesses do not submit the lowest bid on a proposed job. Yet another form of affirmative action in the construction industry has been to compensate firms (via

adjustments of work bids) who subcontracted work to minority-owned or women-owned businesses.

The issue of affirmative action is quite emotional and controversial. A number of reasons account for this situation, one being the extreme difficulty in remaining neutral on subjects pertaining to sex and racial discrimination, which is the nucleus of any discussion on affirmative action. Most of the discussion and commotion related to affirmative action have focused on the comparative success of minorities in three areas—employment, education, and government contracting. Of the three, perhaps the least conspicuous has been the complex and most misunderstood area of government contracting. Despite of its lack of visibility, public contracting is large; therefore, making it an important source of economic opportunity for historically disadvantaged populations. "Affirmative action in contracting also has been heavily contested, with legal challenges driving a broad judicial reconsideration of the occasions on which government can take race explicitly into account in the awarding of such contracts" (Enchautegui et al. 1997).

Government entities procure a wide range of goods and services from private vendors disperse domestically and globally in order to fulfill its operational goals and objectives. Although a variety of legislation has been created to address problems in contracting, women and minorities have historically faced insurmountable barriers that hamper their ability to compete for these government contracts. Despite the passage of statutory laws, executive orders, and other legislative actions, it is still common knowledge by Congress that women and minorities repeatedly encounter systemic legal discrimination that continues to exclude them from securing federal government procurement dollars. To ensure that the government is not an active participant in the continuing cycle of discrimination, Congress created several federal procurement programs designed to reverse the effects of widespread discrimination (*Affirmative action in federal procurement: Still needed to create equal opportunity for women and minority contractors* 2001.)

5.2 Affirmative Action Policy

According to the Advisory Board's Report to the President (1998), most minorities recognize the role of the legacy of race and color in their experiences while many whites do not. The Board concluded that "Americans, whites and people of color, hold different views of race, seeing racial progress so differently that an outsider could easily believe that whites and most minorities see the world through different lenses." Furthermore, "whites and minorities also view the role of government as divergent, especially with respect to the government's role in redressing discrimination" (Advisory Board's Report to the President 1998).

Another aspect of contradiction, if not conflict, according to the Advisory Board, is "the way in which America functions as a Nation of great optimism, tolerance, and inspiration focused on creating a more stable and diverse community, although discrimination, racial and ethnic oppression, and a smaller number of instances of outright racial evil, persist. The Board explains that America is a country in racial transition; some "white" Americans welcome the change, others are unaware of or fear the change and its ramifications, while a few cling to an older order in which racism is so comfortably ingrained that it is simply characterized as "the way it is" (Advisory Board's Report to the President 1998).

The Advisory Board's Report to the President (1998) highlights the following significant consequences (realities) of being Black in America:

- Constrained educational opportunities. Poor children, who live disproportionately in areas of concentrated poverty and are mostly minority, are restricted from educational opportunities and public resources. Concentrated poverty means they face a confluence of interlocking disadvantage. The disadvantage include ineffective schools, where low expectations and low standards are the norm, substandard and crumbling school facilities and housing; inadequate public transportation; and poorly financed social services.

- Concentrated Poverty and Disparities in Standards of Living. In the 1950s the poverty rate for Blacks was nearing 60 percent, while the White poverty rate was less than 20 percent. Although this gap declined substantially by the mid-1990's, it did not disappear. Moreover, the gap is significant not only for Blacks but also for American Indians and Alaska Natives, Hispanics, and Asian Pacific Americans as well.

- Proliferation of Welfare Reform. In 1996, President Clinton signed sweeping welfare reform legislation (the Personal Responsibility and Work Opportunity Reconciliation Act) aimed at moving persons receiving public assistance from welfare rolls onto

payrolls. Although welfare rolls have reduced significantly as a result of the Act and Welfare to Work Programs, studies suggests that even when welfare caseloads are reduced, the family members do not necessarily find jobs that pay a living wage. Additionally, since minorities typically spend more time living in poverty than Whites, they will remain longer on the welfare caseloads, resulting in higher minority representation in the total program.

- Employment and Labor Market Discrimination. A synthesis of evidence suggests that Blacks and Hispanics are on the average likely to be denied employment due to discrimination 20 to 25 percent of the time…Discrimination is not limited to hiring practices; it also exists in promotional opportunities, wages and rate of termination. A major indicator of disparities in economic and employment status is the unemployment rate, according to the Report. Black unemployment rate remains twice that of Whites.

- Denial of Housing. Discrimination - whether in renting an apartment, buying a home, or obtaining a mortgage- is among the key causes of racial segregation and isolation of poor minority families. Housing, more than almost any other factor in life helps shape who we are as individuals and affects our life chances. Numerous studies have been conducted to audit discrimination in both the rental and sale markets. The 1977 Fair Housing Counsel of Greater Washington reported discrimination 35 percent of the time when a Black or Hispanic tester tried to rent an apartment and even higher levels occurred in suburban jurisdictions.

- Racial Stereotyping. The issue of racial stereotyping is a core element of discrimination and the racial divisions and misunderstandings serve as major barriers. People cannot help but be influenced by society's pervasive racial stereotypes, and to commit to paying attention to how such stereotypes can insidiously affect our behaviors and that of our loved ones and our institutions.

- Victimization by way of Racial Profiling, Crime and the Administration of Justice. Racial disparities exist both in the realities and the perceptions of crime and the administration of justice. Blacks absorb a disproportionate amount of the social, economic, and personal costs of crime. Disparities also exist in incarceration rates, sentencing and imposition of the death penalty. Racial profiling imposes costs on innocent people, perpetuates confrontations, and contributes to tensions between Blacks and the criminal justice system.

- Structural Inequities. Black babies have a significantly different life expectancy than White babies. Difficulties accessing the healthcare system are largely related to disparities in employment, income and wealth; these difficulties often mean that Blacks receive medical treatment less frequently and in later stages of health problems than Whites. Racial issues also may affect relationships between health care providers and patients of color in ways that lower the quality of healthcare. (44-62)

Loury (2002) explains that to be born black in America too often means to be born with a deficit of the social capital of nurturing affiliations essential for the creation of meaningful equality of opportunity. Full economic opportunity of any individual does not just depend on immediate

circumstances: it is also determined by the circumstances of those with whom the individual is socially affiliated. Loury points out that essential information about economic opportunities flows through formal and informal networks that are inaccessible to blacks. The cultural setting in which a person is indoctrinated in shapes the attitudes, values and beliefs that are critical for the development of economically relevant skills. Accordingly, a person's, specifically a member of an underrepresented group, position in a social affiliation network plays a substantial impact on his or her lifetime economic prospects. Discrimination in choice of social affiliation continues to occur along racial lines (Loury 2002).

Discrimination in America, especially corporate America, requires one to strip himself/herself of race and ethnicity, and assimilate to corporate norms. For those African Americans, who are able to rise to the professional ranks, have to struggle with the dualities that race introduces to their daily life (Mackie 1997). Mackie explains that there is a "cultural tax" for being black professionals. "This tax may manifest itself as heavy committee works on their job, as excess work to destroy affirmative action stereotypes, or as substantial community service, in an effort to remain attached to or give something back to the community. Regardless, there is a tax borne by black professionals that does more harm psychologically than it does monetarily" (Mackie 1997).

For the African American, there exists the possibility of social and cultural isolation on both the job and in daily survival. In an attempt to explain the challenges faced by blacks, consider the stress and burden like the heat experienced on any humid day. Every day for African Americans the HEAT is on. The question that blacks face each day is, "How am I going to respond to this HEAT?"

According to Mackie (1997), "one cannot practically or readily define heat, but it is present in all dynamic systems. In the dynamic system of life, heat is related to a certain numerical scale called temperature. At home, a thermometer is used to "measure" the temperature of the surroundings; a thermostat is used to "set" the temperature of the surroundings." In the future, government will have to decide whether it sets policies that will

serve as thermostats or thermometers. In his analogy, Mackey explains that a thermometer, a passive device, measures the temperature of the surrounding environment. It cannot change or adjust any of the attitudes of the environment that may be harmful to those in it. It is, for example, government allowing the isolation of full segments of society from educational, banking, housing, healthcare, procurement and employment opportunities, while ignoring the devastating impact on society resulting from such exclusion (Mackie 1997).

It is like the kid on the street selling drugs because he wants nice things now, without seeing the circle of violence that will eventually kill him. It is the absence of knowledge, understanding and consciousness of the role that race has played in our collective history and how our ignorance continues to make it difficult to find solutions that will eliminate discrimination and create equal opportunities in all facets of American life (Advisory Board's Report to the President 1998). "The ultimate goal of "thermometers" is to adjust to the environment and determine the best way to assimilate into the dominant culture. John F. Kennedy was speaking of the thermometer when he stated that conformity is the jailer of freedom and the enemy of growth" (Mackie 1997).

A thermostat, on the other hand, is a pro-active device that determines and prescribes the temperature of the environment around it. Being a thermostat requires energy. Because the thermostat is the gage, it turns on the engine and pumps to make the necessary changes in the surroundings. The thermostat has a responsibility to the environment to maintain it in a state where all occupants are comfortable. "If it fails, the results may be catastrophic for some, while others may be unharmed. In an environment of discrimination, with no thermostat to change it, some people will actually thrive, while others are literally choked to death by the toxic temperature of the environment enclosed by discriminatory acts" (Mackie 1997). The challenge that government faced was to design and implement a program that not only confronted the ills that discrimination placed upon society, but to be the thermostat for changing the way that businesses and institutions allow those actions to affect the daily lives of citizens. Their response to the

challenge was the public policy referred to as affirmative action. The next section discusses the background and concepts of affirmative action.

5.3 Relevance of Affirmative Action Policy to Dissertation Hypothesis

The intent of this chapter is to make known the background of affirmative action policy and to illustrate why it came about. This dissertation does not set out to prove the correctness of affirmative action policy. It takes the position that affirmative action has already been ratified and is at the center of debate when proving discrimination.

The fact that discrimination continues to persist has been documented countless numbers of times and in a number of ways (e.g., increase in discrimination claims, continued disparity in wages, health, employment status and educational opportunity by minorities and females) (Advisory Board's Report to the President 1998). Present day discrimination is more often faint and subtle. This less obvious type of discrimination surfaces in the manifestation of exclusion, oppression and avoidance. Its repercussions are so complex that it will take more than a few decades to dismantle the structures that have so relentlessly and so systematically put some groups at a disadvantage relative to others.

The unconscious actions of many Americans have discriminatory effects on others. The imperceptible consequences of discrimination prevent adequate measurement of its origination. Societal imbalances will continue, even when they are not *intended,* if they go un*attended*.

Justice Oliver Wendell Holmes's aphorism that "a page of history is worth a volume of logic" (256 U.S. 345,349 1921) has particular relevance to an examination of discrimination against minorities in the United States. "Many interpretations of American history provide a variety of evidence for repudiating tales of equality, myths about a color-blind tradition, and charges that remedial affirmative action is unfair" (e.g., the recent Jena Six incident[50]). Other interpretations

[50] "The Jena Six refers to a group of six black teenagers who have been charged with the beating of a white teenager at Jena High School in Jena Louisiana. The beating was sparked by a number of racially charged incidents in the town. The first being in September, 2006 when a Black student asked 'permission' from the school administration, if he could sit under the "white tree," where allegedly only white students sit during breaks. The tree sits in the front yard at a high school in Jena, Louisiana. The

argue that the U.S. has been the most just, equal nation in history, that all men are created equal, that everyone has the same opportunities to achieve success, and that failure is the result of personal irresponsibility (e.g., during the media coverage of the Jena incident, many Jena residents indicated that Jena was a happy, no racial community and that there was no racial motive behind the Jena six incident[51]). However, if we compare America's history to the country's supposed ideal, the latter interpretation does not hold up. Because of the destructive presence of discrimination, these ideals does not necessarily hold true for all segments of the population. Simply stated, "America has not been *America* for everybody."

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principal said that the black student could sit anywhere. The very next day, three nooses, in the schools colors, hung from "the white tree". Three white students were identified as being responsible and the principle recommended they be expelled from school. However, the white superintendent said, "Adolescents play pranks," the superintendent told the *Chicago Tribune*, "I don't think it was a threat against anybody," and gave them a three-day suspension instead. A few days later, the entire black student body protested the no- nothing 'punishment' and sat under "the white tree". "

"On December 1st, a black student was beaten by a group of white students at a "white party". On, December 2nd, at the Gotta Go convenience store, the black student who was beaten up the night before, along with his friends, ran into one of the white students who beat him. A confrontation broke out and the white student went to his vehicle to get his shotgun. The black students wrestled the shotgun away from him and brought it to the police department and told them of the incident. The black students were arrested and charged with theft of a firearm, second degree robbery, and disturbing the peace. The white student was not charged. Monday, December 4th, 2006, a white student, Justin Barker, was attacked at school by a group of black students for taunting them with racial slurs and verbally supporting the nooses that were hung on "the white tree" and also supporting the white students who beat up the black student at the party. Six black students were arrested for beating Barker, and initially charged with attempted second-degree murder and conspiracy to commit murder. These charges held a possible sentence of twenty to one hundred years in prison. They were all immediately expelled from school. The Jena Six incident sparked protest by the African American community in Jena and in numerous other cities.' http://en.wikipedia.org/wiki/Jena_Six#Public_response.

[51] CNN.com/US (2007) published quotes from Jena residents: "I hate to see people label us as something we are not. Because we have black students and white students playing football together. They shake hands, get along. This is an unfortunate incident. We hope that the community can heal." "We are not a racial town. We get along with each other, we get along fine. This is something that got out of proportion. It really has." http://www.cnn.com/2007/US/law/09/20/jena.six/.

Initially traditional press ignored the Jena Six incident. It was not until Black talk radio begin publicly criticizing "Big media" and began spreading the word about the Jena six events. The case began receiving some media coverage approximately a year after the initial incident. On September 20, 2007, an estimate of 15 to 20 thousand people rallied in Jena (a town of 3000 – 85% white) in support of the Jena six and all Blacks in the United States who have been unfairly treated by the justice system. In a backlash against the demonstrators, several self-proclaimed white supremacist also attended the rally. Former Ku Klux Klan leader David Duke publicly gave support for the Jena's "white residents. Ironically, Duke obtained the majority of the Jena vote during his unsuccessful bid for governor during the 1991 Louisiana election. http://en.wikipedia.org/wiki/Jena_Six#Public_response.

What is typologized in chapter 2 as the contextual, conceptual, and subconscious effects and related theories on discrimination provides a foundation for the debate on why past social conditions necessitated the need for new policies and programs such as affirmative action. The use of affirmative action programs to implement equal opportunity policies and end discrimination has created controversy from its inception. Debate over the necessity, advisability, impact and effectiveness of such programs is a long-standing theme in the popular and scholarly literature.

The current opinions of opponents of legislation to curtail discrimination employ very similar arguments to those opposing the 13th and 14th Amendments, the 1864 and 1865 Freedmen's Bureau Bills, the Civil Rights Acts of 1866 (and subsequent amendments), and numerous presidential Executive Orders. Their dissent centers on the disagreement with the promulgation of legislation that is specifically intended to benefit only African Americans (this was later extended to include women and members of other minority groups). Those who disagree view it unfair that poor white citizens would not benefit from civil rights legislation. This led to the beginning in thinking that legislation should apply to all citizens equally, and that America should be a color-blind society, at least when it comes to legislation.

The position articulated by early proponents of race conscious measures was that the civil rights legislation was necessary in order to atone for past discrimination and critical if former slaves were to become self-sufficient. Current proponents of non-discrimination policy are persistent in their view that those who have been and are presently discriminated against, benefits the nation as a whole. Furthermore, it provides a conduit for all members of society to contribute to the community, therefore lessening their status as a liability to the nation.

Since the Emancipation Proclamation, each U.S. president has had something official to say about the problem of discrimination in America. Congressional debates over the challenge of discrimination and civil rights date back to the 1800s. The 13th Amendment was intended to abolish slavery.[52] This was the cornerstone of civil rights legislation in the United States. Although

[52] The Thirteenth Amendment to the United States Constitution, passed by the Senate on April 8, 1864, by the House on January 31, 1865, and ratified in December 6, 1865, abolished slavery as a legal

the former slaves were liberated by the 13th Amendment, they continued to endure racism while trying to assimilate into white society. As a result, Congress proposed the 1864 Freedmen's Bureau Bill with the specific intent to provide special assistance to African Americans in the transition from slavery.

The 14th Amendment was designed to mostly to assure the constitutionality of the race conscious measures established in the Freedmen's Bureau Act, which were subsequently affirmed through the Civil Rights Act of 1866, and to address the problems of discrimination during the post Civil War period. Paradoxically, the Supreme Court interpretations of the constitutional intent of the 14th Amendment and subsequent public policies aimed to combat discrimination has resulted in a state of varied public opinion, contradicting policies and uncharacteristic expenditures to substantiate an obvious occurrence—present day discrimination against minorities.

5.4 The Pre-Affirmative Action Era

America's first race conscious policies were the slave codes of the 1700s. Unlike current remedial affirmative action, these earlier preferences promoted white supremacy and black caste (Fair 1997). By the time that the U.S. Constitution was drafted, slavery had existed for more than 100 years. President Lincoln's Emancipation Proclamation did not eliminate slavery in unincorporated areas; therefore, it was necessary to alter the Constitution in order to put an end to slavery in all parts of the country. The 13th Amendment, which was enacted to abolish slavery, was the first hallmark of civil rights legislation in the United States. This amendment was the first proactive advancement in race relations in America's history and was designed to end the virulent discrimination that had always been present.

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institution. The Constitution, although never mentioning slavery by name, refers to slaves as "such persons" in Article I, Section 9 and "a person held to service or labor" in Article IV, Section 2. The Thirteenth Amendment, in direct terminology, put an end to slavery. Section I of the Amendment states: 'Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.'

After the Civil War, a period of reconstruction began.[53] As shown in figure 5.1, below, during this time Congress enacted three new constitutional amendments and four federal civil rights statutes designed to make sure that blacks had the same rights as whites. In this Section, I discuss these seven legislative percussions to affirmative action policy.

[53] This was the period of 1865 thru 1875 after the Civil War. During this time there was an attempt to recognize the civil liberties of blacks.

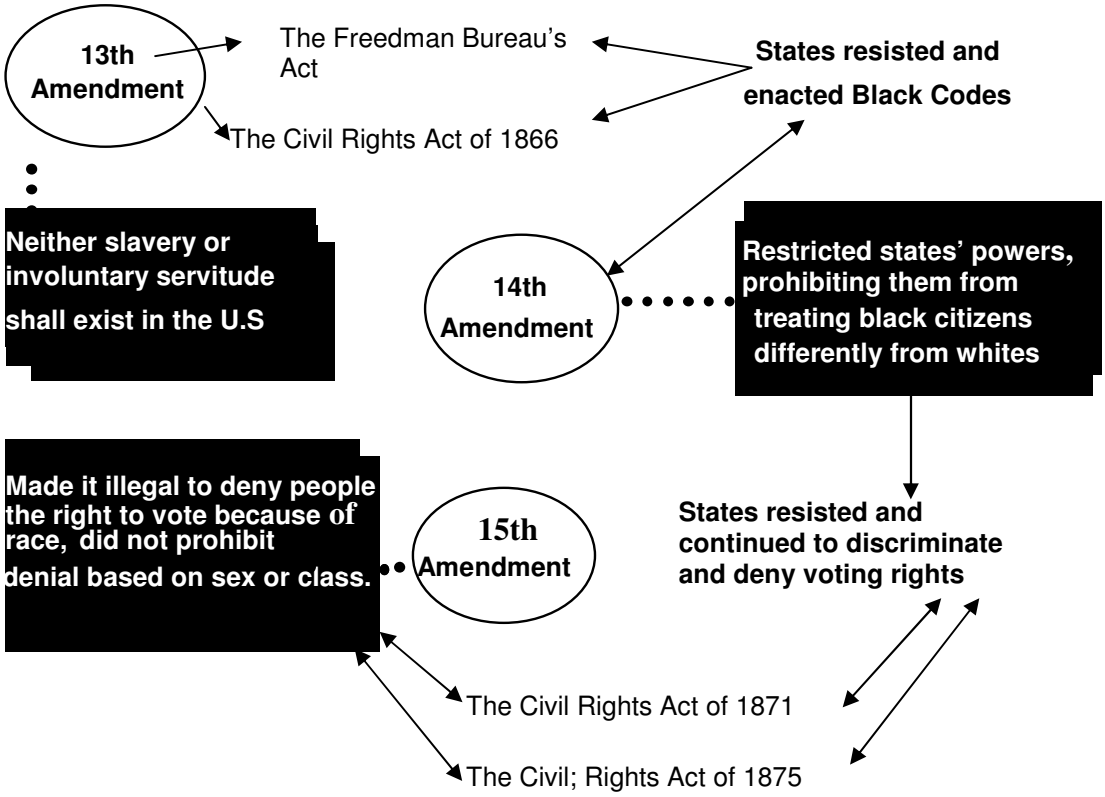

Figure 5.1 U.S. Constitution , 13th, 14th and 15th

Source: The Urban Institute Study

The 13th Amendment did not solve the problem of discrimination directed towards the newly freed slaves nor addressed the challenges of assimilation in a predominantly white-empowered society. In 1864, Congress crafted the Freedmen's Bureau Bill with the intent to provide special assistance to African Americans in their transition from slavery. Activists for the bill argued that it would allow former slaves to become self-sufficient and would prevent them from becoming wards of the nation. They added that the bill was also necessary in order to ease the burdens placed on former slaves resulting from past discrimination. Opponents argued that it was unfair that impoverished white citizens would not benefit from the bill. The final version was not passed until 1865, when it was amended in order to include white refugees as beneficiaries.

The 14th Amendment was attempted to ensure the constitutionality of the race-conscious measures established in the Freedman's Bureau Acts. The Civil Rights Act of 1866 affirmed the 14th Amendment as it addressed the problems of discrimination against African Americans during the post Civil War period. Amending the Constitution became necessary because President Andrew Johnson's decision to veto the original versions of the 1865 Freedman's Bureau Act and the Civil Rights Act of 1866. President Johnson supported the classic conservative argument "that providing special provisions to former slaves while not providing the same provisions for unfortunate whites was unfair" (Brody 2003). Ironically, this is the same argument that conservative justices relied on when handing down the new stringent benchmark for scrutinizing and justifying affirmative action programs initiated to eradicate discrimination. Proponents of the Civil Rights Acts of the 1800s argued that race conscious measures should be supported because such actions directly assist those who had been discriminated against. Congress overrode President Johnson's veto and subsequently passed a new Freedman's Bureau Bill that was even more race specific than the previously vetoed legislation.

Early evidence of the inconsistency of the Supreme Court's interpretation of legislation enacted to eradicate discrimination became apparent with its rulings regarding the Civil Rights Act of 1875. This act was passed to provide blacks "with equal access to public accommodations, including inns, public buildings, theaters and other places of public amusement." The act defined violations as a criminal misdemeanor. Several white owners of private hotels, theater and railroads had policies excluding African Americans and were indicted under the Civil Rights Act of 1875. The private owners stated that the Act was an invalid exercise of Congress' enforcement powers pursuant to the 13th and 14th Amendments and challenged the indictments.

On October 15, 1883, the Supreme Court rejected the government's claims that Congress had enforcement power under the 14th Amendment. The Court ruled that the 14th Amendment only applied to state action and not to private citizens. Therefore, the Court's ruling indicated that Congress had no power to prevent private theater owners, innkeepers, and railroad operators from discriminating against African Americans (Brody 2003). Additionally, although the Court acknowledged that "the 13th Amendment not only abolished slavery but also prohibited the imposition of any badges or incidents of slavery, the Court determined that private policies of discrimination against African Americans did not amount to imposing a "badge or incident of slavery" on them" (Wormser 2003). In the final analysis, the Court re-emphasized that Congress should make no attempt to enact race-conscious laws, and that America should be a color-blind society.

5.5 The Advent of Affirmative Action Policy

Discrimination has been a consistent dilemma in American society. However, it was not until the eve of World War II that discriminatory practices once again became a significant focus of official concern (Taylor 1989). With the inclusion of over a quarter of a million black officers and soldiers in the U.S. army and intensified resentment by the black community with regard to unfair employment practices, President Roosevelt yielded to pressure from civic leaders to

enact something affirmative to mandate African American's integration into the workforce (Taylor 1989).

Faced with disgruntled black Americans likely to be killed in a war for a country that had not granted them full citizenship and the threat of a march on Washington, immediate action was necessary. President Roosevelt issued Executive Order 8802 banning discrimination in war industries and armed services. The Fair Employment Practices Commission (FEPC) was later established to assure nondiscrimination on all defense contracts and federal training and employment. This marked the beginning of numerous presidential actions to end discrimination (see table A.18, Appendix A).

From 1954 to 1978, America made great strides in attempting to resolve the dilemma of discrimination. Legislation was enacted to address employment discrimination and examine methods for achieving its elimination. This also required an examination of the overall effect centuries of discrimination had on societal opportunities for African Americans.

As discussed previously, the roots of discrimination can be traced as far back as prior to the inception of the U.S. Constitution. Executive actions pertaining to civil rights concerns date back to 1776 (Sykes 1995) (see table A.18). Affirmative action measures were established to fight racial discrimination. The federal government mandated affirmative action programs to redress racial inequality and injustice in a series of steps beginning with an executive order issued by President Kennedy in 1961.

The Civil Rights Act of 1964 is the centerpiece of the federal anti-discrimination statutory scheme. This act made discrimination illegal and established equal employment opportunity for all Americans regardless of race, cultural background, color or religion. Title VII of the "act covered employment and included creation of an implementation and enforcement arm in the form of the Equal Employment Opportunity Commission (EEOC)." This agency was empowered to issue orders to those affected by the legislation, and in 1978 it did so in the form of the Guidelines on Employee Selection Procedures (41 CFR 60-3). Title VII's substantive

prohibition against discrimination in employment, proscribing discrimination on grounds of race and other statutes,[54] is said to address both subtle and overt discrimination alike.[55]

An important related development was President Lyndon Johnson's issuance of the 1965 Executive Order 11246. Executive Order 11246 states:

> it is the policy of the Government of the United States to provide equal opportunity in federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each department and agency.[56]

Executive orders are issued by the President without congressional approval and carry the weight of the law. As with Title VII of the Civil Rights Act of 1964, Executive Order 11246 prohibits discrimination on the basis of race, color, religion, sex and national origin. It differs from Title VII in two significant respects: (1) it applies only to the federal government entities and contractors and (2) it includes provisions that federal employers and contractors take affirmative action to ensure nondiscriminatory treatment in decision-making. Employers are further required to prepare an affirmative action plan that developed goals for all federally funded programs. An additional impact of Executive Order 11246 called for relinquishing the requirements for monitoring and enforcing of affirmative action programs from the White House and into the Labor Department. The order was amended to prohibit discrimination on the basis of sex two years later.

"Acting on the basis of this mandate, the Department of Labor in December 1971, during the administration of President Richard M. Nixon, issued Revised Order No. 4, requiring all contractors to develop an acceptable affirmative action program, including "an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to

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[54] 42 U.S.C. Section 2000e-2 [Section 703]

[55] McDonnell Douglas Corp v. Green, 411 U.S. 792, 801 (1973) (Title VII tolerates no racial discrimination, subtle or otherwise)

correct the deficiencies." Contractors were instructed to take the term minority groups to refer to Negroes, American Indians, Orientals, and Spanish Surnamed Americans. The concept of underutilization meant having fewer minorities or women in a particular job classification than would reasonably be expected based on the availability in the market. "Goals were not to be rigid and inflexible quotas but targets reasonably attainable by means or applying every good faith effort to make all aspects of the entire affirmative action program work" (Cahn 1995).

Arguably implicit in Title VII of the Civil Rights Act of 1964, Executive Order 11246 and the "EEOC Guidelines of 1966, is that over time many forms of disparity would be eliminated if discrimination is proscribed and equal opportunity provided." Thus, equal treatment of individuals was expected to yield an equitable, fair and equal outcome. As reality set in and results were different from what was assumed, the language of the Office of Federal Contract Compliance Programs (OFCCP) regulations changed. "In 1968 the agency began requiring a written affirmative action compliance program, a utilization analysis, and specific goals and timetables, but, nonetheless, maintained its ultimate focus on opportunity rather than results." The 1971 OFCCP regulations, however, included a stronger focus on results—that being to increase the utilization of minorities and women at all levels and in all segments of the workforce where deficiencies existed (Sharf 1988).

Judicial rulings have had a significant effect on the practical implications of civil rights legislation and executive orders. The Supreme Court opinion in the 1971 landmark case of *Griggs v. Duke Power Company. 401 U.S. 424* (1971*)* reflected acceptance of this fundamental change in the definition of discrimination. If an employment practice resulted in unequal outcomes across demographic groups, an employer's claim that the discrimination was unintentional was not an adequate defense. Chief Justice Burger, writing the opinion for the Supreme Court, states:

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[56] Executive Order 11246 of Sept. 24, 1965, 30 FR 12319, 12935, 3 CFR, 1964-1965 Comp., p.339

> The objective of Congress in Title VII was to achieve equality of employment opportunities. What is required is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. Title VII proscribes not only overt discrimination but also practices that are discriminatory in operation. The touchstone is business necessity. If an employment practice that operates to exclude blacks cannot be shown to be related to job performance, the practice is prohibited as a classification because of race. (Griggs v. Duke Power Company. 401 U.S. 424 (1971). http://www.debatingracialpreference.org/GRIGGS-Burger+Rebuttal.htm.)

This "re-definition of discrimination was codified under "the rubric "adverse impact" in the 1978 Uniform Guidelines on Employee Selection Procedures. An update and expansion of the original EEOC Guidelines that was jointly adopted by the EEOC, the federal Civil Service Commission, the Department of Labor, and the Department of Justice. According to the Guidelines, in its "80% rule of thumb," adverse impact exists when the selection rate of any group is less than 80% of that for the group with the highest selection rate. To refute a charge of illegal discrimination, the employer had to demonstrate that the practice resulting in this difference is job related and a business necessity." More recently, Congress passed the Civil Rights Act of 1991, which was intended to reverse several Supreme Court rulings of the late 1980s.[57] This Act codified the statistically-defined adverse impact definition of discrimination.

"Both disparate treatment of individuals and disparate impact of procedures, policies and practices on demographic groups are considered discriminatory and illegal. Equal employment opportunity is guaranteed by the Civil Rights Acts of 1964 and 1991. Affirmative Action was created by Executive Order 11246 and requires federal contractors to take active steps to ensure equal opportunity. Thus, equal opportunity is relatively passive, whereas

[57] The Act sets new standards for disparate impact cases by reversing *Wards Cove Packing v. Atonio*. This was a 1989 case that made it harder for protected groups to show disparate impact. The Ward Cove ruling lessened the standard for connecting a practice to the job, making it easier for employers to defend against adverse impact. The Act reinstated disparate impact criteria from the famous 1971 ruling in *Griggs v. Duke Power Co* which stated that hiring practices must be job related and consistent with business necessity. The Act also clears issues regarding intentional discrimination from the 1989 *Price Waterhouse v. Hopkins* case and reverses Patterson v. McLean Credit Union by prohibiting racial harassment and other forms of bias that occur after an applicant is hired. Other reversals included: 1) the *Martin v. Wilks* ruling which allowed the challenge of a decree or settlement of a lower court's ruling; and 2) provisions of the EEOC v Arabian American Oil Co which prohibited

affirmative action is more active. Both, however, have the ultimate goal of eliminating discrimination on the basis of specified demographic factors. Recent political developments have brought affirmative action programs, and especially attitudes and opinions about them, to the forefront of public debate" (Glasser 1998).

When tracing verdicts resulting from key legislation and decisions regarding discrimination, it is clear that the presumption of the existence discrimination has diminished to a presumption of non-discrimination and a shifting of burden to the complainant to prove the mere existence of discrimination (see table A.19, Appendix A).

5.6 The Impact of Affirmative Action on Government Contracting

This research illustrates the ineffectiveness of requiring strict proof of the apparent occurrences of discrimination as it highlights the failure of statistical techniques to measure the extent of racial discrimination. My research attempts to provide a clear understanding of the unattainable burden placed on America's minorities to prevail in claims of discrimination. The impenetrability of proving discrimination will be demonstrated by tracing the lengthy, costly and unanswered experience of the government to defend federal programs designed to ensure that the government is not a passive participant in current day discrimination.

Efforts to prove a compelling government interest for setting affirmative action goals on federally funded contracts has fallen on deaf ears. Depending on the perspectives of presiding justices, evidence of past and current-day discrimination, statistical proof of disparate treatment and Supreme Court precedence has fallen short of swaying steadfast viewpoints. In recent years, new standards have been required and millions of dollars have been spent to meet the burden of proving discrimination. While the City and County of Denver, (the entity used as a

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Americans working abroad for United States-based employers from suing their employers for violations of Title VII or the Americans with Disabilities Act.

case study for dissertation purposes herein) was able to spend over $2.5 million[58] to defend their affirmative action procurement program, the challenge continued and further proof was required, as the case was appealed to the Supreme Court for further consideration.

Following a careful review of the pitfalls experienced by the City and County of Denver, it is logical to surmise that the average minority that is impacted by subtle acts of discrimination would not be able to afford and would be less likely to persuade courts that they have been subjected to discrimination.

5.7 Government Intervention

Government procurement contracts cover almost everything available in the commercial market. Virtually all branches of government need to make purchases and have the power to do so. The federal government purchases amount to approximately $180 billion a year, while state and local governments purchase about $465 billion more. Effective use or potential abuse of government purchasing power can have a substantial impact on government efficiency, the income of particular companies and communities and the financial burden on taxpayers. It would be intolerable if governments used this formidable economic power to discriminate against businesses because of the race, ethnicity or gender of its owners (La Noue 2001).

There has been extensive congressional documentation that minorities and women face obstacles to business formation and development. Included are barriers created due to discrimination in lending (which impairs the ability to secure capital in equal quantity and on equal terms as other businesses), disproportionate difficulties securing adequate bonding, and lack of access to contracting and subcontracting markets that are built on long-standing relationships (61 Federal Register 26.057-58). A U.S. Commission on Minority Business Development appointed by President Bush (1992) reported, “minorities are not

[58]Between 1992 and 2001, Denver spent over $2.5 million defending their affirmative action initiatives. The case was then heard by the 10th Circuit Court of Appeals and later submitted to the Supreme Court on further consideration.

underrepresented in business because of choice or chance. Discrimination and benign neglect is the reason why our economy has been denied access to this vital resource" (61 Federal Register 26.054).

Enchautegui et al. (1997) explain that impediments to formation, growth and participation in the government contracting process embody the major obstacles faced by female and minority owned firms. The barriers have been born and perpetuated, at least in part, by discrimination (Enchautegui et al. 1997). Females and minority-owned firms are generally smaller in size and fewer in number than majority-owned firms. Key hindrances to the development of minority-owned businesses include:

- Lack of financial capital—minorities have lower incomes, fewer assets and diminished access to business loans
- Lack of social capital—minorities access to business networks is limited, and their own family networks may be smaller or less valuable than those of their majority counterparts;
- Lower human capital endowments—minorities have less education and professional training, and their access to union and other apprenticeship programs are more limited;
- Minorities' access to lucrative, non-minority consumer markets are comparatively limited, due in part to historical patterns of residential segregation (Enchautegui et al. 1997, 3).

Minority firms may turn to government contracts to offset some of the limitations imposed by the private market, but hurdles embedded in the contracting process itself can impede minority firms from winning government contracts. These barriers, according to Enchautegui et al. include:

- Failure of government to break large contracts down into smaller projects so that minority firms, which tend to be smaller, can compete
- Extensive granting of waivers from minority subcontracting requirements to majority contractors
- Ineffective screening for false minority fronts
- Limited notice of contract competitions

- Bid shopping on the part of majority prime contractors, who disclose minority firms' subcontracting bids to their majority competitors so they can underbid (Enchautegui et al. 1997).

Congress, working in a bipartisan fashion, has created several federal economic development programs to counter the effects of discrimination that have raised artificial barriers to the formation, development, and utilization of businesses owned by disadvantaged individuals.[59] The programs facilitate growth of these businesses through creating opportunities for them to compete and level the playing field for these businesses to successfully perform on federal contracts. These programs fall into two categories. The first category uses race as a basis for awarding of contracts. Examples include the use of sole source contracts, set-asides, price or evaluation advantage, and the use of goals for prime or subcontracting. The goals of these policies are to increase the number of contract and subcontract awards received by minority firms (Enchautegui et al. 1997). The second category of programs looks at procurement-related policies that can help spur expansion in the number of disadvantaged businesses going business via contracting with the government through increasing their financial, social or human capital. These initiatives are sometimes referred to as affirmative action programs or as race-neutral policies. The goal is to put disadvantaged businesses in a better position to compete as either prime contractor or subcontractor. "These policies include lending and bonding help, technical assistance programs, expanded notice requirements, and imposing prompt payment of potential minority bidders for public contracts" (Enchautegui et al. 1997, 4).

The federal government also promotes equal employment opportunity practices by private firms who have contracts with the federal government through the Department of Labor. Executive Order (EO) 11246 (along with several other statutes banning discrimination and establishing affirmative action requirements for federal contractors and subcontractors) is enforced by the Office of Federal Contract Compliance (OFCCP). In fiscal year 1993

[59] Disadvantaged businesses include small, minority and female owned business.

approximately 92,500 non-construction establishment and 100,000 construction establishments were covered by EO 11246. These establishments employed some 26 million people and received contracts of more than $160 billion. The OFCCP requires goals for hiring and promoting women and minorities as part of the affirmative action program that contractors are required to develop and implement. Race and gender based hiring and promotions are not a requirement of these affirmative action programs, and quotas are prohibited (Whitehouse.gov, 2002).

The goal-setting process which includes a numerical basis for affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. Numerical benchmarks are established based on the availability of qualified candidates in the employer's workforce. The regulations specifically prohibit quotas, preferential hiring and promotions under the guise of affirmative action numerical goals. Numerical goals do not create quotas for specific groups, nor are they designed to achieve proportional representation or equal results. A contractor's failure to attain its goals is not, in and of itself, a violation of the Executive Order; failure to make a good faith effort to attain the goal is (Whitehouse.gov, 2002).

Affirmative action procurement efforts (which include implementation of government-wide efforts to contract with small and disadvantaged businesses) are administered by the Department of Defense, the Department of Transportation and the Small Business Administration. Under these programs, some procurement contracts are set aside for sole source or sheltered competition contracting. Eligibility for award of these contracts is targeted to businesses owned by socially and economically disadvantaged individuals (commonly referred to as minority- and women-owned businesses). Although these efforts are in place, over 93% of federal procurements are with firms owned by white males (Whitehouse.gov. 2002).

Minority and Women Owned Business Enterprise (MWBE) [60] programs were enacted in response to specific executive and congressional findings that widespread discrimination, (especially in access to financial credit), has been an impediment to the ability of minority owned businesses to have an equal chance at developing America's economy (Whitehouse.gov. 2002). This congressional cognizance was recognized by the Court in Fullilove v Klutznick, when it upheld a set-aside program established by Congress at the Department of Transportation. In this case, Chief Justice Burger reviewed the legislative history and documentation that highlighted an extensive history of discrimination against minorities in contracting (especially federal procurement) (Whitehouse.gov. 2002).

Also relied upon was a 1977 Report of the House Committee on Small Business that stated:

> The very problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation….Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular" (Whitehouse.gov. 2002).
>
> Deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate "track record", lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, pre-selection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses were cited by the congressional findings as the difficulties confronting minority businesses" (448 U.S., 448, 483 1980).

Congress examined racial discrimination in federal contracting frequently during the 1980s and consistently found that it persisted (Whitehouse.gov. 2002). In 1976, less than 1% of all federal procurement was concluded with minority business enterprises (448 U.S., 448, 483 1980) and in 1986, of the $185 billion prime contract federal procurement dollars, minority businesses received approximately 2.7% or $5 billion (Whitehouse.gov. 2002). Despite implementation of affirmative action procurement programs, minority- and women-owned business firms continue to be significantly under-represented across every industry in which

[60] Minority and women owned business enterprises differ from disadvantaged business enterprises in that they do not include white owned small business that fit into the net worth criterion of a

procurement with government entities occurred. In fiscal year 1996, women- and minority-owned firms were awarded only 8.1% of the 197.7 billion dollars in federal prime contracts (Whitehouse.gov. 2002). In 2002 federal spending was close to $300 billion, yet less than 10% of the federal dollars went to women- and minority- owned businesses (Miller 2002).

Although Minority Business Enterprise (MBE) procurement programs have been controversial since their inception, the programs authorizing affirmative action in federal procurement historically have been routinely approved by Congress.[61] However, over the last 20 years, affirmative action programs awarding government contracts have undergone extensive review by the Supreme Court and have been subjected to numerous judicial reviews and challenges to substantiate their viability. Two landmark Supreme Court cases that have most restricted the scope of affirmative action have been contracting cases: *City of Richmond v. J. A. Croson Co.*, 488 U.S., 469 U.S. 469 (1989) and *Adarand Constructors v. Pena. 115 S. Ct.* 2097 (1995). These two cases significantly increased the level of constitutional scrutiny the courts applied to these remedial programs under review (*Minorities in Business Insider,* August 1996). I examined each of these cases in turn.

In 1989 the Supreme Court ruled in *City of Richmond v J.A. Croson* that state and local race conscious remedial programs targeting government contracts would be subjected to strict scrutiny (Dellinger, June 1995). "Under this standard of review, such programs are constitutional only if they serve a compelling interest and are narrowly tailored to suit the identified compelling interest. The Supreme Court applied this same level of strict scrutiny to federal race-conscious remedial programs awarding government contracts in the 1995" *Adarand Construction, Inc. v. Pena* decision (Dellinger 1995).

Two interesting notes regarding the Croson and Adarand decisions are: (1) neither addressed the appropriate constitutional standard of review for affirmative action programs

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disadvantaged business.

[61] There is an extensive legislative history of congressional approval of programs to aid minority business enterprises. A detailed record is set out at 61 Federal Register at 26042, May 23, 1996.

using gender classifications as a basis for decision making. In general, the courts have applied a lesser standard or intermediate scrutiny test to gender classifications (Dellinger 1995) and (2) the U.S. Supreme Court decision in Adarand Constructors v. Pena, extended the Croson strict scrutiny standard to federal affirmative action policy and beyond contracting. The U.S. Court of Appeals for the Fifth Circuit, relying heavily on Adrand, invalidated race-based admissions policies at the University of Texas Law School in the case of *Hopwood v. State of Texas.* 861 F. Supp. 551 (U.S.C.A. 5th Circuit, No. 94-50569 1996).

The bellwether case is the Croson decision that declared the City of Richmond's minority business program unconstitutional. In *City of Richmond v. J.A. Croson Co.* 109 S. Ct. 706, the Supreme Court considered a constitutional challenge to a Richmond city ordinance that required prime contractors who received city contracts to subcontract at least 30% of the dollar amount of those contracts to businesses owned and controlled by members of socially disadvantaged groups. The asserted purpose of Richmond's ordinance was to remedy discrimination against minorities in the local construction industry (U.S.C.A. 4th Circuit, No. 94-50569 1996).

In Croson*,* a majority of the Supreme Court held that racial classifications used for affirmative action purposes at the state or local level must be subject to strict judicial scrutiny. To avoid invalidation, the government must have a compelling interest, and the particular program must be narrowly tailored to promote that interest (488 U.S. 469, 485-86 1989). *Richmond v. Croson* was crucial to affirmative action doctrine because it was the first time a majority of the Court agreed on what standard of review these types of programs should receive (488 U.S. 469, 485-86 1989).

It was the *Croson* case that it became increasingly clear that statistical evidence is necessary to justify a race-based remedial program. No matter how compelling the individual testimony of the experience of discrimination, a program will be held unconstitutional if there is not at least some statistical proof supporting the inference of discrimination. If resources were

scarce, hearings where personal testimony is elicited could be gathered by objective and experienced social science research, but not by MBE program advocates or government officials. However, what would be most useful is a statistically sound proof of witnesses that mirrors vendor availability and questions designed to reach the anecdotes that should be relevant to utilization and business success. Specific anecdotes should be verified to the greatest possible extent. Sad stories alone, however poignant, will not withstand judicial review.

Using stringent inspection criteria, the Court held that the Richmond MBE program (1) "did not serve a compelling interest because it was not predicated on sufficient evidence of discrimination in the local construction industry and (2) was not narrowly tailored to the achievement of the City's remedial objective. Applying its strong basis in evidence test, the Court held that the statistics on which Richmond based its MBE program were not probative of discrimination in contracting by the city or local contractors, but at best reflected evidence of general societal discrimination." Richmond had relied on limited testimonial evidence of discrimination, supplemented by statistical evidence regarding: (1) the disparity between the number of prime contracts awarded by the city to minorities during the years 1978-1983 (less than 1%) and the city's minority population (50%) and (2) the extremely low number of MBEs that were members of local contractors' trade associations. Richmond alleged that its program helped remedy past discrimination in the construction industry" (488 U.S. 469, 485-86 1989). Furthermore, the city attempted to prove this discrimination by revealing the low percentage of minority-owned construction contracts in the city and across the nation (488 U.S. 1989).

The Court invalidated a city ordinance which required prime contractors to award 30% of city contracts to minority-owned subcontractors (488 U.S. 469, 485-86 1989). In an opinion written by Justice O'Connor, five Justices joined her in declaring that the Constitution forbade such blatant racial preferences.[62] The majority also held that correcting societal discrimination

[62] *Croson* at 498-506 (Justices Rehnquist, White, Kennedy, Scalia, and Stevens joined in the general holding); *id.* at 511-18 (Stevens J., concurring in part and concurring in the judgment) (rejecting racial preferences but disfavoring any particular level of scrutiny).

was not a compelling interest.[63] For a remedial statute to meet the compelling threshold there must be identified discrimination by a particular government entity (488 U.S. 469, 485-86, 1989). The government must then demonstrate that its use of a racial classification is a narrowly tailored means of rectifying those past wrongs (488 U.S. 469, 485-86, 1989.

The Justices in *Corson* indicated that certain types of statistical evidence would satisfy the compelling interest component of the strict scrutiny analysis. Accordingly, while proof of at-large societal discrimination does not suffice as support for an affirmative action program in public contracting, where it can be shown that gross statistical disparities exist between the number of firms qualified to undertake federal contracts and those that were utilized, that alone (in a proper case) may constitute *prima facie* proof of a pattern or practice of discrimination" (488 U.S. 469, 485-86 1989). Notably, the Court added that the mere under-representation of minorities in a particular sector or industry when compared to the general population statistics is an insufficient predicate for affirmative action (488 U.S. 469, 485-86 1989).

The following year, the Supreme Court in a 5-4 decision in *Metro Broadcasting, Inc.*, *497 U.S. 547* established a lesser standard of review for federal affirmative action programs created by statute or adopted by federal agencies under a congressional mandate (FCC, 497 U.S. 547, 564-65 1990). A federal law that used racial classifications for affirmative action purposes was subjected to intermediate scrutiny and therefore upheld if the classifications bore a substantial relationship to an important governmental interest (FCC, 497 U.S. 547, 564-65, 1990).

As a result of the *Croson* decision, "state and local governments needed to support their Disadvantaged Business Enterprises (DBE) participation policy with a disparity study to establish whether a significant disparity existed between the numbers of available disadvantaged business enterprises (DBEs) and the number of DBEs utilized by state or local

[63] *Croson* at 505 (O'Connor, Rehnquist, Kennedy, White, and Stevens); *see also* Wygant v. Jackson Board. of Educ., 476 U.S. 267, 276 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

government to meet its procurement needs. Disparity studies also determined whether DBEs were limited in their ability to do business with a governmental agency." Based on the disparity study, a DBE participation policy could then be established by the agency to correct the disparity. Economic factors are used to measure the disparity between the merits of the contractors' respective bids in order to measure competitiveness between DBEs and non-DBEs.

In cases involving a claim of discrimination or disparate impact from minority employees or vendors, the introduction of statistical evidence showing that members of their group received a smaller share of jobs (or contracts) than the group's share of the population in the municipality or state is common practice. However, the Supreme Court's majority decision in *Croson* brought this common practice to a halt. The *Croson* decision established the principle that statistical tests in discrimination studies must be used with the proper comparison population in mind, which is normally *not* the general population (FCC, 497 U.S. 547, 564-65 1990). Dellinger, Assistant Attorney General, (1995) in a memo to the White House general counsel stated that the Croson decision caused much chaos and confusion with regards to defense of affirmative action programs, and left the following critical questions unanswered:

- Whether a government may introduce statistical evidence showing that the pool of qualified minorities would have been larger "but for" the discrimination that is to be remedied
- The weight to be given to anecdotal evidence of discrimination that a government gathers through complaints filed by minorities or through testimony in public hearings
- Which party has the ultimate burden of persuasion as to the constitutionality of an affirmative action program when it is challenged in court?
- Whether a government must have sufficient evidence of discrimination at hand before it adopts a racial classification, or whether "post hoc" evidence of discrimination may be used to justify the classification at a later date. (Dellinger, 1995 June)

The ruling in he Croson case, which applied to state and local government, was brought to bear of federal affirmative action programs in the Adarand case. The 1995 *Adarand Constructors v. Pena* case involved a constitutional challenge to a Department of Transportation

(DOT) program that compensated persons who receive prime government contracts if they hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals. The legislation on which the DOT program is based, the Small Business Act, establishes a government-wide participation goal for groups presumed to be socially disadvantaged of not less than 5% of the total value of all prime contract and subcontract awards for each fiscal year (15 U.S.C. 644(g)(1)). The Department of Transportation awarded the prime contract for a highway construction project in Colorado to Mountain Gravel and Construction. Mountain Gravel and Construction solicited bids from subcontractors for the guardrail portion of the contract. Adarand Construction, a non-minority firm which specializes in guardrail work, submitted a low bid on a DOT subcontract. Gonzales Construction, another subcontractor in the guardrail business, also submitted one of the lower bids. Under the terms of the prime contract, Mountain Gravel and Construction would receive a bonus of $10,000 from the government if it hired subcontractors certified as small businesses controlled by socially or economically disadvantaged individuals, as defined in the Small Business Act (SBA).

The SBA defines socially disadvantaged individuals “as those who have been subjected to racial or ethnic bias because of their membership in a group without regard to their individual qualities. It defines economically disadvantaged individuals as socially disadvantaged individuals whose ability to compete in the free-enterprise system has been impaired because of diminished capital and credit opportunities compared with those of others in the same business area that are not socially disadvantaged.” Under the SBA, Black, Latino, Asian, and Native Americans are presumed to be socially disadvantaged. A related provision extends the same presumption to women. In practice, a third party who objects to this presumption in a particular case can come forward and establish that a particular business is not disadvantaged (115 S. Ct. 2097, 2102-4 1995).

Gonzales had been certified as a small, socially and economically disadvantaged business; Adarand had not. The prime contractor awarded the subcontract to Gonzales who was presumed to be socially disadvantaged which allowed the prime contractor to receive additional compensation from DOT (63 U.S.L.W. at 4525). Adarand then brought suit in federal court, pushing the issue that the federal government's practice of awarding contracts to general contractors for projects with a financial incentive to hire subcontractors controlled by socially and economically disadvantaged individuals and also the government's use of race-based presumptions in identifying such individuals violate the equal protection component of the 5th Amendment's due process clause: "No person shall. . .be deprived of life, liberty, or property, without due process of law (115 S. Ct. 2097, 2102-4 1995).

Adarand's challenge to this subcontract award began a string of federal court decisions that continued for more than a decade. The case has been to the United States District Court in Colorado, twice; the U.S. Court of Appeals, 10th Circuit, three times; and then back to the U.S. Supreme Court, for the third time. Table 5.3 provides a chronological listing of the Adarand decisions. The Adarand case has been on the legal highway for so long that the court system keeps track of it with roman numerals. It has been through numbers I, II, III, IV, V, VI, VII, and VIII.

Table 5.3 Chronology of Adarand Decisions

Adarand I	*1992*: In *Adarand Constructors, Inc. v. Skinner*, 790 F.Supp.240, the District Court supports DBE program under *moderate scrutiny*.
Adarand II	*1994*: 10th Circuit (in *Adarand v. Pena*, 16 F.3d 1537) affirms the District Court ruling in Adarand. I
Adarand III	*1995*: Supreme Court rules for *retrial* of Adarand II by the Appeals Court *under strict scrutiny*.
Adarand IV	*1997*: District Court noted that strict scrutiny test included two questions: (1) whether the interest cited by the government for a racial classification is sufficiently compelling to overcome the suspicion that racial characteristics ought to be irrelevant so far as treatment by the government is concerned; and 2) whether the government has narrowly tailored its use of race so that race-based classifications are applied only to the extent absolutely required to reach the proffered interest. The Court rules that *DBE program was not narrowly tailored.*
Adarand V	*1999*: After District Court's judgment in 1997, Adarand sued Colorado challenging its DBE guidelines in administering federally assisted highway programs. (*Adarand v. Slater*, 169 F3d 1292). Colorado subsequently modified its regulations to eliminate the presumption of social disadvantage of its DBE inquiry solely on the applicant's certification that they were socially disadvantaged. When Adarand applied for DBE status, it was certified as a DBE. The court concluded that the certification made the challenge to the constitutionality of the DBE program moot. The 10th Circuit reversed Adarand IV and sent it back for dismissal.
Adarand VI	*2000*: Supreme Court states that the Appeals Court erred in saying the issue was moot and forces 10th Circuit to make strict scrutiny analysis
Adarand VII	*2000*: 10th Circuit rules that revised DBE program passes strict scrutiny
Adarand VIII	*2002*: Supreme Court decides to review Adarand VII (which was entitled Adarand Constructors, Inc. v. Mineta) but changes its mind. The Supreme Court dismissed the challenge as the Justices conceded that they had taken the wrong case to decide this major issue on the constitutionality of Disadvantaged Business Enterprise (DBE) Programs.

The District Court ruled in favor of the government in 1992. The Court of Appeals for the 10th Circuit affirmed in 1994, holding that DOT's race-based action satisfied the requirement of intermediate scrutiny, which it determined was the applicable standard of review under the Supreme Court's ruling in *Metro Broadcasting, Inc. v FCC*, 497 U.S. 547 (1990) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), (63 USLW at 4525). Adarand appealed the 10th Circuit decision to the Supreme Court and Court watchers waited to learn the fate of affirmative action.

In 1995, the Supreme Court ordered that the case be retried using strict scrutiny as the measure; and under the 1997 District Court ruling, the DBE program was deemed not narrowly tailored. By a 5 to 4 vote, in an opinion written by Justice O'Connor, the 2000 Supreme Court held that strict scrutiny was the new standard of constitutional review for federal affirmative action programs that use racial or ethnic classifications as the basis for decision-making. The Court clearly stated that this standard applied to programs that were mandated by Congress, as well as those undertaken by government agencies on their own accord. The Court overruled *Metro Broadcasting* to the extent that it had prescribed intermediate scrutiny—a more lenient standard of review—for federal affirmative action measures. Under strict scrutiny, a racial or ethnic classification must serve a compelling interest and must be narrowly tailored to serve that interest. This was the same standard of review that, under the Supreme Court's decision in Croson applied to affirmative action measures that were adopted by state and local governments (63 USLW at 4525).

Dellinger's (1995) June memorandum declared that the following questions remained open on remand subsequent to the Supreme Court's decision in Adarand:

- Adarand did not determine the constitutionality of any particular federal affirmative action program. In fact, the Supreme Court did not determine the validity of the federal legislation, regulations or program at issue in Adarand itself.

- Adarand left open the possibility that, even under strict scrutiny, programs statutorily prescribed by Congress may be entitled to greater deference than programs adopted by state and local governments.

- Aside from articulating the components of the strict scrutiny standard, the Court's decision in Adarand provided little explanation of how the standard should be applied.

5.8 Standard of Scrutiny

The Supreme Court applied three standards (levels of review) to cases involving equal protection issues. They included a two-part analysis of a governmental program. First, there is a determination of whether the governmental program serves a valid purpose, objective, or interest. Second is an analysis of the means the government uses to fulfill the purpose, objective or interest. The rational, intermediate, and strict scrutiny are the standards.

1. The rationale standard of scrutiny is the least thorough standard. The governmental purpose or interest may be referred to as *legitimate*. The means to achieve the

interest is reviewed to determine if it is “rationally related” to the accomplishment of the government purpose, objective or interest.

2. Intermediate Scrutiny is a more thorough analysis than rational scrutiny. The governmental purpose, objective or interest may be referred to as *important*. The means to achieve the interest is reviewed to determine if it is substantially related to the accomplishment of the governmental purpose or interest.

3. The strict scrutiny standard is the most thorough analysis. It has been referred to as strict in theory but fatal in fact because few governmental programs survive strict scrutiny. The governmental purpose, objective or interest may be referred to as compelling. The means to achieve the purpose, objective, or interest is reviewed to determine if it is narrowly tailored to the accomplishment of the governmental purpose (Dellinger 1995).

CHAPTER 6

THE USE OF DISPARITY STUDIES TO PROVE DISCRIMINATION

Why are policymakers seemingly unable to identify and act on discrimination despite its being so prominent? Why do policymakers turn a blind eye to the findings of the 1997 National Disparity Study that was conducted by the Urban Institute? Why do they not explore what these 95 collective disparity studies suggest about discrimination? The results found in this dissertation reveal that the majority of disparity studies disclose a plethora of statistically significant levels of past and current day discrimination. More pointedly, disparity studies that look at minority and female utilization in federal procurement reveal significant incidents of discrimination during business formation, competition for contracts, attempting to meet bonding requirements, and applications for loans for inventory to complete assignments. As noted in chapter 2 on page 22, the realist perspective states that through acts of discrimination, racism is a means by which society allocates privilege, status and wealth. Following the realist ideology, disparity studies unveil hidden inequalities that singularly appear insignificant, but collectively illustrate devastation.

The dissertation hypothesis suggests that regardless of the statistical evidence presented to the Courts to prove the phenomenon of discrimination, it may be deemed insufficient because of the inability of the Justices to conceptualize the existence (and externalities) of the abstract occurrence of discrimination. This is compounded by the Justices' unconsciousness of their actions—injection of their personal perspectives and impact of the Courts' judgment—on the continued existence of discrimination. The standards and questions posited by the Justices from the *Concrete Works v. City and County of Denver* case are compared to the Urban Institute study, which showed aggregates from individual results of numerous disparity studies to provide a national picture of disparity in government contracting. I use the Urban Institute study to

determine whether this national standard of disparity would satisfy the criteria required by Chief Judge Matsch of my case study, Concrete Works.

Disadvantaged Business Enterprise programs are necessary to allow participation on contractual opportunities to minority and female owned business. The barriers to opportunity in the construction industry are well documented the 1998 Transportation Equity Act for the 21st Century (TEA-21). "The congressional record supporting this legislation shows that informal, racially exclusionary business networks dominates the subcontracting industry, shutting out competition from minority firms" (Verdugo 2002, 145).

"While minorities make up more than 20% of the national population and own 9% of construction firms, they receive only 4% of money awarded for construction contracts. Non-minority construction companies receive 50 times as many loan dollars as Black-owned firms that have identical equity" (Verdugo 2002, 148). For example, the disparate study conducted for the Colorado Department of Transportation (the cases study herein) indicates that "a disproportionately small number of women- and minority-owned contractors participated in Colorado's highway construction industry; and more than 99% of the state's contracts went to firms owned by male males" (US DOT SDBU 2000, at. 12).

According to the U.S. DOT, Small Disadvantaged Business Division, "Transportation construction continues to rely on the "Old Boy Network," which, until the influence of affirmative action, was almost exclusively white. This network perpetuates itself because it is based on business friendships and relationships established decades ago, before, minority-owned firms were allowed to compete" (US DOT SDBU, at. 12). "Research suggests that during the 1960s, 1970s, 1980s, and 1990s progress was made in redressing racial and gender disparities in employment and business opportunities. Yet despite the changes brought about by affirmative action, along with laws combating discrimination, there remains a sizable gap in economic status by race and gender" (Verdugo 2002, 148).

6.1 Overview of Urban Institute Study Findings

From the time that a minority firm decides to form a business, to the time that they are actually awarded a contract, there are numerous opportunities for the firm to be subjected to discriminatory barriers. Thomas Black (1982) describes selling to the government as a complex maze that can become a traumatic experience. He states, “Ignorance is not a bliss when it comes to contracting with the federal government. Failure to stay informed can prove to be legally and financial disastrous” (64).

In figure 6.1 below, the Urban Institute Study identifies what they considered to be the risk points in firm formulation and the procurement process for minority businesses. This effort was initiated to identify biased acts of discrimination that could have: (1) limited the number of minority-owned firms winning contracts or (2) discouraged firms from bidding on government contracts. This was “an attempt to avoid an understatement of qualified minority-owned firms that were available (and their degree of disparity) by using a more restrictive vendors list” (Enchautegui et al. 1997, 18).

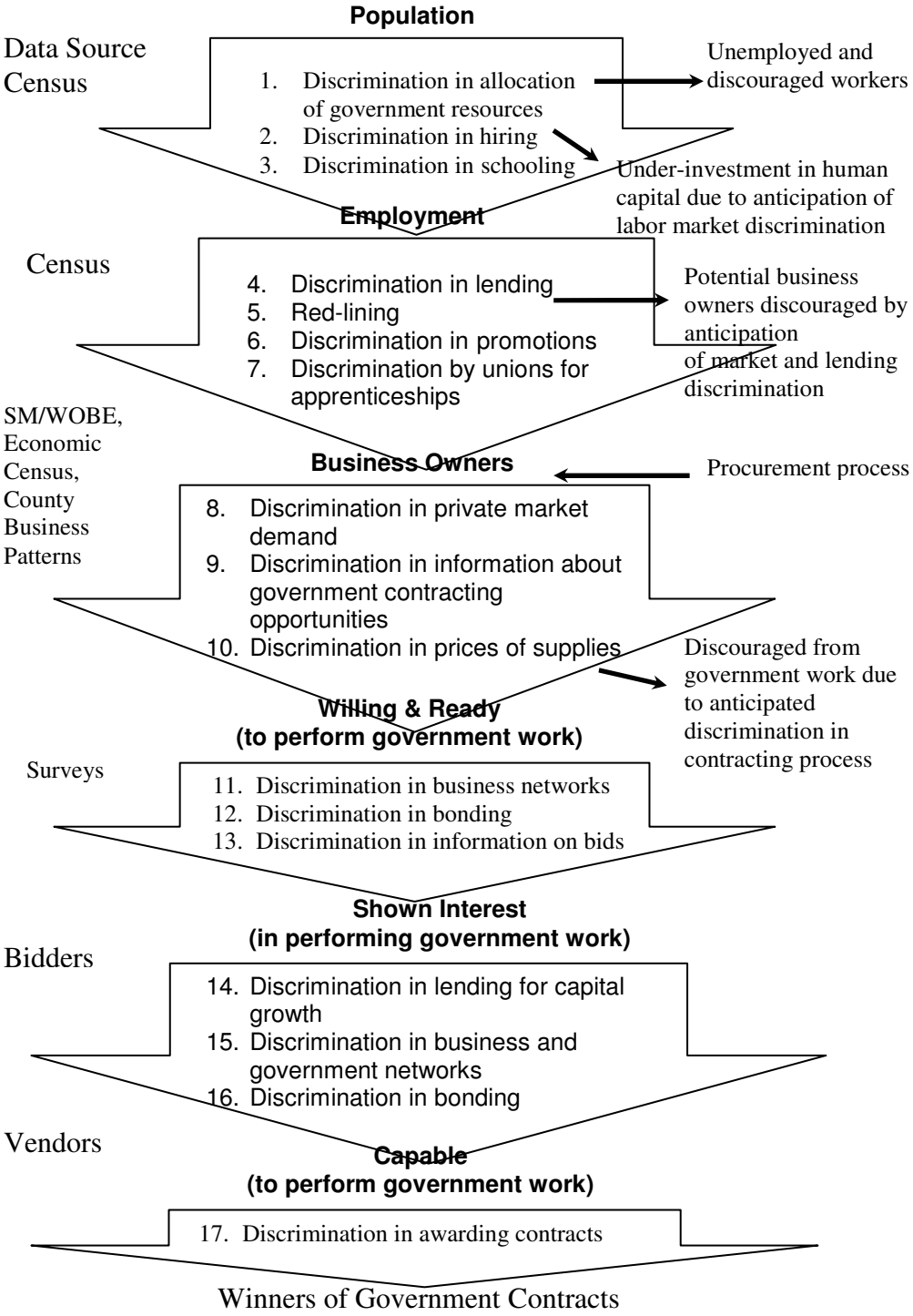

Figure 6.1 Minority and Women Owned Business Flowchart
Source: The Urban Institute Study

6.2 Testing the Dissertation Hypothesis

In his decision, Chief Judge Richard Matsch "criticized the methodological approaches typically found in disparity studies, elaborated on the growing judicial impatience with the eclectic list of minority groups preferred by these programs, and reinforced the judicial insistence that race neutral programs be tried before initiating race conscious programs" (F.3d 1145, 10th Cir. Court, 2000). While recognizing the difficulties of doing disparity studies in the construction industry, the Court's comments cast doubt about the future viability of such studies. According to Chief Judge Matsch (2000):

> All of the witnesses testifying about the disparity studies recognized the inherent limitations in attempting to collect and measure useful information about the construction industry because of the nearly infinite number of variables affecting the fate of firms operating within the special business environment of the many submarkets for products and services called construction. (F.3d 1145, 10th Cir. Court, 2000)

However, Judge Matsch concluded that the construction industry is varied and complex and there are many non-discriminatory reasons why a firm might chose to work consistently with a small set of subcontractors.

In his 79-page opinion (F.3d 1145, 10th Cir. Court, 2000), Chief Judge Matsch gave six major criticisms followed by six major flaws of the Denver Disparity Study used as evidence in the 1999 *Concrete Works v City and County of Denver* District court trial. These six criticisms and six fatal flaws of the Denver disparity study are shown in Table 6.1. below. I added a column at the right side of the table linking each criticism/flaw posed by the Court with my assessment of which typology factor appears to be present. This position is further supported by data from the Urban Institute Study to examine the study hypothesis and address each stated criticism and flaw.

Table 6.1 Six Criticisms and Six Fatal Flaws of the Denver Disparity Study

Unconscious conditioning influences how we perceive, believe, and read to individuals and situations that are unfamiliar to us. My typology suggests that there are 3 points of influence that shape one's value perspective:

1. Contextual (context.) factors external to the decision maker that shape the area of debate;
2. Conceptual (concept.) factors that consist of the decision maker's conceptualization of important ideas like political socialization, community, self interest, equity and fairness; and
3. The decision maker's subconscious (subcon.) reactions and socialization, which predict influences how they perceive, believe and respond to people, things and events.

Item #	Concern Articulated by the Court	Point of Influence
Criticism #1	The census data relied upon is suspect because it uses a different definition of MWBE than that found in the Denver certification program and was believed to overstate the number of MWBEs	Context
Criticism #2	Data offered by Denver did not distinguish the degree and specificity of the type of discrimination suffered by each group. According to the Justices: "it is contrary to common sense to believe that racial prejudice affects all racial/ ethnic groups equally	Subcon
Criticism #3	Lack of adjustment made for size of firms, construction specialties or whether the firm worked mainly as a prime or subcontractor	Context
Criticism #4	The failure to limit surveys on anecdotal discrimination to Denver, to follow-up on any allegation or to ask White men about discrimination against them	Concept
Criticism #5	Doubt was cast on the validity of disparity studies because of the inherent limitations in attempting to collect and measure useful information about the construction industry because of the nearly infinite number of variables affecting the fate of firms. In short, the sentiment was that the construction industry is varied and complex, therefore, there are many non-discriminatory reasons why a firm might chose to work consistently with a small set of subcontractors	Context
Criticism #6	Aggregation of the MBEs and WBEs in estimating availability without regard for the size of a business or the particular type of service or work in which they specialize was a serious flaw in methodology and impairs the values of the results.	Context
Flaw #1	Is there persuasive race, ethnic and gender discrimination through all aspects of the construction and professional design industry in the six county Denver MSA?	Concept
Flaw #2	Does the discrimination equally affect all the racial and ethnic groups designated for preference by the Denver MWBE program and all women?	Concept
Flaw #3	Does such discrimination result from policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity and gender?	Subcon
Flaw #4	Would Denver's use of those discriminating firms without requiring them to give work to certified MBEs and WBEs in the required percentage of each project make Denver guilty of prohibited discrimination?	Concept

Court Criticisms #1

The census data relied upon is suspect because it uses a different definition of MWBE than that found in the Denver certification program and was believed to overstate the number of MWBE's (F.3d 1145, 10th Cir. Court, 2000).

Response to District Court Criticisms #1

The U.S. Census data provides a wealth of population, social, economic and housing data that is used for many purposes by federal, state and local government as well as the private and non-profit sectors. This data is widely used to make public policy and planning decisions. The Court discounts Census data and questions its usefulness when convenient, yet relies on it heavily for the same data when it is advantageous to do so.

Court Criticisms #2

Data offered by Denver did not distinguish the degree and specificity of the type of discrimination suffered by each group. According to the Justices, it is 'contrary to common sense to believe that racial prejudice affects all racial/ ethnic groups equally'. (F.3d 1145, 10th Cir. Court, 2000)

Questions unanswered by Denver's disparity study that resulted in flaws 1 and 2 as cited by the Judge Matsch:

1. Is there persuasive race, ethnic and gender discrimination through all aspects of the construction and professional design industry in the six county Denver MSA? (Or is the problem much more limited which would make the Denver MWBE program not narrowly targeted?)

2. Does the discrimination equally affect all the racial and ethnic groups designated for preference by the Denver MWBE program and all women. (Or is the Denver program over inclusive in its beneficiaries?) (F.3d 1145, 10th Cir. Court, 2000)

Response to District Court criticisms #2 and
cited disparity study flaws 1 and 2

"Disparity studies examine the degree to which the share of contract awards received by minority firms is lower than the proportional representation of minority firms within selected industries. These studies are not designed to distinguish the degree and specificity of the types of discrimination suffered by each group" (Enchautegui et al. 1997, 4). Findings from the Urban Institute Study suggest that barriers remain to minority firms' participation in the government contracting process. The Urban Institute study authors further deduce that "while

there were important differences in disparity across industries, each group (African American-Latino-, Asian-, Native American- and women-owned businesses) received fewer government contract dollars than expected given their availability" (Enchautegui et al. 1997, 4-5).

Data limitations constrained the ability of the Urban Institute Disparity Study to determine the degree to which its findings of disparity represented discrimination, either in the government contracting process or the private market. The authors noted that "little evidence exists on the extent to which disparity in government contracting may be due to discrimination by government officials or participants in the private market. However, if a comparison is made of the contract awards of similarly qualified minority owned and majority owned firms, one could be more confident that any resulting disparity in awards would be due to current discrimination in the contract process and not differences in the qualifications of firms. The fact is, few disparity studies include the necessary information to carry out this type of comparison. Additionally, even if the data were available, there would be two difficulties with this comparison:

1. Differences in firm qualifications may themselves result from discrimination. There would be a need then to analyze the extent to which the private market practices that determine firm qualifications (bank lending, for example) are themselves discriminatory.
2. Defining which firms are similarly qualified is not straightforward. Some possible indicators of firm capacity include total revenue, number of employees, bonding levels, and experience. Required qualifications may vary by type of contract. For example, firm size may be more important in winning a highway construction contract than a legal services contract" (Enchautegui et al. 1997, 4-5).

The summary from the Urban study did indicate that "contracting is a closed network, with prime contractors maintaining long-standing relationships with subcontractors; so minority-owned firms are rarely subcontractors on projects that lack affirmative action requirements" (Fix and Turner 1999, 233). According to congressional testimony on the need for continued

affirmative action policies, it is not uncommon for non-minority contractors to accept higher bids from other firms in order to avoid working with disadvantaged business enterprises. Others testified that some general contractors "would rather loss money than deal with minority and female contractors" (Verdugo 2002, 146).

In reference to the Justice's request to distinguish the degree and specificity of the type of discrimination suffered by each group is an unachievable request. The full impact of discrimination is unknown. Therefore, the externalities of discrimination are impossible to measure at this time. For example, a Denver-based study (U. S. DOT, 1998) showed that African Americans were 3 times, and Hispanics 1.5 times, more likely than whites to be rejected for business loans. This one aspect of discrimination could result in a significant domino effect (e.g., lack of capital results in higher bids, less experienced employees, longer turnaround on projects, small inventory levels). The study also suggests that minority businesses are viewed as bad risks and less desirable. Thus, the legitimate capital needs of such businesses are ignored (Verdugo 2002). The findings of the Urban Institute study indicated that the pattern of disparity across industries varied within each racial and ethnic group:

- African American-owned businesses are most underutilized in the professional services industry category. Underutilization is also relatively high in the goods and other services industries for these businesses.

- Latino-owned and Asian-owned businesses were most underutilized in the goods and other services industries. Eighty percent of studies find substantial underutilization of Latino-owned businesses in the other services category. More than two-thirds of studies find substantial underutilization of Asian-owned businesses in both the goods and other service industries.

- Native American-owned firms are extremely underutilized in the goods, professional services, and other service industries. More than 80 percent of all studies showed underutilized of Native Americans in professional and other services. Native American –owned firms' utilization rates are the lowest of any group in these industries.

- Women-owned businesses experience the greatest disparity between the percent of contract dollars received and availability. Underutilization is particularly high in professional services, where 95 percent of studies show substantial underutilization.

Court Criticisms #3

Lack of adjustment made for size of firms, construction specialties or whether the firm worked mainly as a prime or subcontractor." (F.3d 1145, 10th Cir. Court 2000)

Response to District Court Criticisms #3

An individual study may have data limitations (it may be based on a smaller number of contracts) that make its results comparatively unreliable. Accumulating findings across many studies increases the accuracy of the results. By aggregating the findings of all the individual disparity studies and making adjustment to correlate data (as was done in the Urban Institute Study) stronger estimates of disparity were derived than from an individual study. Therefore, this concern was adequately addressed.

Court Criticisms #4

Denver's failure to limit surveys on anecdotal discrimination to Denver, to follow-up on any allegation or to ask White men about discrimination against them. (F.3d 1145, 10th Cir. Court 2000)

Questions unanswered by Denver's disparity study that resulted in flaws 3 as cited by the Judge Matsch:

3. Does such discrimination result from policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity and gender (Or are discriminatory acts contrary to policy and unknown to firm owners?) (F.3d 1145, 10th Cir. Court 2000)

Response to District Court criticisms #4

The Urban Institute study did not take into account any of the qualitative information such as hearing testimony and historical analysis presented in the aggregated disparity study. However, it should be noted, "in Colorado, after the federal district court held in *Adarand* that the DBE program was unconstitutional, significantly less highway construction work was awarded to companies owned by minorities and women. While companies owned by blacks received slightly more work (up from zero in 1998 to 0.5% in 2000) Hispanic, women- and Native American-owned firms experienced a significant decline in participation. As previously mentioned, there was still a

finding of disparate treatment of minority- and women-owned businesses in Denver" (Verdugo 2002, 149).

Response to cited disparity study flaw #3:

The Justices' questioned whether such discrimination results from policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity and gender: or are discriminatory acts contrary to policy and unknown to firm owners. Research indicates that although policies are in place, overt (e.g., firms that deliberately exclude the utilization of minority and female owned businesses) and subtle (e.g., firms that unconsciously exclude minority and female owned business, perhaps because of the business' size, experience or location) discrimination continues to take place.

The study authors reported that "discrimination can prevent minorities from becoming business owners, hamper the growth of minority-owned businesses and contribute to their failure. In the absence of discrimination, it is likely that there would be more minority owned firms, and existing firms would have greater capacity and experience. The authors further explained that the differing availability measures used to calculate disparity ratios are affected by past and present discrimination against minorities. But even the most inclusive of all measures of availability used in the disparity studies do not take into account the fact that many minority firms were never created because of discriminatory barriers" (Enchautegui et al. 1997, 3-4).

Discriminatory barriers prevent minority-owned firms from becoming more numerous, from increasing their capacity, and from obtaining government contracts. The Urban Study authors suggest that over the past 30 years, government at the federal, state and local levels have responded to discriminatory barriers to minority firm formation, development and participation in the government procurement process with a wide range of procurement related initiatives. Although initiatives are in place, discrimination continues to plague minority and female owned businesses and limit their existence. These initiatives are now under attack and are the focus of Supreme Court scrutiny to substantiate their continued need by providing evidence of current day discrimination.

Questions unanswered by Denver's disparity study that resulted in flaws 3 as cited by the Judge Matsch:

4. Would Denver's use of those discriminating firms without requiring them to give work to certified MBEs and WBEs in the required percentage of each project make Denver guilty of prohibited discrimination (Or has Denver been a passive participant in discrimination). (F.3d b1145, 10th Cir. Court 2000)

Response to cited disparity study flaw #4:

The Urban Institute Study was inconclusive on this inquiry. However, the study's authors concluded that "large disparities in government contract awards could result from government or private market discrimination. Accordingly, government has a clear responsibility to eliminate direct discrimination in the government contracting process. Therefore, government can play a role in reducing private market discrimination so that it does not end up passively participating in private market discrimination through its contracting process" (Enchautegui et al. 1997, 6).

Research suggests that state and federal government has a compelling interest in enacting and implementing DBE programs. The DBE programs are intended to "level the playing field" for those minority and female firms by enhancing opportunities to fair compete in the procurement process. While some have argued that the DBE programs result in white male contractors not receiving the contracts they would have otherwise expected to receive, without the DBE programs, statistics have not substantiated these perceptions. White males have continued to receive more than their share of government contracts. Speaking more pointedly to the examples relevant to the dissertation test case, DBE programs "affects a small percentage of total federal contracting dollars awarded by the Department of Transportation. In fiscal year 2000, only 7% of the prime contracts and only 2% of federal dollars awarded went to DBEs" (General Accounting Office 2001, 14). Minorities and females would lose the opportunity to compete for federal contracts without DBE programs. This study posits that absent efforts purposefully put in place to assure inclusion, DBE's would be excluded from many contracting opportunities. Therefore, if Denver closes its eyes to the presence of unconscious and/or unintended

discrimination and continues to financially reward these behaviors, Denver would be passive participants of discrimination.

Questions unanswered by Denver's disparity study that resulted in flaws 5 as cited by the Judge Matsch.

5. Is the compelled use of certified MBEs and WBEs in the prescribed percentages on a particular project likely to change the discriminatory policies and programs that taint the industry? (Or is Denver's program an effective remedy for the discrimination that does exist?) (F.3d b1145, 10th Cir. Court 2000)

Response to Cited Disparity Study Flaw #5

The Urban Institute Study was inconclusive on this inquiry. The Urban study cannot be generalized to deduce that Denver's program was an effective remedy for two reasons: (1) the affirmative action program utilized by Denver was not separated from the other type of affirmative action programs and analyzed by the Urban Institute for its individual effectiveness and (2) it would be difficult to determine whether disparities found in the Urban study differ from those that exist solely in the Denver area. The authors of the Urban study indicated that it was difficult to define whether a program was in place because of the differing types of affirmative action programs that exist. For the purpose of the analysis, the Urban study considered a program to be in place when a jurisdiction had adopted mandatory or voluntary goals for minority-or women-owned business participation. When the results of the analyses were compared with those that had a program in place and those that did not, it was clear that disparity was greater when there was no goal programs in place for almost all groups and industries.

Court Criticisms #5 and 6#

> "Doubt was cast on the validity of disparity studies because of the inherent limitations in attempting to collect and measure useful information about the construction industry because of the nearly infinite number of variables affecting the fate of firms. In short, the sentiment was that the construction industry is varied and complex, therefore, they are many non-discriminatory reasons why a firm might choose to work consistently with a small set of subcontractors" (F.3d

b1145, 10th Cir. Court, 2000). The aggregation of all the MBEs and WBEs in estimating availability without regard for the size of the business or the particular type of service or work in which they specialize was a serious flaw in the methodology and impairs the values of the results" (F.3d b1145, 10th Cir. Court, 2000).

Questions unanswered by Denver's disparity study that resulted in flaws 6 as cited by the Judge Matsch:

6. Is the burden of compliance with Denver's program preferential program a reasonable one fairly placed on those who are justly accountable for the proven discrimination? (Or does the Denver MWBE program punish the right people. (F.3d 1145, 10th Cir. Court, 2000)

Response to District Court Criticisms #5, # 6
and cited disparity study flaw #6:

Analytical challenges resulting from court criterion to support affirmative action programs raise concerns that the required evidence standards outstrip the capacity of existing data and research. Among the factors that courts now consider in weighing race-conscious policies include whether:

- policymakers can show with some specificity how current practices and the lingering effects of discrimination have diminished minorities' opportunities (it is not enough to demonstrate general patterns of societal discrimination);
- numerical targets set by government for contracting dollars going to minority-owned firms reflect the availability of minority firms that are "ready, willing and able";
- equivalently effective, race-neutral alternatives exist to set-aside and other race-based policies;
- guidance has been provided on when the preference programs should be terminated, and
- The burdens imposed by race-conscious policies on non-beneficiaries have been minimized. (Enchautegui et al. 1997, 3)

According to the Urban Institute Disparity Study, "together, these standards would not only undermine the *Adarand* Court's assurance that strict scrutiny need not be "strict in theory and fatal in fact," they would effectively repeal affirmative action programs ranging from price preferences to simple outreach. This outcome would not be the product of a political choice that affirmative action is no longer necessary to combat discrimination. Rather it would be the result of inadequate or unavailable data" (Enchautegui et al. 1997, 18).

"The validity of Urban Institute Disparity Study was increased because of the care taken in collecting and measuring useful information about the construction industry categories. In order to be included in the analysis, the individual studies had to: (1) present its findings as disparity ratios or provide the data necessary to calculate disparity ratios, (2) report findings separately by industry categories, (3) report the number of contracts in each industry on which the disparity findings were based or report the statistical significance of each disparity finding, and (4) have more than 80 contracts for all years of the study period combined. This criterion ensured a basic level of consistency and reliability across studies for the Urban Institute analysis" (Enchautegui et al. 1997, 3-4).

"The major findings of the Urban Institute study indicated disparity for all minority-owned and female-owned businesses. The findings were presented for African American-, Latino, Asian-, and Native American- owned businesses. Within each group, findings were also presented separately for broad industry categories, including construction, construction subcontracting, goods (or commodities), professional services (such as architecture or engineering), and other (nonprofessional), services such as housekeeping or maintenance. The results of the Urban Institute analysis drew the following conclusions:

- African American-, Latino, Asian-, and Native American- owned businesses are underutilized (i.e. they receive fewer government contracts dollars than expected, given their availability).

- Minority-owned businesses receive 57 cents of every other dollar expected to be allocated to them based of firm availability (i.e. the median disparity ratio for all minority businesses across finding substantial underutilization of minority-owned businesses.

- Women-owned businesses receive only 29 cents of every dollar expected to be allocated to them based of firm availability. This disparity is even more widespread than for minority-owned businesses: 87 percent of all studies find substantial underutilization of women-owned businesses.

- In each industry category minority-owned and women-owned businesses as a group as underutilized.

- All findings of underutilization are statistically significant with the exception of construction subcontracting and Native American in construction. Statistical significance means that these results are unlikely to be due to chance" (Enchautegui et al. 1997, 3-4).

The research literature suggests that the spending by state and local government makes up a substantial share of the GNP (Affirmative Action Review, 1995), thereby influencing the number and size of minority firms. The literature further suggests that minority and female contractors face significant barriers in the private market (e.g., bonding, insurance, higher supply price, lending, networking with majority business) as well as in the government procurement process (Enchautegui et al. 1997). The government uses tax payer dollars to purchase goods and services and the purchases are often times paid with a mix of federal and local money. When mixed funds are used, the federal procurement rules govern state and local activities. The study findings suggest that performance of state and local government officials is a direct regulatory concern of the federal government. Since eliminating discrimination on the part of state and local government officials is clearly a constitutional responsibility of the federal government, policing discrimination in the private market as well as the passive participation of state and local government within those markets is also a responsibility of the federal government (Enchautegui et al. 1997).

6.3 Summary

The test of the dissertation hypotheses suggests that even with the consolidation of aggregate data from numerous disparity studies commissioned after the *Croson* decision to form one study showing a national picture of disparity, the findings are insufficient to satisfy the concerns of chief Justice Metsch of the District Court of Colorado.

La Noue (2001) attempts to explain the judicial stance taken in regard to disparity studies. He claims that every time disparity studies have been challenged at trail, judges have found them unreliable. Therefore, a number of jurisdictions have settled cases rather than subject their studies to judicial scrutiny. La Noue advocates that although many disparity studies' claims of present day disparities appear quite damaging at first glance, on closer analysis, these statistical conclusions are deeply flawed. The flaws are

1. inappropriate comparisons—the statistical comparisons are not an “apple-to-apple” comparison;

2. insufficient anecdotal evidence—the studies are plagued with low response rates and poorly designed questions; many times the respondent want to remain anonymous; and the allegations are not thoroughly investigated;

3. studies being conducted by individuals who have a vested interest in the result outcomes; and

4. studies often making exaggerated claims of discrimination and failing to identify form of bias that might exist. (La Noue 2001, 214-215)

Ironically, LaNoue (2000) uses the Census Bureau data to declare that between 1982 and 1992, the number of black-owned firms grew 67%, Hispanic-owned firms by 189%, Asian-owned firms by 177% and women-owned firms by 162%. He compares this growth to that of white-male owned firms which was purported to be *only* 24%. La Noue contends that more time and money has been spent in disparity studies investigating public contracting discrimination than in any other area of social research in the nation’s history. And yet, La Noue exclaims, after this enormous public expenditure, the studies have documented no pattern of discrimination against minority businesses by anyone, (government, private industry, prime contractors or professional or trade organizations (LaNoue).

La Noue’s (2000) conclusion follows the theoretical rationale of the transparency phenomenon logic as he proclaims:

> Most whites believe that the overt forms of discrimination that characterized American institutions in the past have disappeared. In their place, procedures based on subtle subjective decisions that sometimes reflected biased assumptions coexist institutionally with affirmative action policies that clearly discriminate against non-favored classes.
>
> If, as many advocates of MBE programs advocate, discrimination is everywhere, committed by everyone, then it may seem futile to eradicate it. . .assertions of generalized marketplace discrimination, “old boy network,” and other nebulous forms of bias may actually retard the formation of minority businesses, especially among African Americans. Who would want to make the investment of capital and labor that a new business requires if they were convinced that discrimination was so prevalent that success was highly unlikely? (211)

If we subscribe to the conservative viewpoint as described by La Noue (and followed by the Justices that follow his logic), proving discrimination would require unambiguous verification with

detailed explanation, the name of the specific actor and victim, a measure of the degree of intent resulting from the discriminatory actions, the exact level of damage to the victim and tangible documentation to show that the damage to the victim could not have resulted extraneously from any other occurrence. Once this is established, one would need to produce witnesses to attest that the event did in fact take place *intentionally* and that the actor knew the consequences of their behavior. Simply put, it would be impossible to prove subtle forms of discrimination. (To paraphrase La Noue, Why would a rationally thinking individual choose to interact with a group of individuals that are destined to fail)?

CHAPTER 7

TRANSPARENCY THEORY REVEALED THROUGH COURT DECISIONS

The final inquiry of this study delves into the rationale serving as the foundation for the thought process leading to judicial findings in discrimination cases. To answer the dissertation questions (What makes discrimination hard to see or acknowledge and Why are policy-makers seemingly blind to discrimination in spite of its presence?) we examining majority and dissenting opinions of Supreme Court Justices' rulings on six precedent-setting cases regarding affirmative action policy to explore value perspectives of the decision makers and check for the presence of the transparency phenomenon to illustrate this blindness in setting anti-discrimination policy. The questioned presented is, "Do Court decisions regarding discrimination reveal the transparency phenomenon?" The results of this inquiry reveal that the visibility of transparency phenomenon increases with the conservativeness of the Court—the more conservative the Court, the higher the probability of transparency phenomenon.

In America federal laws can be made by any of the three branches of government—the executive, legislative and judiciary. Presidents can sign executive orders. Congress can pass statutes. The courts make laws when they rule on matters brought before them. The judicial branch determines whether given practices conform to the law of the land; the judicial branch is also empowered to determine whether executive orders and statutes are constitutional and consistent with established legal doctrine.

The federal judiciary has three levels. At the bottom is the district level. Next is the appellate level (also known as the circuit level). At the highest level is the nine-member Supreme Court. A circuit court can uphold or reverse district court decisions within its jurisdiction, and its pronouncements about what is or is not legal are binding for people in its territory. The United States is divided into eleven circuits. The Supreme Court can uphold or reverse any district court

decision and any appellate (circuit) court decision. Supreme Court decisions are determined by votes, and a simple majority wins. Each decision is written up by one of the Justices in such a way as to make clear the reasoning behind the decision as well as the decision itself. One or more of the Justices that disagree with the majority vote also writes up minority opinions. In some instances, the Justice may concur with the majority vote, but not with the reasoning behind it. Therefore, a separate opinion may be written to explain why the particular Justice voted in a specific manner.

All three branches of the federal government have weighed in on the topic of affirmative action. Since the passage of the Civil Rights Act of 1964 and the signing of Executive Order 11246, there have been numerous challenges to the legality and constitutionality of affirmative action programs. Disagreement among Supreme Court Justices appears to be greater on issues of affirmative action than on any other issues before the Court (Newman 1989). Crosby et al. suggest that one reason for this judicial controversy is that America's legal system has been designed to be reactive and not proactive. Generally, the judiciary is supposed to become involved in correcting bad situations or in punishing wrong doers. In discrimination cases, the actions of these wrong doers are sometimes unintended and quite often the actors are unconscious of the acts and impacts of their behavior (Crosby and Van deVeer 2003). Most controversial is the fact that many Justices can identify with these wrongdoers because they may have been the recipient of similar benefits or performed similar acts in the past.

7.1 The Impact of Supreme Court Decisions on Society

The legal environment of the Supreme Court is examined as a means to address some of the influences on decision-making during cases requiring proof of discrimination. The Court opinions provide narratives that address conceptual factors used to shape the value perspective of the decision-makers. The opinions selected for review are related to cases dealing with proof of current and ongoing discrimination against minorities to validate affirmative action initiatives: *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448

U.S. 448 (1980); Wygant, et al v. *Jackson Board of Education et al*., 476 U.S. 267 (1986); *City of Richmond v. J. A. Croson Co*., 488 U.S. 469 U.S. 469 (1989); *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990); and *Adarand Constructors, Inc. v. Pena*, 115 S.CT. 2097 (1995). Opinions rendered on both sides of the debate in these cases provide the opportunity to deal with the conflicting perspective of these decision-makers.

Supreme Court rulings have the additional important effect of confronting societal controversies, as social norms are often created and legitimized at this level. Public policy is directly influenced by Court rulings. Affirmative action policy has been debated by the Supreme Court, first in response to discrimination against minorities, and later in considering questions of constitutionality of programs put into place to counter the effects of the discriminatory action against minorities. The Court has had a historical role both in making laws and later interpreting and defining the boundaries of that law. The process of judicial review that gave the Court power to proclaim a law or action of government to be unconstitutional greatly expanded the jurisdiction of the Court and has been the driving force of the court's decision-making.

Supreme Court decisions regarding race and civil rights were analyzed by Davis and Graham (1995). They suggest that the Supreme Court initially took an indifferent attitude toward discrimination and left decision-making to the individual states. These events led to the Civil Rights Movement. During this movement, there was an increased vocalization against discrimination and inequity suffered by African Americans. Demands were made for the taking of concrete steps to end this exclusionary behavior. These steps set the tone for changes in the treatment blacks received in all walks of life. The Court, as a collective and revered voice of reason, was able to initiate changes that individuals were unable to make on their own. In addition, the Court may have been attempting to redress its ineffectiveness in cases of racial discrimination that had been presented to it from the time of the Emancipation Proclamation until the Civil Rights Movement. Davis and Graham (1995) discuss the development of the Court as a collective body of influence on American society and the Courts change in stance towards issues of discrimination over the years:

> "Prior to the Civil Rights Act of 1964 the political branches had done almost nothing to deal with the problem facing Blacks in America. The Civil Rights Act of 1957 – the first such legislation passed by Congress since Reconstruction – and later the Civil Rights Act of 1960 were little more then sympathetic gestures towards civil rights interests. It was not until the passage of the 1964 Act that the political branches at last began to come to grips with the problem…Dire circumstances and enormous resources created the environment conducive to its passage. A crucial element in this environment was the strong support given Blacks by the Warren Court, highlighted by the famous Brown decision of 1954. Indeed the Warren Court did not shy away from the problem of race; unlike previous Courts, it met and directly addressed issues that had long been brushed aside and stymied in the political process." (103)

In the face of ineffective law making and the inability of Executive Orders to enforce or punish, the last branch of government left to appeal to was the Courts. The Supreme Court has become a forum for redress for many who have been unable to find relief through traditional methods of political participation, and it was the stage where the debate over the use of minority goals in governmental procurement awards has been played out. The debate over minority goals in governmental contracting must be traced by looking at Court decisions regarding racial discrimination. The Court has been asked on numerous occasions to determine the constitutionality of affirmative steps initiated to eradicate effects of discriminatory practices. Davis and Graham (1995) identify five time periods that demonstrate the Courts' positions on civil rights and discrimination:

> "For example, from 1801 to 1910, the Supreme Court constitutionalized racism, subordinated Blacks and women to second-class citizenship status, disfranchised Blacks and women, and fostered segregation in public education, public accommodations and housing. From 1910-1953, we identify a transitional shift in the Supreme Court's commitment to racial equality. The Supreme Court's institutional commitment to egalitarianism reached its peak during the Warren Court era (1953-1969), the period we refer to as the "modern era" with respect to civil rights. We also view the Burger Court (1969-1986) as a Court in transition, providing continuity with the Warren Court in some policy areas but becoming increasingly conservative in others. Finally, our analysis of the Rehnquist Court (1986-1995) indicates that it has substantially reduced its support for civil rights, compared with the previous Courts during the modern era" (Davis and Graham 1995, 106-107).

Davis and Graham (1995) explain that within the modern era the Supreme Court has historically dealt with issues of race and sex discrimination, and the Burger Court (1969-1986) "addressed controversial equal protection issues, such as busing and affirmative action, which were not previously considered by the Warren Court" (218). Upon the retirement of Justice

Warren, Fortas, Harlan and Black, President Nixon nominated Burger, Blackmun, Rehnquist and Powell. Justice Stevens was appointed by President Ford to replace the retiring Justice Douglas. According to Davis and Graham, "These personnel changes on the Court were sufficient to establish an ideological shift away from the liberal activism of the Warren Court to a more conservative jurisprudence" (Davis and Graham 1995, 218). It is apparent that the Court has the ability to shape and change policy that reflects individuals' and groups' value positions, despite the intentions of the Founding Fathers. Thus judicial interpretation of laws can support current societal beliefs and values, refute those values or offer some alternative that attempts to balance them (Davis and Graham 1995, 218).

7.2 Transparency Theory

Barbara Flagg (1993) asserts that one cornerstone of constitutional race discrimination law is the Supreme Court's ruling that there is a constitutional requirement of discriminatory intent. Under this doctrine "a facially race-neutral practice with racially disparate effects will not be deemed even presumptively inconsistent with the Equal Protection Clause unless it can be shown to have been adopted with discriminatory intent" (953). Flagg has proposed a revised doctrine that would "impose a heightened burden of justification upon the government whenever a challenged facially neutral criterion of decision has racially disparate effects that disadvantage minorities; it emphasizes the concern that race-neutral criteria of decision formulated and deployed by white decision-makers are in fact white-specific" (Flagg 1993, 954-955).

The proposal is asymmetrical; it would not call for similarly heightened scrutiny in the case of a facially neutral practice that disadvantages whites. According to Flagg (1993), "the reason for the asymmetry can be found in the phenomenon that gives rise to the proposal: the fact that whiteness generally is transparent to whites" (969). The transparency of criteria of decision employed by white people impels further examination, which in constitutional doctrine takes the form of heightened scrutiny. Flagg declares that "since only whites have the social power that renders our point of view seemingly perspectiveless, there is no need for similar close

examination of race-neutral criteria of decision that operate to the advantage of nonwhites (assuming there *are* instances of such)" (Flagg 1998, 953).

Flagg (1998) introduces the concept of transparency theory which posits that "race does not speak to most white people. Rather, whites tend to associate race with people of color and to equate whiteness with "racelessness." This transparency phenomenon, the invisibility of whiteness to white people, profoundly affects the way in which whites make decisions; they rely on criteria perceived by the decisionmaker as race-neutral, but which in fact, reflect white, race-specific norms" (Flagg 1998, 3-4). Flagg identifies this transparently white decision-making as a form of institutional racism that contributes significantly, though unobtrusively, to the maintenance of various forms of discrimination. Flagg (1998) contends that transparency phenomenon is present when:

1. "there is a tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific;

2. transparency serves as a mechanism through which white decision-makers who disavow white supremacy impose white norms on blacks. This is typically emphasized by advocates of the color-blind claim that legal (as opposed to social) equality can be achieved only if law is truly color-blind;

3. transparency operates to require black assimilation even when pluralism is the articulated goal; it affords substantial advantages to whites over blacks even when decision-makers intend to effect substantive racial justice; and,

4. an argument of "whites" as potential victims of reverse discrimination is made to justify rational for failing to address inequities." (8-11)

Lipsitz (2008) aligns with transparency theory as he argues that gains and unearned rewards as part of the structured advantage that whiteness produces. He further alleges that a lack of "whiteness" imposes impediments to asset accumulation, employment, housing, and health care for minorities. Lipsitz (1998) states, "racism is as much a matter of interests and pigmentation as it is a matter of attitudes and a problem of property." Lipsitz argues,

> "Whiteness has a cash value; it accounts for advantages that come to individuals through profits made from housing secured in discriminatory markets, through the unequal educations allocated to children of different races, through insider networks that channel employment opportunities to the relatives and friends of those who have profited most from present and past

> racial discrimination, and especially through intergenerational transfers of inherited wealth that pass on the spoils of discrimination to succeeding generations." (vii)

Pierre Bourdieu's (1999) aligns with Flagg and Lipsitz and unconscious theory as he posits that success in society depends largely on the individuals' ability to absorb the cultural ethos or what he refers to as "habitus" of the dominant class. Stately simply, habitus could be described as a set of acquired patterns of thought, behavior and taste. According to Bourdieu, these patterns are the result of internalization of culture or objective social structures through the experience of an individual or group. Bourdieu describes habitus as a system of durable and transposable acquired schemes of perceptions, thoughts and action which he refers to as "dispositions." Individuals develop these dispositions in response to determining structures (such as class, family, and education) and the external environments they encounter. Therefore, according to Bourdieu, the individual's actions are neither wholly voluntary nor wholly involuntary.

7.3 Testing Transparency Theory Using Supreme Court Decisions

For the most part, individual and group complaints regarding the use of affirmative action in securing governmental contracting opportunities have been dealt with in the lower courts. However, current decisions most impacting how organizations continue to address affirmative action contracting programs are frequently making their way up to the federal level. The range of sentiment regarding the required proof necessary to validate the existence of discrimination to justify affirmative action programs is reviewed in the following cases. Additionally, transparency theory will be used to examine the rationale behind Supreme Court decisions impacting proof requirements of present day discrimination in affirmative action implementation strategies for goals programs in procurement awards utilizing federal funding.

The following six affirmative action cases were selected in part because of the sharp divisions of perspective articulated in each judicial opinion. Majority and dissenting opinions express the reasoning that the selected Justice used to arrive at his/her position on the case. All

of the Justices' opinions are not examined in each case; however, the selected opinions examined in each case show either support or non-support of affirmative action. A brief summary of each case is given; then, the majority opinion given by one of the Justices is reviewed for alignment with transparency theory. The minority opinion is considered in the same manner.

Tables A.24 and A.25 (see appendix A) lists the Supreme Court Justices involved in the cases being reviewed and their standings. Table A.26 (see appendix A) highlights key decisions by the Supreme Court regarding Affirmative Action Policy and gives a snapshot of this chapter's discussion by highlighting the case, decision, and Justice position as majority and dissenting proponent.

7.3.1 The Regents of the University of California v. Bakke

The well-known case of *Regent of the University of California v. Bakke* (438 U.S. 265 1978) epitomized the notion of reverse discrimination as a consequence of the implementation of Title VII. It also helped to clarify the use of quotas as a means to measure intent to remedy any identified quotas as a potential source of exclusion of non-protected applicants. The school applied affirmative action to target 16 of the 100 available openings for minority group members. "Along with the benchmark score,[64] economic disadvantage and the status of disadvantaged minority group member were considered in order to be eligible for the 16 seats that were set aside for minority applicants" (Davis and Graham 1995, 309-310).

The Bakke case focused on the practices of admission at the medical school of the University of California at Davis. This case provided the impetus for examination of the implementation of affirmative action policy. The case centered on the constitutionality of the practice of using race to reserve places for minority candidates at the University of California's Medical School at Davis. Allan Bakke, a white male, was rejected twice for admission to the medical school and sued the medical school arguing that his rejection resulted in discrimination

[64] A "benchmark" score was derived for all applicants based on grade point average, the Medical College Admission Test score, letters of recommendation, grade point average (GPA) in science courses

that was prohibited by the 14th Amendment (equal protection clause) and by the Civil Rights Act of 1964. Bakke asserted that minority students with ratings lower than his were admitted, and therefore his race had become a barrier to his admission to the school.

The case decisions were made on two questions: (1) Were Bakke's rights to equal protection denied due to the special admission program? and (2) Can race be used as a factor in the admission process? In the first part, the Court's vote was 5-4 in favor of Bakke. This vote indicates a lack of agreement in the interpretation of both the facts and the intent of the school's special admissions procedure. The Court did find, in the second part of the case, that race could be a factor in admission.

In the *Bakke* decision there was very little on which a majority of justices agreed. As illustrated in table A.26 (appendix A), the four more liberal justices ruled that the plan was valid, neither violating the 14th Amendment nor Title VI, arguing, "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice" (438 U.S. 265 1978) The four more conservative justices opined that it was unnecessary to rule on the constitutionality of the admissions system because it clearly violated Title VI.

Justice Powell was to caste the deciding vote and proclaim the court's judgment. He entered a conservative ruling announced that "the medical school's system of setting aside seats for minorities was unconstitutional, but also sided with the liberals, saying that the use of race as one factor in an admissions process did meet constitutional muster." According to Powell, "The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body" (438 U.S. 265 1978)

There were six separate opinions written. Even when the Justices agreed with one another's conclusion, they disagreed about the reasoning behind the conclusion. Justice Powell gave the majority opinion of the Court finding that the special admissions program at the medical

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and other information. This "benchmark" score, with a score of 500 being the highest, was then used to decide on admission of an individual candidate.

school was unfair to white applicants and declared that Bakke was entitled to admission. The court found that special consideration leading to treatment more favorable than to those without that consideration, unfairly denies favorable treatment to those not under special consideration.

Four of the justices (Burger, Rehnquist, Stewart, Stevens) joined with Chief Justice Powell concluding that a racial quota system by government was in violation of the 1964 Civil Rights Act. Chief Justice Powell, however, concurred with Justices Brennan, White, Marshall and Blackmun in their ruling for the Regents in that race could be used as one criterion of several in the admissions process without violating the equal protection clause of the 14th Amendment. Justice Marshall wrote the minority opinion.

The Judgment

1. "Title VI of the Civil Rights Act of 1964 proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or it agencies.

2. Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner's special admissions program, which forecloses consideration to persons like Bakke, is unnecessary to the achievement of this compelling goal, and therefore invalid under the Equal Protection Clause.

3. Bakke must be admitted into the University" (438 U.S. 265 1978).

Powell's Interpretation

Dissertation Question: *Does the decision maker's judgment align with the transparency phenomenon (white unconsciousness)*?

Yes. Powell suggests that the terms "minority" and "majority" describe only numerical differences. He does not consider, that for most Whites, preferential treatment is a given in many settings. These differences also impact power relationships whereby whites, regardless of past history, have maintained much of the economic and social power in the United States.

> "The concepts of "majority" and "minority" reflect temporary arrangements and political judgments. As observed above, the White "majority" itself is composed of various "minority" groups. Most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of White Anglo-Saxon Protestants" (Davis and Graham 1995, 311).

Powell states that the discrimination faced by blacks in the United States is the same as the discrimination faced by some white immigrants upon their arrival to this country. According to Powell, this kind of discrimination is inherent for a nation of immigrants and cannot be attached to any present consideration of individual circumstance. Powell argues that making a distinction about the level of discrimination faced by a group would possibly lead to claims of discrimination by many who feel that "societal injury is thought to exceed some arbitrary level of tolerability. . .judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces (Davis and Graham 1995, 312).

Powell offers a strict constitutional view of equality in the following statement:

> "Petitioner [the University of California] urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the White 'majority' cannot be suspect if its purpose can be characterized as 'benign.' The clock of our liberties, however, cannot be turned back to 1868 [Emancipation]…It is far too late to argue that the guarantee of equal protection to all persons permit the recognition of special wards entitled to a degree of protection greater than that accorded others" (Davis and Graham 1995, 311).

In responding to the question of whether the University's special admission program provided for a goal or quota, Powell stated that it was beside the point. He further explained that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect, and goes on to say that all such restrictions are unconstitutional. It is his opinion that courts must subject them to the most rigid scrutiny. He writes:

> "This semantic distinction [goals versus quotas] is beside the point: the special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status" (438 U.S. 265 1978).

Justice Powell later refers to a case heard by the Supreme Court shortly after the Emancipation Proclamation. The phase “special wards” was used in this case to suggest that the newly emancipated Blacks did not require any additional protections than those offered to whites under the Constitution and its Amendments and that equality was achieved for blacks by simply changing the law.

Davis and Graham (1995) pointed out the serious problems of injustice that Powell expressed were “connected with the idea of preference itself: First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the groups’ general interest. Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. Third, there is a measure of inequity in forcing innocent persons in respondent’s position to bear the burden of redressing grievances not of their making” (Davis and Graham 1995, 312).

Marshall’s Interpretation

Dissertation Question: *Does the decision maker’s judgment align with the transparency phenomenon (white unconsciousness)*?

No. Justice Thurgood Marshall suggests that the inclusion of Blacks in society should be a compelling interest of the state. Through the use of affirmative action policy, which considers race as a positive factor in admissions, blacks will be integrated into American society. Marshall explains that it would be a great detriment to American society to continue a system of discrimination. Marshall expresses a belief that a society must include all of its members in order to move toward some notion of a public good. Marshall’s opinion focuses on the historical impact of slavery and discrimination and believes that the Constitution was not and is not color-blind in its treatment of blacks

> "In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negroes into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society….It is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of this skin color he never even made it into the pot" (Davis and Graham 1995, 316).

Marshall addresses three important presuppositions about the nature of discrimination in the United States:

1. "Neither socio-economic status nor professional achievement shields Blacks from racism and discrimination. This point refutes opponents of affirmative action claims that blacks of a certain socio-economic or professional status are shielded from the effects of discrimination and are unfairly advantaged.

2. The experiences of Blacks in this country are different in kind and in degree than those of other immigrants. This position conflicts directly with Powell's claim that all Americans have faced discrimination as part of the process of assimilation into American culture.

3. The Constitution and its amendments did not protect Blacks in the past. Therefore it should not be used to prevent government entities from attempting to correct the inequities that resulted from that lack of protection. Marshall states, "The use of the Constitution as a measure of the rights and protections historically extended to Blacks is unreasonable. The 14th Amendment did not provide equal protection for Blacks in most cases." Marshall finds that the only way to deal with then injustices faced today is to deal with the injustices of the past" (Davis and Graham 1995, 316-320).

Other justices, including Justice Brennan, argued that whites do not comprise a suspect class because whites are "not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" (438 U.S. 265 1978). Therefore, Brennan argued, "programs designed to benefit rather than harm minorities ought to be held to a lesser intermediate standard of meeting *important* governmental objectives, where the racial classification is substantially related to meeting those objectives" (438 U.S. 265 1978).

7.3.2 Fullilove vs. Klutznick

In May 1977 Congress passed the Public Works Employment Act, which authorized a $4 billion appropriation for federal grants to be made by the Secretary of Commerce to state and local governmental entities for use in local public works projects. The Act authorized a minority business enterprise (MBE) provision requiring that 10% of each grant be expended for minority business enterprises. The petitioners were several associations of construction contractors and subcontractors and a heating, ventilations and air conditioning business. This group filed a complaint claiming they were forced to endure economic injury because of the MBE requirement. Fullilove alleged that the MBE provision violated the equal protection component of the 5th Amendment's due process clause and various federal statutes, including Title VI of the Civil Rights Act of 1964. The District Court upheld the validity of the MBE provision, and the Court of Appeals for the Second Circuit affirmed, expressly rejecting the contention that the set-aside requirement violated equal protection and also rejecting the plaintiff's statutory claims.

The *Fullilove* case demonstrates how previous decisions are interpreted differently by the then present court. These often opposing viewpoints of precedents led to a continuing battle over the necessity of affirmative action policies to redress present and prior discrimination and the rights of individuals who are assumed to be competing on some standardized and equal level. The Supreme Court ruled that the MBE provisions did not violate the Constitution. The judgment was supported by six justices. The following statements from Chief Justice Burger and Justice Stewart expressed the majority and dissenting opinions of the Court.

The Court noted its usual deference given to Congress:[65]

> "A program that employs racial or ethnic criteria, even in a remedial context, call for the close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the. . .general Welfare of the United States [and to] enforce, by appropriate legislation the equal protection guarantees of the 14th Amendment" (448 U.S. 448 (1980).

[65] This reference points out that the Constitution gives Congress enumerated powers to legislate for the general welfare of the nation and to protect the equal protection rights of all people

The Judgment

The MBE provision of the Public Works Employment Act of 1977 did not violate the Constitution.

Burger's Interpretation

Dissertation Question: *Does the decision maker's judgment align with the transparency phenomenon (white unconsciousness)*?

No. Chief Justice Burger considered whether the limited use of racial criteria was a constitutional means of achieving congressional objectives. He noted that the two issues that needed to be considered in this case were: (1) whether the goals of the Act are within the power of Congress and (2) is the limited use of race and ethnicity as criteria in the achievement of this goal constitutionally permissible and does it violate the equal protection clause and the due process clause of the 5th Amendment? Chief Justice Burger distinguishes between Congress' legislative power and power to promote the general welfare, citing that this power has been upheld in other cases.

> "This court has recognized that the power to "provide for the …general Welfare" is an independent grant of legislative authority, distinct from other broad congressional powers…The Court has repeatedly upheld against constitutional challenge the use of this technique to induce government and private parties to cooperate voluntarily with federal policy...
>
> As a threshold matter, we reject the contention that in remedial context the Congress must act in a wholly "color-blind" fashion. In *Swann v. Charlotte-Macklenburg Board of Education*, we rejected this argument in considering a court formulated school desegregation remedy on the basis that examination of attendance assignments were permissible so long as no absolute racial balance of each school was required. In *McDaniel v. Barresi*, citing *Swann*, we observed that: [I]n this remedial process, steps will almost invariably require that students be assigned 'differently because of their race'. Any other approach would freeze the status quo that is the very target of all desegregation processes. . .and in *North Carolina Board of Education v. Swann*, we invalidated a state law that absolutely forbade assignment of any student on account of race because it foreclosed implementation of desegregation plans that were designed to remedy constitutional violations. We held that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy" (448 U.S. 448 1980 484).

Chief Justice Burger's statement reflects his views on the use of historically based judgments to support the present decision to provide the ten percent "set aside" for minority subcontractors. Chief Justice Burger suggests that even though the Public Works Employment

Act does not state specific cases of discrimination, it is commonly known that barriers to participation did exist. Therefore, it is found that non-traditional practices like those provided in the Act, are necessary to ensure the discrimination is not a barrier in the present. Chief Justice Burger rejected the "white innocence" rationalization as he explained that redistribution, although it may cause a temporary inconvenience or burden on innocent parties, is correct and constitutional. He implies that expectations and rights are different intentions with rights being those things that are expected by the Constitution. Chief Justice Burger's statements imply that contracting opportunities have been distributed unequally in the past and as a primary resource in society, should be redistributed more evenly.

> "Although the Act recites no perambulatory "findings" on the subject, we are satisfied that Congress has abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. . . .
>
> It is not a constitutional defect in this program that it may disappoint the expectations of non-minority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. The actual "burden" shouldered by non-minority firms is relatively light in this connection when we consider the scope of the public works program as compared with overall construction contracting opportunities. Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some non-minority businesses may have reaped competitive benefits over the years from virtual exclusion of minority firms from these contracting opportunities" (448 U.S. 448 1980 484).

A two-step approach was used by the justices to analyze this case. They first asked whether the objective of the legislation was within the powers of the U.S. Congress. They noted that Congress often used its spending power to advance its policy objectives and that the Court repeatedly upheld this power. Next, they acknowledged that Congress may employ racial or ethnic classifications only if those classifications do not violate the equal protection component of the Due Process Clause of the 5th Amendment. After recognizing the need for careful judicial evaluation and stressing the limited scope of their inquiry, the Justices wrote:

> "For its part, the Congress must proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment; administration of the programs must be vigilant and flexible; and when such programs come under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations.
>
> Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*, 438U.S. 265 (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several *Bakke* opinions. The MBE provision of the Public Works Employment Act of 1977 does not violate the constitution" (Antonio 2001, 32).

Stewart's Interpretation

Dissertation Question: *Does the decision maker's judgment align with the transparency phenomenon (white unconsciousness)*?

Yes. Justice Stewart's dissenting opinion indicated that he found unequal treatment, even if it is done temporarily to correct unequal treatment, is unconstitutional. His discussion centered mainly on the Constitution's equal protection clause. Stewart's interpretation relies on the notion that, in spite of historical misinterpretation of the Constitution, the present interpretation must be strict. This kind of interpretation eliminates any possible discussion of past injustices and removes the opportunity for a developmental view of government policy.

> "The equal protection clause of the Constitution has one clear and central meaning—it absolutely prohibits invidious discrimination by government. That standard must be met by every State under the Equal Protection Clause of the Fourteenth Amendment…and that standard must be met by the United States under the Due Process Clause of the Fifth Amendment. Under our Constitution, any official action that treats one person different on account of his race or ethnic origin is inherently suspect and presumptively invalid".
>
> Fullilove v. Klutznick 1980, 485-486

In order to rationalize Justice Stewart's argument, one must assume that governments have never acted to the detriment of a person solely because of that person's race. As discussed earlier, this is clearly not the case (see chapters 2 and 5). Stewart further suggests that America has always had a racially just system: one where a color-blind marketplace accurately determines success. Stewart then contradicts his prior statements as he admitted that racial injustice is a

historical fact in this country and that government has been involved at least in its acknowledgement. He states that the government does have a role in teaching" the public by shaping the public values. Stewart then suggests that to use affirmative action policy is to encourage private discrimination:

> "Most importantly, by making race a relevant criterion once again in its own affairs, the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves in terms of their racial characteristics. Notions of "racial entitlement" will be fostered, and private discrimination will necessarily be encouraged. . . .There are those who think that we need a new Constitution, and their views may someday prevail. But under the Constitution we have, one practice in which government may never engage is the practice of racism—not even "temporarily" and not even as an 'experiment'" (Fullilove v. Klutznick 1980, 386).

Wygant et al v. Jackson Board
of Education et al.

> A collective-bargaining agreement between the Board of Education (Board) and a teachers' union provided that "if it became necessary to lay off teachers, those with the most seniority would be retained, except that at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff" (476 U.S. 267 1986). The Board had received an unfavorable ruling due to a previous reduction of minority workers under the same collective bargaining agreement. Therefore, the Board opted to adhered to the collective bargaining agreement and lay off non-minority teachers while minority teachers with less seniority were retained. The displaced non-minority teachers brought suit in Federal District Court, alleging violations of the Equal Protection Clause and certain federal and state statutes (476 U.S. 267 1986).

The District Court upheld the constitutionality of the layoff provision by dismissing the suit on cross-motions for summary judgment. The District Court held that "the racial preferences granted by the Board need not be grounded on a finding of prior discrimination but was permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing role models for minority schoolchildren" (476 U.S. 267 1986). The Court of Appeals affirmed the District Court's decision.

The Judgment

"The CBA violated the Equal Protection Clause of the 14th Amendment because (1) the Board of Education did not convincingly show that it had engaged in discriminatory hiring practices against minorities and (2) the layoff provision was not sufficiently narrowly tailored" (476 U.S. 267 1986).

Justice Powell's Interpretation

Dissertation Question: *Does the decision maker's judgment align with the transparency phenomenon (white unconsciousness)*?

Yes. As shown in the chart below, Justice Powell announced the judgment of the Court and delivered an opinion in which Chief Justice Burger and Justice Rehnquist joined. Justice O'Connor joined in all parts of the opinion with the exception of Part IV (Antonio 2003, 10).

Table 7.1 List of Justices Ruling on the *Bakke, Fullilove, Wygant, Croson, Metro Broadcasting* and *Adarand* Affirmative Action Cases

Part	Description	Justices Concurring in Opinion
I	The Collective Bargaining Agreement	Powell, C. J. Burger, Rehnquist, and O'Connor
II	Standard of Scrutiny To Apply	Powell, C. J. Burger, Rehnquist, and O'Connor
III	Lack of a Compelling Interest	Powell, C. J. Burger, Rehnquist, and O'Connor
IV	Narrow Tailoring	Powell, C. J. Burger and Rehnquist
V	Decision	Powell, C. J. Burger, Rehnquist, and O'Connor

Source: Robert Antonio. *Adarand Chronicle: From Bakke to Adarand VII* – The Justices 2003. http://www.wifcon.com/analadar_justices.html.

Justices Powell, Chief Justice Burger, Justice Rehnquist and Justice O'Connor noted:

> "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. There are two prongs to this examination. First, any racial classification 'must be justified by a compelling governmental interest. Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal. We must decide whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored" (476 U.S. 267 1986).

According to Justices Powell, Burger, Rehnquist and O'Connor the Supreme Court did not state that:

> "Societal discrimination alone was sufficient to justify a racial classification. They noted that the Court insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications to remedy such discrimination" (476 U.S. 267 1986).

The Justices cited *Hazlewood School District v. United States*, 433 U.S. 299 (1977) as a precedent for determining the proof necessary to show discrimination by statistical disparity. The racial composition of Hazlewood School District's teaching staff was compared to the racial composition of the qualified public school teacher population in the relevant labor market to

determine the number of teacher ready, willing and able to work for the District. The Justices explained that "tying the required percentage of minority teachers to the percentage of minority students could allow the Board to could engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. This is because, a comparison of teachers to students does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices of the teachers" (476 U.S. 267 1986). Chief Justice Burger, and Justice Powell, Rehnquist and O'Connor concluded:

> *"Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future" (476 U.S. 267 1986).*

In assessing the methods to accomplish the race-conscious objective, Justice Powell, Chief Justice Burger, and Justice Rehnquist indicated that "the Court's decisions had always employed a stringent standard of review—however articulated—to test the validity of the means chosen by a State to accomplish the race-conscious purpose." (476 U.S. 267 1986). The Justices articulated a duty to "recognize the need for careful judicial evaluation to assure that any. . .program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal" (476 U.S. 267 1986). They argued, "Under strict scrutiny, the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose" (476 U.S. 267 1986).

Justice Powell, Chief Justice Burger, and Justice Rehnquist indicated that previous Court decisions have recognized that, it may be necessary to take race into account when remedying the effects of prior discrimination. This may cause innocent persons to be called upon to bear some of the burden of the remedy. According to the Justices, this sharing of the burden by innocent parties is not impermissible. However, in reviewing the burden placed on innocent employees at CBA, the Court concluded that the actual effects of layoffs on employees is more significant than to the prospective employment opportunity of a future job. Specifically, they said "In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job" (476 U.S. 267 1986).

Looking to the value of seniority to a union employee, Chief Justice Burger, and Justices Powell, Rehnquist and O'Connor concluded that "the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns' worth even more that the current equity in his house" (476 U.S. 267 1986). They then concluded that

> "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored" (476 U.S. 267 1986).

Marshall's Interpretation

> Dissertation Question: *Does the decision maker's judgment align with the transparency phenomenon (white unconsciousness)*?

No. A dissenting opinion was submitted by Justice Marshall and joined by justices Brennan and Blackmun. These Justices suggested that the case record was informal and incomplete. Justices Marshal, Brennan and Blackmun felt that the case should be sent back to the lower court for development of the facts. In regard to the standard of scrutiny to apply to the case, the Justices stressed their belief that "when the goal is to eliminate the effects of discrimination the remedial use of race is permissible if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives' " (476 U.S. 267 1986).

The Justices contested the concerns about layoffs and providing cases that disagreed with the concept in the plurality's opinion. In summarizing their concerns, the Justices stated:

> "The alleged facts that I have set forth above evidence, at the very least, a wealth of plausible evidence supporting the Board's position that Article XII was a legitimate and necessary response both to racial discrimination and to educational imperatives. To attempt to resolve the constitutional issue either with no historical context whatever, as the plurality has done, or on the basis of a record devoid of established facts, is to do a grave injustice not only to the Board and teachers of Jackson and to the State of Michigan, but also to individuals and governments committed to the goal of eliminating all traces of segregation throughout the country. Most of all, it does an injustice to the aspirations embodied in the Fourteenth Amendment itself. I would vacate the judgment of the Court of Appeals and remand with instructions that the case be remanded to the District Court for further proceedings consistent with the views I have expressed" (476 U.S. 267 1986).

7.3.3 City of Richmond v. Croson

In 1983, the Richmond (Virginia) City Council adopted, in an ordinance, a minority business utilization set-aside plan. Under this plan non-minority prime contractors awarded city construction contracts were required to subcontract at least 30% of the dollar amount of the contract to one or more minority business enterprises from anywhere in the United States. The

minority business enterprise was required to be at least 51% owned and controlled by U.S. citizens who were black, Spanish-speaking, Asians, Native Americans, Inuits, or Aleuts.

Although the city of Richmond, Virginia was 50% black, only 0.67% of its prime contracting dollars went to minority-owned businesses in the five years (1978-1983) preceding the ordinance. It was also established that various contractor associations had virtually no minority businesses within their membership, and that the city's legal advisor had indicated that in light of *Fullilove v. Klutznick*, the ordinance would be constitutional. The Supreme Court ruled that a set-aside program aimed at promoting opportunities for groups that were historically underrepresented violated the 14th Amendment's equal protection clause unless there is specific evidence of discrimination in the industry in which the affirmative action program is applied. Even then, the beneficiaries must be local and the program of limited scope and duration.

The *Croson* decision established the constitutional requirement for those state and local government entities that wish to validate affirmative action procurement programs. It established that in order to specify a racial preference, a local government must either show specific evidence of past and local; discrimination or prove a significant statistically disparity between the number of qualified minority contractors willing and able to perform services and the number actually employed.

Of particular significance was the constitutional standard under which state and local affirmative action programs were to be judged, that of strict scrutiny. This is the most difficult standard to meet. In other words, the Supreme Court would make no distinction between acts that are intentionally and maliciously intended to discriminate against individuals on the basis of race and programs that are adopted with the intention of remedying disadvantages suffered by individuals or groups on the basis of race.

The *City of Richmond v. Croson* divided the Court to an even greater extent than prior affirmative action cases had, producing six separate opinions. However, *Croson* marked that first time that a majority of the Supreme Court held that race-based affirmative action measures were subject to strict scrutiny. It is interesting to note that the facts in *Croson* were strikingly similar to

those in *Fullilove*, except that the set-aside was sponsored by the city of Richmond and the percentage set-aside for minority controlled businesses was 30. Justice O'Connor announced the Court's judgment invalidating the Richmond set-aside.

The Judgment

The Richmond Plan violated the constitution because it was not justified by a compelling interest and the 30% set-aside was not narrowly tailored to accomplish a remedial purpose.

O'Connor's Interpretation

Dissertation Question: *Does the decision maker's judgment align with the transparency phenomenon (white unconsciousness)*?

Yes. Justice O'Connor distinguished *Croson* from *Fullilove* citing that Congress has specific constitutional mandate to enforce the dictates of the 14th Amendment, Section 5 being a positive grant of legislative power authoring Congress to exercise its discretion in determining whether and what legislation was needed to secure its guarantees. Conversely, Justice O'Connor found Section 1 of the 14th Amendment to be a constraint on state power. Unlike Congress, the states could undertake only those efforts to remedy discrimination that were consistent with section 1 (Fair 1997).

> "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at time also include the power to define situations which Congress determines threaten principles of equality, and to adopt prophylactic rules to deal with those situations. See *Kitzenbach v. Morgan*, 384 U.S., at 651 (Correctly viewed, Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment). See also *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (similar interpretation of congressional power under Section 2 of the Fifteenth Amendment). The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race. Speaking of the Thirteenth and Fourteenth Amendment in *Ex Parte Virginia*, 100 U.S. 339, 345 (1880), the Court stated: "They were intended to be, what they really are, limitations of the power of the States and enlargement of the power of Congress" (Antonio 2001, 15-16).
>
> "[that] Congress may identify and redress the effects of societal-wide discrimination does not mean that, a fortiori, the State and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit constraint on state power. . . . The mere recitation of a benign or compensatory purpose for the use of racial classification would essentially entitle the States to exercise the full

> power of Congress under section 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under Section 1" (Antonio 2001, 15-16).

From O'Connor's opinion, it could be inferred that the problem in this case was not affirmative action per se, but rather, the poor evidentiary showing of specific private discrimination in the local construction industry:

> "It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdication. . . if the city show that it has essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice" (488 US at 492).

Justice O'Connor continued her opinion with a recipe for the proper standard of review, pointing out that strict scrutiny was essential in determining whether a racial classification was benign or, instead, motivated by illegitimate notions of racial inferiority or racial politics. It was clearly stated that a mere under-representation of minorities in a particular sector or industry when compared to the general population statistics is an insufficient predicate for affirmative action. Applying its strong basis in evidence test, the Court held that statistics on which Richmond based its MBE program were not probative of discrimination in contracting by the city or local contractors, but at best reflected evidence of general societal discrimination. Justice O'Conner specifically identified the defects of the Richmond plan:

> "[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy…[State and local agencies] had to establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding process or upon determinations made by other competent institutions. . .the foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond contracting industry. . . . It may well be that Richmond has never had an Aluet or Eskimo citizen. This random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination" (488 US at 550).

Marshall's Interpretation

> Dissertation Question: *Does the decision maker's judgment align with the transparency phenomenon (white unconsciousness)*?

No. The dissenters regarded the set-aside provision in *Croson* as indistinguishable from its model in *Fullilove*. Justice Marshall wrote a lengthy dissent in which he pointed to the evidence presented in the *Croson* case and declared:

> "These are precisely the types of statistical and testimonial evidence which, until today, this Court had credited in cases approving of race-conscious measures designed to remedy past discrimination" (Antonio 2001, 20-22).

Marshall further explained why race conscious remedial policies should be subjected to less rigorous review by the Court:

> [I]t is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst…..a profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral government activity from perpetuating the effects of such racism. (488 US at 528, 551-554).

Marshall believed that Richmond had two powerful compelling interests: (1) eradicating the effects of past racial discrimination and (2) preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination. He concluded that the evidence provided by Richmond and supported by the studies of the U.S. Congress offered satisfactory proof of the discrimination suffered by minority businesses

Metro Broadcasting, Inc. v. Federal Communications Commission

This case challenged the constitutionality of Federal Communications Commission's two minority preference policies. Under the first policy "the FCC awards an enhancement for minority ownership and participation in management, which is weighed together with all other relevant factors in comparing mutually exclusive applications for licenses for new radio or television broadcast stations" (497 U.S. 1990, 547, 564-65). This policy was challenged by Metro Broadcasting, Inc. Shurberg Broadcasting of Hartford Inc. challenged the second policy which was known as the distress sale. This policy allows "a radio or television broadcaster whose qualifications to hold a license have come into question to transfer that license before the FCC resolves the matter in a noncomparative hearing, but only if the transferee is a minority enterprise that meets certain requirements" (497 U.S. 1990, 547, 564-65).

These polices were adopted by the FCC as a diversity measure to comply with the Communications Act of 1934. Despite past efforts by FCC to increase minority participation in the broadcast industry, there was very little progress made. FCC felt that this lack of diversity was detrimental not only to the minority audience but to all of the viewing and listening public. The FCC granted Rainbow a television license by allowing substantial enhancements due to its minority ownership. Since Metro Broadcasting did not qualify for these enhancements, their licensing was not granted. Metro filed suit against the FCC and eventually sought review in the Court of Appeals.

"The court remanded the appeal for further consideration in light of the FCC's separate, ongoing inquiry into the validity of its minority ownership policies. Prior to completion of that inquiry, however, Congress enacted the FCC appropriations legislation for fiscal year 1988, which prohibited the FCC from spending any appropriated funds to examine or change its minority policies. FCC closed its Docket 86-484 inquiry and reaffirmed its grant of the license to Rainbow. Metro appealed this decision to the U.S. Court of Appeals for the District of Columbia. When the court upheld the FCC's decision, Metro took its case to the U.S. Supreme Court" (Antonio 2003, 14).

Shurberg Broadcasting of Hartford, Inc. appealed the FCC order approving Faith Center, Inc.'s distress sale of its television license to minority enterprise, Astroline Communications Company Limited Partnership. The appeal ruling was delayed pending resolution of the Docket 86-484 inquiry by the FCC. After the inquiry was closed, the Court reaffirmed its order allowing the distress sale to Astroline. The court then ruled that the distress sale policy deprived Shurberg of its right to equal protection under the 5th Amendment.

The Judgment

The Court ruled that "benign race-conscious measures mandated by Congress—even if those measures are not remedial in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they

serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives" (497 U.S., 1990, 547, 564-65). This decision includes a majority opinion with a new level of scrutiny and a minority opinion completely against the majority decision. The opinion was delivered by Justice Brennan with Justices White, Marshall, Blackmun, and Stevens joining in the opinion (Antonio 2003, 26-27).

7.3 Cases Reviewed by Justices and their Respective Standings on the Issues

Part	Description	Justices Concurring in Opinion
I A	The Minority Ownership Policies	Justices Brennan, White, Marshall, Blackmun, and Stevens
I B	Application of the Policy	Justices Brennan, White, Marshall, Blackmun, and Stevens
II	Standard of Scrutiny To Apply	Justices Brennan, White, Marshall, Blackmun, and Stevens
II A	Important Governmental Objective	Justices Brennan, White, Marshall, Blackmun, and Stevens
II B	Substantial Relationship to the Achievement of the Important Objective	Justices Brennan, White, Marshall, Blackmun, and Stevens

Source: Robert Antonio. *Adarand Chronicle: From Bakke to Adarand VII* – The Justices 2003. http://www.wifcon.com/analadar_justices.html.

Dissertation Question: *Does the decision maker's judgment align with the transparency phenomenon (white unconsciousness)*?

No. In the Supreme Court, Metro challenged the notion that FCC programs aimed at increasing minority ownership would further the national goal of promoting programming diversification. Justice Brennan wrote the majority opinion for the Court. He declared that FCC's program did further the national goal of promoting programming diversification. In approving the FCC's policies:

> "Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." Congress and the Commission do not justify the minority ownership policies strictly as remedies for victims of this discrimination, however. Rather, Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies" (FCC, 497 U.S. 547, 564-65 1990).

The Court noted that FCC adopted and Congress endorsed minority ownership policies only after long study and painstaking consideration of all available alternatives. The FCC's efforts included the following:

- In 1946 and 1960, the FCC directed that station owners discover and meet the broadcast interests of their communities or service areas.
- In the late 1960s, a special commission found that television stations were not providing service to their minority communities. In response, FCC adopted equal employment opportunity regulations for station owners and new guidelines for station owners to devote a significant proportion of their programming to the concerns of minorities and ethnic groups.
- By 1978, FCC determined that its efforts still did not provide an effective means of generating adequate programming diversity. As a result, FCC concluded that ownership was needed to foster the inclusion of minority views in the area of programming (FCC, 497 U.S. 547 1990).

The Court recognized that FCC established minority ownership preferences only after long experience demonstrated that race-neutral means could not produce adequate broadcast diversity. Additionally, the Court noted that Congress followed the FCC's efforts closely and concurred in their minority ownership policy.

Dissertation Question: *Does the decision maker's judgment align with the transparency phenomenon (white unconsciousness)*?

Yes. Four Justices dissented in *Metro Broadcasting*, making a point that the strict scrutiny standard applies to all reviews of racial classification. Justice O'Connor submitted a dissenting opinion that was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. They stated:

> "Almost 100 years ago, in Plessy v. Ferguson, 163 U.S. 537 (1896), this Court upheld a government-sponsored race-conscious measure, a Louisiana law that required "equal but separate accommodations" for "white" and "colored" railroad passengers. The Court asked whether the measures were "reasonable," and it stated that, [i]n determining the question of reasonableness, [the legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort. The Plessy Court concluded that the "race-conscious measures" it reviewed were reasonable because they served the governmental interest of increasing the riding pleasure of railroad passengers. The fundamental errors in Plessy, its standard of review and its validation of rank racial insult by the State, distorted the law for six decades before the Court announced its apparent demise in Brown v. Board of Education, 347 U.S. 483 (1954). [497 U.S. 547, 632] Plessy's standard of

review and its explication have disturbing parallels to today's majority opinion that should warn us something is amiss here" (FCC, 497 U.S. 547, 630-634 (1990).

"Today the Court grants Congress latitude to employ "benign race-conscious measures [that] are not designed to compensate victims of past governmental or societal discrimination," but that "serve important governmental objectives. . .and are substantially related to achievement of those objectives." The interest the Court accepts to uphold the Commission's race-conscious measures is "broadcast diversity." Furthering that interest, we are told, is worth the cost of discriminating among citizens on the basis of race because it will increase the listening pleasure of media audiences. In upholding this preference, the majority exhumes Plessy's deferential approach to racial classifications. The Court abandons even the broad societal remedial justification for racial preferences once advocated by JUSTICE MARSHALL, e.g., Regents of University of California v. Bakke, 438 U.S. 265, 396 (1978) (opinion of MARSHALL, J.), and now will allow the use of racial classifications by Congress untied to any goal of addressing the effects of past race discrimination. All that need be shown under the new approach, which until now only JUSTICE STEVENS had advanced, Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (opinion concurring in part and concurring in judgment); Wygant v. Jackson Board of Education, 476 U.S. 267, 313 (1986) (dissenting opinion), is that the future effect of discriminating among citizens on the basis of race will advance some "important" governmental interest" (FCC, 497 U.S. 547, 564-65 1990).

Transparency theory is visible as the dissenting Justices go on to state:

"Once the Government takes the step, which itself should be forbidden, of enacting into law the stereotypical assumption that the race of owners is linked to broadcast content, it follows a path that becomes ever more tortuous. It must decide which races to favor. While the Court repeatedly refers to the preferences as favoring "minorities," purports to evaluate the burdens imposed on "nonminorities," it must be emphasized that the discriminatory policies upheld today operate to exclude the many racial and ethnic minorities that have not made the Commission's list. The enumeration of the races to be protected is borrowed from a remedial statute, but since the remedial rationale must be disavowed in order to sustain the policy, the race classifications bear scant relation to the asserted governmental interest. The Court's reasoning provides little justification for welcoming the return of racial classifications to our Nation's laws" (FCC, 497 U.S. 547, 564-65 1990).

"I cannot agree with the Court that the Constitution permits the Government to discriminate among its citizens on the basis of race in order to serve interests so trivial as "broadcast diversity." In abandoning strict scrutiny to endorse this interest, the Court turns back the clock on the level of scrutiny applicable to federal race-conscious measures. Even strict scrutiny may not have sufficed to invalidate early race-based laws of most doubtful validity, as we learned in Korematsu v. United States, 323 U.S. 214 (1944). But the relaxed standard of review embraced today would validate that case, and any number of future racial classifications the [497 U.S. 547, 634] Government may find useful. Strict scrutiny is the surest test the Court has yet devised for holding true to the constitutional command of racial equality. Under our modern precedents, as JUSTICE O'CONNOR explains, strict scrutiny must be applied to this statute. The approach taken to congressional measures under 5 of the Fourteenth Amendment in Fullilove v. Klutznick, 448 U.S. 448 (1980), even assuming its validity, see Croson, supra, at 518 (opinion of KENNEDY, J.), is not applicable to this case (FCC, 497 U.S. 547, 564-650 1990).

7.3.4 Adarand v. Pena

Adarand involved a constitutional challenge to a Department of Transportation (DOT) program that compensates prime contractors if they hire subcontractors certified as small businesses controlled by "socially and economically disadvantaged" individuals. The program relied on the Small Business Act which established a government-wide goal for participation of small businesses at not less than 5% of the total value of all prime contracts and subcontract awards for each fiscal year.

This case presented the court with the opportunity to examine whether the status of disadvantaged violated the equal protection clause of the 5th Amendment. Adarand subcontracted for a portion of a project funded by the U.S. Department of Transportation. The company was the lowest bidder which is one primary condition for the awarding of contracts. However, prime contractors would receive extra compensation as an incentive if they subcontracted with subcontractors who were categorized as socially and economically disadvantaged individuals. In this case, the Gonzales Construction Company, which was certified as a minority business, was awarded the subcontract. The petitioner claimed and the Court agreed that the prime contractor awarded the subcontract to the Gonzales Construction Company in order to receive the additional compensation even though Adarand was the lowest bidder for the subcontract.

At issue in this case was the definition of minority and the use of a racial preference in the awarding of government contracts. The Equal Protection Clause was again cited as being violated by the use of such racial preferences. By a 5 to 4 vote, in an opinion written by Justice O'Connor, the Supreme Court held that strict scrutiny is now the standard of constitutional review for federal affirmative action programs that use racial or ethnic classifications as the basis for decision-making. The Court made it clear that this standard applies to programs that are mandated by Congress, as well as those undertaken by government agencies on their own accord." (Antonio 2003, 18) The Court overruled the earlier Metro Broadcasting decision to the

extent that it had prescribed a more lenient standard of review for federal affirmative action measures.[66]

"Under strict scrutiny, a racial or ethnic classification must serve a compelling interest and must be narrowly tailored to serve that interest. This is the same standard of review that, under *Croson*, the Supreme Court applied to affirmative action measures adopted by state and local governments. It is also the same standard of review that applies to government classifications that facially discriminate against minorities" (63 U.S.L.W. at 4529, 4531).

The U.S Supreme Court overturned the 10th circuit decision. The Court ruled that "all racial classifications imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny" (63 U.S.L.W. at 4529, 4531). The Court remanded the case to the lower court for a determination as to whether the SCC was narrowly tailored to serve a compelling governmental interest.

Dissertation Question: *Does the decision maker's judgment align with the transparency phenomenon (white unconsciousness)*?

Yes. Justice O'Connor wrote the majority opinion for the Court which found that any racial preference extended by a government's action should be examined with extreme skepticism. The Court repeated the facts from the earlier Adarand cases. Thereafter, the Court took a bi-focal approach to explaining their position: (1) taking a historical review of decisions dealing with equal treatment under the 5th Amendment and (2) attacking the *Metro Broadcasting* and *Fullilove* decisions. Justice O'Connor had cast the pivotal vote in this cause. Her actions, (consistent with her dissent in *Metro Boradcasting)*, were aimed at enlisting *Adarand* to overrule *Metro Broadcasting* and implicitly *Fullilove*. To achieve this goal, Justice O'Connor had to ignore much of her *Croson* opinion, especially the parts in which she distinguished *Fullilove*. This opinion was

[66] Justice O'Connor criticized the majority for departing from fundamental principals under the equal protection clause and the strict scrutiny standard of review in her dissent. It appears that she eliminates the term benign racial classification from equal protection jurisprudence as she states, "…benign 'racial classification' is a contradiction in terms. Government distinction among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign.."

remarkable for how it deftly recasts the Court's prior affirmative action decisions into inconclusive plurality opinions, with less force than those in the majority of the Court adopted ones (Fair 1999). The Court held that all explicit racial classifications, whether imposed by federal, state or local government, must be subjected to strict scrutiny. Justice O'Connor wrote:

> "The Court's cases through *Croson* had established three general propositions with respect to governmental racial classification. First, Skepticism: "any preference based on racial or ethnic criteria must necessarily receive a most searching examination," *Wygant*. Second, consistency: "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson*. And third, congruence: "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Bolling*. Taken together, these propositions lead to a conclusion that any person, of whatever race, has a right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny" (115 S. Ct 2097, 2102-2104 1994).

Fair (1999) suggests that Justice O'Connor did far more than review precedent in her above statements. By piecing together comments from carefully selected cases, she revised and transformed their context and meaning. Fair contends that O'Connor's opinion implies that racial classifications were first at issue in the 1940s. (This overlooks all the cases regarding desegregation, voting, *Dred Scott* and *Plessy, etc.*) Fair accuses O'Connor of painting over America's blighted racial history, altering to gray what for many had been black and white. The specific cases quoted in O'Connor's opinion lost their focus, creating the misimpression that in each the Court faced an instance of invidious racial discrimination. According to Fair, the Court's analysis in the earlier cases was heavily driven by facts, and the decisions were anything but consistent. However, as a result of the O'Connor revisionism, the Court majority could insist that any racial classification was produced by caste and that none was benign or remedial (Fair 1999).

In an attempt to discount the prior Court precedence, Justice O'Connor stated that the Court in *Metro Broadcasting* took a surprising turn from its principles and repudiated the long held notion that it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government than it does on a State to afford equal protection of the laws. The Justice wrote:

> By adopting intermediate scrutiny as the standard of review for congressionally mandated "benign" racial classifications. Metro Broadcasting departed from prior cases in two significant respects. First, it turned its back on Croson's explanation of why strict scrutiny of all governmental racial classifications is essential. (115 S. Ct 2097, 2105, 1994)

Justice O'Connor suggests that present societal distributions are fair because they have resulted from a pluralistic competition between groups in society. She then suggests that the necessity of race-based or gender-based classifications will be determined through a political process but that their justifications will also be made using the same standard. "Strict scrutiny," "intermediate scrutiny," and now "extreme skepticism" as the standards for justifications have moved steadily towards a position that allows few if any, reasons for distinguishing between groups or individuals regardless of past injustice or present disadvantage. She states:

> "Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant. This is how it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process" (115 S. Ct. at 2106-12 1994).

O'Connor finds that present or temporary unfairness is not acceptable to correct past unfairness. Referencing the Constitution's individual rights, she suggests that the Constitution has historically provided the standards of equality and fairness. O'Connor did, however, admit that some uses of racial classification by the government are legitimate. She insists on strict scrutiny to decide which racial classifications are constitutionally objectionable and which are not. Justice O'Connor states that with the proper evidentiary record, some narrowly tailored affirmative action policies would be upheld as valid:

> "[W]e wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases" (115 S. Ct. at 2118 1994).

Justice Steven's Interpretation

> Dissertation Question: *Does the decision maker's judgment align with the transparency phenomenon (white unconsciousness)*?

No. Four Justices dissented in *Adarand*, insisting that the majority had ignored controlling precedent. Justices Stevens, Breyer, Ginsburg and Souter wrote:

> "As a matter of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of the minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority" (115 S. Ct. at 2133-36).

Justice Ginsburg, citing Stephen Carter, addressed the difference between laws designed to benefit a historically disfavored group and laws designed to burden such a group. Justice Ginsburg cited:

> "[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend…that the issue presented in *Bakke* was the same as the issue in *Brown v. Board of Education* is to pretend that history never happened and the present doesn't exist" (115 S. Ct. at 2136 1994).

Justice Steven's dissenting opinion addressed the historical inequities of application of constitutional law, specifically as it has applied to race. He suggests that the Court's attempt to apply consistency in this standard for justification of race- or class-based remedies assumes that constitutional law has always been just. He finds that invidious discrimination can be easily distinguished from discrimination that is used to remedy past inequities (benign) and states that to assume that they are the same is foolish. Justice Stevens further explains that the term affirmative action is known to be used as a means to correct inequities in academic and employment opportunities. He suggests that no confusion exists as to its purposes and that the Court in its majority ruling implies that discrimination or preference is unconstitutional even when its use is specific and limited. Justice Stevens writes:

> "Instead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications.
>
> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a "welcome mat." It wild treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off of the Supreme court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program that aimed at recruiting black soldiers.

> The Court's explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. But the term "affirmative action" is common and well understood. Its presence in everyday parlance show that people understand the difference between good intentions and bad.
>
> Nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account. For example, if the Court in all equal protection cases were to insist that differential treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provide legitimate basis for disparate treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only on Equal Protection Clause. . . . Under such a standard, subsidies for disadvantaged businesses may be constitutional though special taxes on such businesses would be invalid. But a single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of "equal protection" (115 S. Ct. at 2126 1994).

Justice Stevens then questioned the Court's unequal treatment of race and sex classifications by stating that:

> "…as the law currently stands, the Court will apply "intermediate scrutiny" to cases of invidious gender discrimination and "strict scrutiny" to cases of invidious race discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today's lecture about 'consistency' will produce the anomalous result that the Government can more easily enact affirmative action programs to remedy discrimination against women than it can enact affirmative action programs to remedy discrimination against African Americans – even though the primary purpose of the equal Protection Clause was to end discrimination against the former slaves. See Associated General Contractors of Cal, Inc. v. San Francisco, 813 F 2d 922 (CA9 1987). . . . When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency" (Antonio 2003, 35).

Justice Stevens disapprove of the Court's statement that "there is no significant difference between a decision by the Congress of the United States to adopt an affirmative action program and such a decision made by a State of municipality" (115 S. Ct. at 2126 1994). He referred to that assumption as "untenable because it ignores important practical and legal differences between federal and state or local decision makers" (115 S. Ct. at 2126 1994). He refers to earlier opinions of the Justices in *Metro* and *Fullilove* that showed a distinction between the federal and state government. He quoted Justice Scalia in the *Croson* decision:

> "It is one thing to permit racially based conduct by the Federal Government-whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment. . .and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed" (Antonio 2003, 35).

Justice Stevens then recited from the opinion of Justices Rehnquist, O'Connor and White:

> "What appellant ignores that Congress, unlike State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race" (Antonio 2003, 36).

7.3.5 Summary

Although we began our review with a 1978 case opinion, distorted discourse on the issue of race is not new for the Supreme Court. Twenty years after the Emancipation Proclamation, in 1883, the Supreme Court struck down federal legislation that outlawed discrimination by private actors against the newly freed slaves. The Court stated its impatience with those who would continue to seek race-based remediation:

> "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the status of a mere citizen, and ceases to be a special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected" (Jones 1996, 48).

The opinions rendered by the justices in these cases provide some insight into the recent decisions making processes used to examine questions of discrimination and the remedial measures put in place to eradicate its effect. The use of affirmative action policy in government contracting was used as point of reference for this discussion. The Justices were presented with cases questioning the level of proof necessary to authenticate present day discrimination and the constitutionality of the implementation of affirmative action policy to correct impacts from this behavior. There is a clear distinction between those with conservative or liberal perspectives and those who were unconscious of the governance of whiteness, or the lack thereof (namely, blackness). These distinctions align with transparency theory and are generally uniform with support or non-support of affirmative action policy.

Consistent with the notion of white unconsciousness, a majority of those justices opposed to affirmative action tended to interpret the Constitution as a document that had always been

used fairly and in the best interest of all citizens. The justices supportive of affirmative action policy seemed to take a forward-looking approach to their interpretation of the Constitution. They recognized that the document had been interpreted in the past to the detriment of many and in order to correct those inequities, it should be viewed as a means to make distribution of a crucial resource more equal in the present. These justices also reminded us that the debate was over the distribution of opportunities, not individual awards of contracts, jobs or seats in a classroom. However, these opportunities are of a finite number. As these opportunities diminish with the inclusion of more candidates and shrinking resources, these debates will become more heated.

Table A.27 (appendix A) lists the justices who wrote majority or dissenting opinions in the examined cases. The perspective (conservative or liberal) was determined based on quotes made in majority or dissenting opinions and alignment with suppositions made by Flagg (1995) in her explanations of transparency theory is noted for each justice. There is a consistent pattern of the favoring of affirmative action policy by liberal justices that did not appear to be unconscious of the advantages that "whiteness" brings.

Table A.27 (appendix A) indicates a dramatic shift from a more liberal court in the 1970s and 1980s to a more conservative court from the 1990s to the present. The oft-cited *Metro Broadcast, Inc. v. Federal Communications Commission* case was the last decision made by a majority liberal court. Justice Marshall, Brennen, Blackmum and White left the Supreme Court before the 1995 Adarand decision. It was these Justices, joined by Justice Stevens that set the "new" precedence which stated that benign race-conscious measures mandated by Congress—even if those measures are not remedial in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important government objectives within the power of Congress and are substantially related to achievement of those objectives. This decision included a new level of scrutiny, immediate scrutiny. It also produced a minority opinion (from Justices O'Connor, Scalia, Kennedy and Rehnquist) that was directly opposite the majority. Justice Clarence Thomas' vote elevated this group's perspective to a majority in the 1995 *Adarand* case.

CHAPTER 8

CONCLUSION AND FUTURE RESEARCH

8.1 Contributions

Discrimination contributes to current day disparities. Traditional disparities (e.g., income, education, morbidity, employment) and expanded disparities (e.g., wealth, space, access to opportunity, developmental potential, structural institutional arrangements, voice) can create concentrated poverty. In areas of concentrated poverty, residents are cut off from meaningful access to opportunities. “Opportunity structures are the resources and services that contribute to stability and advancement. Fair access to opportunity structures is limited by segregation, concentration of poverty, fragmentation, and sprawl in our regions for low-income households and families of color. Because opportunity structures exist as a web, a multi-faceted equity-centered approach is needed” (Verdugo 2002, 45).

Affirmative action programs began as a small step taken by the federal government to ensure inclusiveness on contracts sponsored by the federal government. These contracts were used as a carrot to encourage business to utilize and employ minority (and later female) citizens. As a result of the heightened controversy over affirmative action policy, numerous data has been collected and studies conducted. The challenge here was that the more analyses made, the more visible the unexplained disparities between minorities and females when compared to white males. After discounting other arguments to justify these disparities,

discrimination is left as a viable culprit. The prevailing inquiries centered on who, how and why do individual's discriminate.

This dissertation examines discrimination by using federal contracting affirmative action programs as one focal point. In September 2000, the Milken Institute and the U.S. Department of Commerce's Minority Business Development Agency (MBDA) developed report to discuss the significance of minority- and women- business to the U.S. According to the report, exclusion of minority businesses would create instability in the economic growth of the nation. The report also noted that "without broad-based institutional investor participation in minority business communities—which are predicted to soon be the new majority of businesses—continued growth in the American economy is impossible, affecting not just minority business but putting the nation's macro economy at risk" (Milken Institute & U.S. Dept. of Commerce 2000, iv).

According to the report, "minority firms receive only 2% of all private equity investments and 3% of all Small Business Investment Company Investment funds. This underinvestment in minority business also limits employment growth. Minorities account for 70% of the growth in the U.S. workforce and minority firms, as with other entrepreneurs, are an important source of job, income, and wealth creation." (Milken Institute & U.S. Dept. of Commerce 2000, iii) "The report warns that without minority labor force participation, labor shortages will become acute, further limiting productivity and growth. Therefore, access to capital for minority-owned firms is vital for the healthy development of this growing sector of American businesses (Milken Institute & U.S. Dept. of Commerce 2000, v).

The review of the numerous theories concerning racism (e.g. critical race theory (CRT), unconscious theory, the realist perspective, political economy/Marxism, transparency theory) and the synthesis of this literature into the contextual, conceptual and subconscious typology has allowed an analysis of precedent setting court cases used to set the tone, interpret and enforce important social policies impacting discrimination. This, followed by an application of Flagg's transparency theory to hone in on why policy-makers are striking down affirmative action policy is a unique contribution that has not been previously presented.

The central inquiries addressed in this dissertation are: (1) *What makes discrimination hard to see or acknowledge and* (2) *Why are policy-makers seemingly blind to discrimination in spite of its presence*? The research suggests that the answer to both questions is "unconscious conditioning." Unconscious conditioning manifests from three points of influence, which are at play during the decision-making process. These three points of influence include: (1) those factors external to the decision-maker that shape the arena of debate (e.g. media depiction, educational attainment) –Contextual factors; (2) the decision maker's conceptualization of important ideas (e.g., political socialization, community, self interest, equity and fairness) – Conceptual factors and (3) subconscious conditioning and socialization, which influences how the decision maker perceives, believes and responds to people, things and events. – Subconscious factors.

It is important to recognize (and understand) the existence of unconscious theory in the decision-making process because of the significant impact it has on the development, interpretation and enforcement of social policy. It is noteworthy to point out that overt forms of discrimination that characterized American institutions in the past are less common. However, most significant, when creating and applying social policy today, one must be aware of the subtler, more subjective forms of discrimination reflected in slanted decisions and biased assumptions that coexist despite the decision-makers intent (or lack of intent) to discriminate against non-favored classes.

Every individual makes significant life impacting decisions everyday, from the most basic: (whether to allow a panicked driver in front of you to avoid missing the exist lane); to the more serious (determining whether a person who has stolen items from the grocery store should be imprisoned or given a probationary sentence). Unconscious conditioning influences everyday decision-making and is cultivated from numerous environments. One's political affiliation, social surroundings, media influences, economic atmosphere, cultural exposure, conservative/liberal nurturing, and societal pressures resulting from position obligations sets the foundation of how we internalize and process information received for making decisions. When unconscious

conditioning hampers one's ability to be fair in their decision-making, unconscious discrimination occurs.

Affirmative action programs have been required to bear so much practical and symbolic weight -- that we often overlook other ways of fighting discrimination. Behaviors, perceptions and internalized beliefs are formed during the early childhood and formative years. Putting social policies in place to ensure grad school diversity would increase social interaction between children of different races. This will serve as a catalyst to debunk stereotypes, myths and negative feelings resulting from lack of knowledge due to disassociation.

Since, public policy is directly influenced by Court rulings, this dissertation focused on the Court system as the decision-makers for social policy. Supreme Court rulings have the important effect of confronting societal controversies, as social norms are often created and legitimized at this level. The Justices appointed to the Courts have the ability to shape and change policy that reflects individuals' and groups' value positions, despite the intentions of the Founding Fathers. Thus judicial interpretation of laws can support current societal beliefs and values, refute those values or offer some alternative that attempts to balance them.

In the face of ineffective law making and the inability of Executive Orders to enforce or punish, the last branch of government left to appeal to was the Courts. The Supreme Court has become a forum for redress for many who have been unable to find relief through traditional methods of political participation, and it was the stage where the debate over affirmative action has been played out. The Court has been asked on numerous occasions to determine the constitutionality of affirmative steps initiated to eradicate effects of discriminatory practices.

The inability of social policy to combat discrimination contributes to the denial of basic necessities for entire segments of American society and potentially creates a nihilistic state of hopelessness and despair for those communities. Therefore, it is extremely important that decision-makers at this level are able to recognize (and understand) the concept of "unconscious theory" and pinpoint when their own self biases influence their rulings with regard to public policy.

Ensuring that legislatures are demographically representative of the diverse classes of citizens that it represents may help in the delivery of more balanced judicial decisions "Political representatives tend to be drawn from the elite stratum of society. Even where representatives are chosen through fair and democratic elections, it is often said that legislative assemblies remain "unrepresentative," and, in particular, that they are under-representative of women, ethnic minorities, and the poorer and less educated social classes" (Bird 2004, 3). When classes of citizens have some members of their own group in the representative body, their issues and interests are be better understood and attended to.

8.2 Limitations of the Study

This research paper applies to the study of race- and gender-conscious permissibility in purchasing policies and the disparity studies activated as the result of the *Croson* case. It examines discrimination encountered by Disadvantaged Business Enterprises (DBEs) in the competitive federal procurement environment. This review is limited in several important respects. First, it is concerned solely with disparity study used for statistical evidence to prove continued discrimination of minority and female business in governmental contracting. One problem with much of the debate over affirmative action is that it lumps together a large number of highly disparate areas and programs. These programs range from the awarding of contracts to minority owned businesses, to policies governing hiring and promotions, to the admission policies of colleges and universities. Most importantly, the arguments that pertain to one area may or may not pertain to the other.

Second, discrimination in contracting is not an isolated act; it is intermingled with other varying forms of discrimination. Fish (1993) cites the following example:

> If two individuals of equal education, cultural sophistication, level of affluence, and so forth were compared as they went about everyday life activities, one would expect that their life expectation would be about the same. However, if the two differed in only one attribute, one being White and the other Black, that small difference would mean everything.
>
> The inescapable conclusion found that alike though they may have been in almost all respects, one of these individuals, because they were Black, would lead a significantly lesser life than their White counterpart: they would be housed less well and at greater

> expense; they would pay more for services and products when and if they were given the opportunity to buy them; they would have difficulty establishing credit; the first emotions they would inspire on the part of many people they met would be distrust and fear; their abilities would be discounted even before they had a chance to displace them; and. above all, the treatment they received from minute to minute would chip away at their self-esteem and self-confidence with consequences that most people could not even image.
>
> No matter how well groomed, eloquently spoken or highly skilled, it really won't matter, because determinations are made on the basis of skin tone alone, which affects the entire quality of life. (Fish 1993, 319)

This study lacks the ability to highlight a comprehensive approach by painting a more complete and powerful portrait of the role that discrimination plays in daily life. It merely touches on a single area of economic activity, government contracting.

APPENDIX A

TABLES

Table A.1 Post-Croson Disparity Studies Included in Urban Institute Analysis

Location	Title, Author and Date of Disparity Study
Alabama	Birmingham-Jefferson County Transit Authority, Final Report of a Study to Support a Disadvantaged Business Enterprise Set-Aside Program, MGT of America, August 17, 1992
Arizona	Disparity Study: City of Phoenix, BBC, July 1993
Arizona	The City of Tucson Disparity Study, BBC, June 3, 1994
Arizona	Pima County Disparity Study, BBC, June 1994
Arizona	The Maricopa County Minority and Women – Owned Business Enterprise Program Study, Mason Tillman (publication are not given – report commissioned in September 1989)
California	The Utilization of Minority and Women-Owned Business Enterprises by Alameda County, NERA, June 1992
California	The Utilization of Minority and Women Owned Business Enterprises by Contra Costa County, NERA, May 1992
California	The Utilization of Minority and Women Owned Business Enterprises by the City of Hayward, NERA, March 1993
California	Sacramento Municipal Utility District: M/WBE Disparity Study, Mason Tillman, October 1992
California	Oakland Unified School District Disparity Study, Mason Tillman, November 1994
California	City of Richmond Disparity Study, Mason Tillman, March 1994
California	City of San Jose Disparity Study: Professional Services and Procurement, Mason Tillman, April 1995.
California	MBE/WBE Disparity Study For the City of San Jose (Construction), BPA Economics, Mason Tillman and Boasberg and Norton, 1990
Colorado	Denver Disparity Study: Goods, Services and Remodeling (Phase II of an earlier study), BBC, June 27, 1991
Colorado	Denver, The Utilization of Minority and Women Owned Business Enterprises by the Regional Transportation District, NERA, September 14, 1992
District of Columbia	Discrimination Study on Minority Business Enterprises: Final Report, District of Columbia Department of Human Rights and Minority Business Development, A. D. Jackson Consultants, Inc. July 1, 1994.
Florida	State of Florida: Minority/Women Business Study, "Phases I-II, TEM Associates, Inc. December 1990

Table A.1—*Continued*

Florida	State of Florida: Minority/Women Owned Business Discrimination Study, prepared for Metropolitan Dade County, Parts I-IV, MRD Consulting, November 29, 1993
Florida	City of Jacksonville Disparity Study, D. J. Miller, November 1990
Florida	Disparity Study for Orange County Consortium, D. J. Miller, February 24, 1993
Florida	City of St. Petersburg Disparity Study, D. J. Miller, June 1990
Florida	City of Tampa Disparity Study, D. J. Miller, November 1990
Illinois	City of Chicago, Report of the Blue Ribbon Panel to the Honorable Richard M. Daley, Mayor of the City of Chicago, March 29, 1990
Louisiana	Discrimination in New Orleans: An Analysis of the Effects of Discrimination on Minority and Female Employees and Business Owners, NERA, September 13, 1994
Louisiana	State of Louisiana Disparity Study, Volume II: An Analysis of Disparity and Possible Discrimination in the Louisiana Construction Industry and State Procurement System and its Impact on Minority and Women Owned Firms Relative to the Public Works Arena, D. J. Miller & MBELDEF, June 1991.
Maryland	The Utilization of Minority-Business Enterprises by the State of Maryland, prepared for the State of Maryland and Department of Transportation, BERA, December 6, 1994.
Maryland	State of Maryland Minority Business Utilization Study, Final Report, Volumes I & II, A. D. Jackson Consultants, Inc. and Coopers & Lybrand, March 15, 1990
Maryland	An Examination of Prince George's County's Minority Business Program, Parts I-III, February 1991
Massachusetts	Executive Office of Transportation and Construction, Disparity Study, Phase I: Final Report, D. J. Miller, March 16, 1994
Massachusetts	The Utilization of Minority and Women Owned Business Enterprises in the Boston Metropolitan Area, NERA, June 1994.
Minnesota	The Disparity Study of Women/Minority Business, City of Minneapolis, BBC, June 1995
Minnesota	The Multi-Jurisdictional Disparity Study of Minority/Women Business Enterprises: City of St. Paul, BBC, September 1995
Minnesota	The Multi-Jurisdictional Disparity Study of Minority/Women Business Enterprises: Ramsey County, BBC, September 1995
Minnesota	The Disparity Study of Women/Minority Business Enterprises: Hennepin County, BBC, June 1995

Table A.1—*Continued*

Minnesota	Multi-Jurisdictional Disparity Study of Minority/Women Business Enterprises: Independent School District Number 625, BBC, September 1995
Nevada	Regional Economic Disparity Study: City of Las Vegas, and Las Vegas Area Local Governments (Including: City of Las Vegas, Clark County Department of Aviation, Clark County Department of General Services, Clark County Regional Flood Control District, Clark County Sanitation District, Clark County School District, Housing Authority of the City of Las Vegas, Housing Authority of the County of Clark, Las Vegas-Clark County Library District, Las Vegas Convention and Visitors Authority, Las Vegas Valley Water District, Regional Transportation Commission, University Medical Center, the University of Nevada, Las Vegas, and the Community College of Southern Nevada, BBC, July 1994
New Mexico	Disparity Study: City if Albuquerque, BBC, December 1995
New Mexico	New Mexico State Highway and Transportation Department Disparity Study, Volumes I & II, BBC, January 1995
New York	A Study of Disparity and Utilization of Minority and Women Owned Businesses by the Port Authority of NY and NJ, Office of Business and Job Opportunity and the Office of Economic Policy Analysis, June 1993
New York	Utilization of Minority and Women Owned Business Enterprises by the New York City Housing Authority, NERA, September 1993
New York	Opportunities Denied! A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State, Executive Summary and Appendices A-E, New York State Division of Minority and Women Development, 1992
New York	The Utilization of Minority and Women-Owned Business Enterprises by the City of New York, NERA, January 24, 1992
New York	City of Syracuse Report of Local Public Works Contracting, Knowledge Systems and Research, January 1991
North Carolina	City of Greensboro Minority and Women Business Enterprise Capacity Study, and City of Greensboro Minority and Women Business Enterprise Disparity Study, North Carolina Institute of Minority Economic Development, January/July 1992.
North Carolina	Final Report: Minority Business Disparity Study to Support City of Asheville Minority Business Plan, Research and Evaluation Associates and MGT of America, October 29, 1993
Ohio	City of Cincinnati Croson Study, Volumes I & II, Institute for Policy Research, University of Cincinnati, April 17, 1992

Table A.1—*Continued*

Ohio	City of Columbus, Predicate Study, BBC and MBELDEF, August 1992, and City of Columbus Predicate Study Second Supplemental Report: Construction, Goods and Services, BBC, January 1995.
Ohio	City of Dayton Disparity Study, D. J. Miller, March 1991
Pennsylvania	The Utilization of Minority and Women Owned Business Enterprises by the Southeastern Pennsylvania Transportation Authority, NERA, September 29, 1993
Tennessee	Memphis/Shelby County Intergovernmental Consortium Disparity Study, D. J. Miller, October 1994
Texas	The State of Texas Disparity Study: A Report to the Texas Legislature as Authorized by H. B. 2626, 73rd Legislature, NERA, December 27, 1994
Texas	Availability/Disparity Study: Fort Worth Transportation Authority, BBC, November 1993
Texas	Availability/Disparity Study: Dallas/Fort Worth International Airport, BBC, November 1993
Texas	Disparity Study: City of Fort Worth, BBC, November 1993
Texas	Disparity Report for Houston City Government, D. J. Miller, November 1994
Texas	Availability and Disparity Study for the City of Dallas, D. J. Miller, February 1995
Texas	San Antonio, The Utilization of Minority and Women Owned Business Enterprises in Bexar County, NERA, April 15, 1992
Wisconsin	M/WBE Disparity Study for the County of Milwaukee, City of Milwaukee, and Milwaukee Public Schools, Affirmative Action Consulting, Ltd. And Ralph G Moore and Associates (AAC/RGMA), April 1992

Source: *Urban institute report. Does minority-owned business get a fair share of government contracts?* (1997)

Table A.2 Post-Croson Disparity Studies Forwarded by Department of Justice, Reviewed but Excluded for Urban Institute Analysis

Location	Title, Author and Date of Disparity Study
California	Alameda County Transportation Authority Disparity Study, Mason Tillman, June 1994
Reason for Exclusion from Analysis	Utilization data is for Alameda County, not the transportation Authority. The utilization data is taken directly from the NERA study on Alameda County which is included. Study was not included in order to avoid duplication
California	City of Los Angeles, Department of Airports: MBE/WBE Utilization Study-Executive Summary, Mason Tillman, January 1993
Reason	No calculation of availability is performed. The Study demonstrates extremely low levels of utilization which may be useful by themselves or if availability data were compiled.
Colorado	Denver Disparity Study Phase I: Construction and Professional Design Services, BBC, June 22, 1990
Reason	The study does not test findings for statistical significance and does not provide number of contracts by industry. In addition, it is poorly organized and unclear.
Colorado	Analysis of Minority and Women – Owned Businesses in the Denver Metropolitan Area: Goods and Services Marketplace, BBC, 1995
Reason	Study examined disparity in the private sector, not in government contracting.
Colorado	Analysis of Minority and Women – Owned Businesses in the Denver Metropolitan Area Construction and Professional Design Marketplace, BBC, 1995
Reason	Study examined disparity in the private sector, not in government contracting.
Colorado	Potential Annual Goal Setting Methodology for General Services, BBC, 1995
Reason	This was not a disparity study, but a set of recommendations about how Denver should set goals in the General Service area.
Connecticut	The New Connecticut: Toward Equal Opportunity in State Contracting. Hendersen, Hyman & Howard, (date unclear)
Reason	The study does not provide estimates of availability. The study does contain extensive legislative history and ample evidence of a historical trend of non-compliance with legislated set-aside goals.

Table A.2—*Continued*

Connecticut	Committee Report: Special Committee on Section 12 ½ Review: New Haven, Board of Aldemen: Minority and Women Participation in the New Haven Construction Industry, with appended report by Jaynes and Associates, May 23, 1990
Reason	Only scant information is provided on utilization and availability. What information is provided does not necessarily match up in terms of time periods. The study contains an excellent analysis of historical discrimination in the New Haven construction trades.
District of Columbia	Availability and Utilization of Minority and Women – Owned Business Enterprises at the Metropolitan Washington Airports Authority, NERA, February 14, 1990.
Reason	The method used to calculate utilization appears to be flawed. Utilization appears to be based on the required goal for each contract rather than an examination of the actual dollars received by minority businesses. It is also unclear how the estimates of the disparities in the number of awards are calculated.
District of Columbia	The Metropolitan Washington Airport Authority. Local Disadvantaged Business Enterprise (LDBE) Programs. An Examination of its Effectiveness in Improving Contract Access for Minority and Women Business Enterprises, MBELDEF, April 22, 1992
Reason	This is not a disparity study. Instead this document is an attempt by MBELDEF to evaluate the "race-neutral" LDBE program which was put in place after the Metro Airports Authority disbanded its MBE program in the wake of Croson. For the most part, this study consists of surveys and interviews with MBEs, attempting to determine what changes in access have accompanied changes in the program. The only data provided regarding utilization before and after the program was cut off. The study reports the M/WBE utilization was 33 percent under the previous mandatory preference program and that M/WBE participation fell to 9-15 percent under the new LDBE program.
District of Columbia	An Examination of86 {Washington Suburban Sanitary Commission's} WSSC's Minority Business Program, Summary and Recommendations, Part I: Legal Analysis, MBELDEF, March 1988.
Reason	The key part of this study (Part II) was not received. That section probably contains whatever data analysis was performed by the authors. A review of the executive summary suggests that this report does not appear to calculate availability in a useable way

Table A.2—*Continued*

Florida	Dade County Public Schools, Minority Business Enterprise Utilization Study Recommendations and Administrative Responses, Bureau of Management and Accountability Division of Minority Business Enterprises, April 24, 1991.
Reason	This study did not have the necessary data for calculating disparity ratios.
Florida	Hillsborough County, Hillsborough County Disparity Study, D. J. Miller, (date unclear, pre-Croson)
	Organization of data in the study makes it impossible to determine number of contracts in each industry category. No disparity ratios are calculated and therefore no standard error tests are conducted. The study pre-dates the Supreme Court's decision in Croson
Florida	Final Report: City of Tallahassee MBE Disparity Fact-Finding Study, MGT of America, Inc. January 11, 1990.
Reason	The study does not test findings for statistical significance and does not provide number of contracts by industry.
Georgia	Public Policy and Promotion of Minority Economic Development City of Atlanta and Fulton County, Georgia, Brimmer and Marshall, Volumes I-VIII, June 29, 1990.
Reason	While this study provides a huge amount of information, it does not present any appropriately paired data on utilization and availability to calculate disparity in government contracting. In most cases, availability and utilization data are not presented by industry or broken down by racial groups or gender. Where such data are presented (e.g. for construction) the availability data is presented for "all minorities" while the utilization data are presented for minorities and women combined, and thus calculation of disparity ratios is not possible. The study focuses on disparity in the private market.
Georgia	Unequal Access: Minority Contracting and Procurement with the Atlanta Board of Education, Thomas Boston, August 8, 1991.
Reason	Study does not calculate statistical significance or report number of contracts by industry. The study shows that 50 percent of the firms listed as minority-owned by the school board are in fact owned by White men. The study also finds that minority-owned businesses that had applied to be included on the list of potential bidders were not included.

Table A.2—*Continued*

Illinois	Report Concerning Consideration and Adoption of the Revised Remedial Plan for Minority and Women Business Enterprise Economic Participation, Board of Education of the City of Chicago, January 30, 1991.
Reason	Study does not calculate statistical significance or report number of contracts by industry
Illinois	Predicate Study for the Cook County Minority and Women – Owned Business Enterprise Program, by Thomas Abram and James J. Zuehl, Vedder, Price, Kaufman and Kaufman, September 2, 1993.
Reason	Study does not break down disparity results by industry
Louisiana	State of Louisiana Disparity Study: Volume I of An Analysis of Disparity and Possible Discrimination in the Louisiana Construction Industry and State Procurement System and its Impact on Minority and Women-Owned Firms Relative to the Public Works Arena, LSU and Southern University, 1990.
Reason	The study does not provide disparity results in a form consistent with the other studies in our analysis. The study provides an interesting regression analysis of disparity, controlling for a number of factors that could affect the award of government contracts including experience, bonding and revenues.
Louisiana	An Analysis, Critique and Chronicle of the Audubon Park Commission Minority Business Enterprise Plan, Xavier University of Louisiana, (date unclear)
Reason	This study has no availability measurements – it deals exclusively with minority participation. It does include a good deal of anecdotal evidence and an interesting discussion of “fronting” and other plan “management:” issues.
Louisiana	Basic Findings, Conclusions and Recommendations on the Audubon Park Commission Minority Business Enterprise Plan, Xavier University of Louisiana, August 8, 1990.
Reason	This study was simply a summary of the above study. Again, no availability measures were included.

Table A.2—*Continued*

Maryland	City of Baltimore, Notice of Public Comment Period and Assessment of Baltimore City's Minority and Women's Business Enterprise Program in Light of Croson: Draft Report, by Michael Millemann and Maxwell Chibundu, Maryland School of Law, November 1989.
Reason	This study provides very sketchy information about availability and especially about utilization. It also does not provide either the number of contracts or tests for statistical significance.
Maryland	National Capital Parks and Planning Commission, Minority, Female, Disabled Business Utilization Study, AD Jackson Consultants, Inc. November 4, 1992.
Reason	The study does not test finding for statistical significance and does not provide number of contracts by industry.
Massachusetts	Blueprint of Tasks for Massachusetts MBE/WBE Disparity Studies, Marcus Weisis & Affiliates and D. J. Miller, 1990
Reason	This is not a disparity study. Instead it is a strategy for compiling a disparity study.
Massachusetts	Brief of Defendant MBTA in *Perini v. MBTA* (date unclear)
Reason	This is a legal brief and not a disparity study. Data on government utilization and appropriate measures of availability are extremely sparse.
Massachusetts	Availability and Utilization of Minority and Women-Owned Business Enterprises at the Massachusetts Water Resources Authority, NERA, November 1990.
Reason	Availability and utilization measures are not compatible. Specifically, utilization combines construction and architecture/engineering services, while availability is calculated for each industry separately. This makes it impossible to calculate disparity ratios by industry.
Minnesota	A Study of Discrimination Against Women and Minority Owned Businesses and of Other Small-Business Topics, by the Minnesota Department of Administration, Management Analysis Decision, January 1990.
Reason	Findings reported only for three-digit industry categories
North Carolina	A Preliminary Report and Examination of Marketplace Discrimination in Durham County, MBELDEF, July 1, 1991.
Reason	Preliminary report (not a disparity study) containing no data on utilization or availability

Table A.2—*Continued*

North Carolina	State of North Carolina, North Carolina General Assembly: Study of Minority and Women Business Participation in Highway Construction, MGT of America, Inc. January 26, 1993.
Reason	The study does not test findings for statistical significance and does not provide number of contracts by industry
Ohio	City of Columbus, Construction Supplemental Report, BBC, September 1993.
Reason	The information in this study was actually provided in a more detailed form in the Second Supplemental Report, issued in January 1995. Therefore the data from that report was used.
Ohio	City of Columbus, Employment Predicate Study, BBC, August 1992
Reason	This study evaluates their program requiring contractors to meet certain minority employment goals. It does not deal with disparity in contract dollars awarded.
South Carolina	State, Report to the General Assembly: A Limited-Scope Review of the SC Department of Highways and Public Transportation Minority Goals Program, by the South Carolina Legislative Audit Council, May 1991.
Reason	The study does not test findings for statistical significance and does not provide number of contracts by industry.
Texas	Tarrant County, Availability Study, BBC, November 1993.
Reason	This is not a disparity study, it covers only availability. No data on utilization were provided.
Washington	City of Seattle/Pierce and King Counties, Study of Minority Women Business Participation in Purchasing and Concessions, Washington Consulting Group, July 9, 1990.
Reason	Study does not provide usable availability information. Statistics are provided about the number of minority firms which are available, but no information is provided about the number of all available firms and therefore a ratio cannot be calculated.
Wisconsin	A Study to Identify Discrimination Practices in the Milwaukee Construction Marketplace, Consta and Associates, February 1990.
	Study did not include required disparity information. It focused on a historical review of discrimination in the Milwaukee construction marketplace.

Source: Urban Institute Report. Does Minority-Owned Business Get A Fair Share of Government Contracts? 1997

Table A.3 Median and Distribution of Disparity Ratios
for All Minorities and Women by Industry

	Construction	Construction Subcontract	Goods	Professional Services	Other Services	Total
All Minorities						
Median Disparity Ratio of:	0.61 +	0.95	0.48 *	0.61 +	0.50 *	0.57 *
0.0 to 0.8	59%	38%	66%	63%	67%	63%
0.8 to 1.2	24%	46%	26%	11%	7%	18%
1.2 and over	18%	15%	9%	26%	27%	18%
Number of Studies	57	13	47	35	30	163
Women						
Median Disparity of Ratio of:	0..48 *	0.77	0.30 *	0.17 *	0.31*	0.29 *
0.0 to 0.8	81%	54%	89%	95%	82%	87%
0.8 to 1.2	10%	8%	11%	3%	7%	8%
1.2 and over	10%	38%	0%	3%	11%	5%
Number of Studies	52	13	47	37	28	164

Source: Urban Institute analysis of disparity studies

Steps taken to calculate the median, the report (1) calculate the average disparity ratio for each study and (2) take the median of these averages. Median figures for "Total" industries are calculated by taking the median across all studies for all industries. Figures for construction may include dollars paid to both prime and subcontractors. Number of studies for "Total" industries is greater than the number of studies read, because the individual studies include multiple industries. The data on which this table is based are reported in table 2-3c.

Tests were conducted for two null hypothesis: the median equals 1.0; and the median equal 0.8. The tests of statistical significance were conducted using a "sign" test. Each test measures the probability that the observed distribution of studies reporting disparity values below 1 (or below 0.8) could occur by chance, if the true median disparity ration is 1 or (0.8).

Cells for which there is less than a 5 percent chance of the observed under-utilization occurring by chance given a true median of either 0.8 or 1.0 are marked with an asterisk, while cells with a less than 5 percent chance of the observed under-utilization given an true median of 1.0 (but not 0.8) are marked with a plus sign. A one tail test of significance was used.

Table A.4 Median and Distribution of Disparity Ratios
for Minority Subgroups by Industry

	Construction	Construction Subcontract	Goods	Professional Services	Other Services	Total
African Americans						
Median Disparity Ratio	0.56 *	0.72	0.48 +	0.33 +	0.49 +	0.49 *
0.0 to 0.8	64%	62%	59%	63%	65%	63%
0.8 to 1.2	14%	31%	14%	14%	15%	14%
1.2 and over	22%	8%	27$	23%	19%	23%
Number of Studies	50	13	44	35	26	155
Latinos						
Median Disparity Ratio	0..67 +	0.84	0.24 *	0.60 +	0.26*	0.44 *
0.0 to 0.8	59%	46%	74%	65%	80%	68%
0.8 to 1.2	18%	15%	10%	24%	12%	16%
1.2 and over	22%	38%	17%	12%	8%	16%
Number of Studies	49	13	42	34	25	150
Asians						
Median Disparity Ratio	0.60 +	0.90	0.20 *	0.41 *	0.28	0.39 *
0.0 to 0.8	63%	38%	67%	71%	69%	67%
0.8 to 1.2	10%	31%	10%	9%	8%	9%
1.2 and over	27%	31%	24%	21%	23%	24%
Number of Studies	49	13	43	35	26	153
Native Americans						
Median Disparity Ratio	0.72	2.28	0.18 *	0.01 *	0.16*	0.18 *
0.0 to 0.8	55%	40%	80%	80%	93%	74%
0.8 to 1.2	13%	0%	0%	4%	0%	5%
1.2 and over	32%	60%	20%	16%	7%	21%
Number of Studies	31	5	25	25	15	96

Source: Urban Institute analysis of disparity studies

Steps taken to calculate the median, the report (1) calculate the average disparity ration for each study and (2) take the median of these averages. Median figures for “Total” industries are calculated by taking the median across all studies for all industries. Figures for construction may include dollars paid to both prime and subcontractors. Number of studies for “Total” industries is greater than the number of studies read, because the individual studies include multiple industries. The data on which this table is based are reported in table 2-3(c).

Tests were conducted for two null hypotheses: the median equals 1.0; and the median equal 0.8. The tests of statistical significance were conducted using a “sign” test. Each test measures the probability that the observed distribution of studies reporting disparity values below 1 (or below 0.8) could occur by chance, if the true median disparity ration is 1 or (0.8).

Cells for which there is less than a 5 percent chance of the observed under-utilization occurring by

chance given a true median of either 0.8 or 1.0 are marked with an asterisk, while cells with a less

than 5 percent chance of the observed under-utilization given a true median of 1.0 (but not 0.8) are marked with a plus sign. A one tail test of significance was used.

Table A.5 Median Disparity Ratios for Minorities and Women in the Construction Industry Region

	West	South	Northeast	Midwest
African Americans				
Median	0.28	0.60	0.53	1.01
Number of Studies	15	19	7	9
Latinos				
Median	0.54	0.60	0.76	0.90
Number of Studies	15	18	7	9
Asians				
Median	0.60	0.34	0.59	1.36
Number of Studies	15	18	7	9
Native Americans				
Median	0.08	0.56	NA	0.88
Number of Studies	11	9	NA	7
All Minorities				
Median	0.51	0.58	0.69	1.02
Number of Studies	16	17	8	10
Women				
Median	0.50	0.58	0.41	0.52
Number of Studies	16	18	8	10

Source: Urban Institute analysis of disparity studies

Steps taken to calculate the median, the report (1) calculate the average disparity ration for each study and (2) take the median of these averages. Median figures for "Total" industries are calculated by taking the median across all studies for all industries. Figures for construction may include dollars paid to both prime and subcontractors. Number of studies for "Total" industries is greater than the number of studies read, because the individual studies include multiple industries.

NA means results for a particular cell were based on less than 5 studies, and therefore not reported. Studies for the West region include Alameda Co, CA; Albuquerque, NM; Contra Costa, CA; Denver Phase II, CO; Denver RTD, CO; Sacramento, CA; San Jose, CA Tucson, AZ.

Studies for the South region include Asheville, NC; Dade Co, FL; Dallas, TX; Dallas/Ft Worth International Airport, TX; District of Columbia, FL; Fort Worth, TX; Greensboro, NC; Houston, TX; Jacksonville, NC; Jefferson Co, AL; Louisiana, Memphis, TN; New Orleans, LA; Orange Co, FL; St. Petersburg, FL; San Antonio, TX; Tampa, FL, Texas

Studies for the Northeast Region include Boston, MA; Massachusetts, New York; New York City, NY; New York City Housing Authority, NY; Port Authority NY/NJ; S. E. Pennsylvania Transportation, PA; Syracuse, NY.

Studies for the Midwest region include Chicago, IL; Cincinnati, OH; Columbus, OH; Dayton, OH; Hennepin Co. MN; Milwaukee, WI; Minneapolis, MN; Ramsey Co. MN; St. Paul, MN; St. Paul School District, MN.

Table A.6 Median Disparity Ratios for Minorities and Women by Industry
Using Only Results from Studies with Large Numbers
of Contracts or High Availability

	Construction	Construction Subcontract	Goods	Professional Services	Other Services	Total
African Americans						
Median	0.36 +	0.72	0.75	0.20 *	0.49 *	0.41 *
Number of Studies	20	5	28	17	16	82
Latinos						
Median	0.68 +	0.99	0.19 *	0.71 +	0.36 *	0.36 *
Number of Studies	22	9	26	16	16	80
Asians						
Median	0.59	NA	0.17 *	0.19 *	0.22 *	0.19 *
Number of Studies	9	NA	26	18	14	68
Native Americans						
Median	0.72	NA	0.19 *	0.09	0.23	0.18 *
Number of Studies	5	NA	11	6	6	28
All Minorities						
Median	0.56 *	0.75	0.47 +	0.52 *	0.49 *	0.51 *
Number of Studies	40	10	40	28	28	136
Women						
Median	0.45 *	0.54	0.30 *	0.16 *	0.27 *	0.26 *
Number of Studies	31	9	41	31	26	129

Source: Urban Institute analysis of disparity studies

The results presented in this table are based on a subset of studies with large numbers of contracts or high availability of minority-or-women-owned firms. The criteria for including these studies was a combination of the following levels of availability and contracts: (1) 1% availability and 1,175 contracts; (2) 1.25% availability and 940 contracts; (3) 1.5% availability and 783 contracts; (4) 2% availability and 587 contracts; (5) 2.5% availability and 45 contracts. If a study had the appropriate combination of number of contracts and availability, it was included in the analysis. No study with availability of less than 0.5% or number of contracts less than 45 was included. If the number of contracts was not reported, the study was included if the availability was greater than 10%. For studies with more than one measure of disparity, this criterion was applied to every measure in the study. If a majority of measures met the criterion, all measures from the study were included.

NA means results for a particular cell were based on fewer than 5 studies, and therefore not reported.

Tests were conducted for a two null hypothesis: the median equal 1; and the median equals 0.8. The tests of statistical significance were conducted using a “sign” test. Each test measures the probability

that the observed distribution of studies reporting disparity values below 1 (or below 0.8) could occur by chance, if the true median disparity ratio is equal to 1 (or 0.8).

Cells for which there is less than 5 percent chance of the observed under-utilization occurring by chance given a true median of either 0.8 or 1.0 are marked with an asterisk, while cells with less than a 5 percent chance of the observed under-utilization given a true median of 1.0 (but not 0.8) are marked with a plus sign. A one-tailed test of significance was used.

Table A.7 Median Disparity Ratios for Minorities and Women
by Industry Comparing Different Availability

	Construction		Construction Subcontract		Goods		Professional Services		Other Services		Total	
	All Firms	RWA	All Firms	WA	All Firms	WA	All Firms	RWA	All Firms	RWA	All Firms	RWA
African Am.												
Median	0.83	0.52	0.85	0.70	0.69	0.25	0.93	0.11	0.71	0.45	0.80	0.26
# of Studies	28	36	8	7	31	26	17	24	14	18	90	104
Latinos												
Median	0.77	0.53	0.58	0.99	0.32	0.19	0.45	0.43	0.24	0.20	0.41	0.36
# of Studies	27	36	8	7	29	26	17	24	13	18	86	104
Asians												
Median	0.86	0.46	1.01	1.07	0.31	0.19	1.13	0.22	0.47	0.24	0.64	0.31
# of Studies	26	35	8	7	29	26	17	24	14	18	86	103
Native Am.												
Median	2.57	0.48	NA	NA	2.06	0.16	0.00	0.00	NA	0.16	0.90	0.16
# of Studies	5	30	NA	NA	6	22	7	22	NA	15	20	89
All Minority												
Median	0.99	0.56	0.97	0.87	0.80	0.35	1.40	0.36	0.99	0.34	0.99	0.42
# of Studies	28	37	8	7	30	31	17	25	14	22	89	115
Women												
Median	0.59	0.43	1.12	0.97	0.21	0.30	0.21	0.20	0.31	0.33	0.21	0.28
# of Studies	28	38	8	7	31	30	19	25	13	21	91	114

Source: Urban Institute analysis of disparity studies

Median disparity ratios using measures of availability based on data from the Survey of Minority-and-Women-Owned Business Enterprise are included in the “All Firms” columns. Those based upon all measures of availability that are more reflective of “ready, willing and able” firm are included in the columns headed “RWA”. Findings from individual studies may be included in both categories if they employed All Firms and RWA measures of availability.

NA Means results for a particular cell were based on less than 5 studies, and therefore, not reported.

Table A.8 Median Disparity Ratios for Minorities and Women by Industry, Using Results from Areas without an Affirmative Action Program in Place Before and During Study Year

	Construction	Construction Subcontract	Goods	Professional Services	Other Services	Total
African Americans						
Median	0.21	NA	0.24	0.11	0.38	0.22
Number of Studies	14	NA	12	11	8	45
Latinos						
Median	0.27	NA	0.16	0.72	0.24	0.26
Number of Studies	14	NA	12	11	8	45
Asians						
Median	0.00	NA	0.16	0.19	0.11	0.13
Number of Studies	14	NA	12	11	8	45
Native Americans						
Median	0.00	NA	0.25	0.04	0.03	0.04
Number of Studies	9	NA	8	7	5	29
All Minorities						
Median	0.43	NA	0.32	0.61	0.50	0.45
Number of Studies	15	NA	12	11	9	47
Women						
Median	0.43	NA	0.21	0.07	0.26	0.24
Number of Studies	15	NA	13	12	9	49

Source: Urban Institute analysis of disparity studies

This table is based on findings from areas and time periods where there were no race-based mandatory or voluntary goals programs in place at any point up to that time. It does not include findings for time periods after a program had been suspended.

NA means results for a particular cell were based on fewer than 5 studies, and therefore not required.

Table A.9 Median Disparity Ratios for Minorities and Women by Industry Using Results from Areas without an Affirmative Action Program in Place During Study Year

	Construction			Professional	Other	
	Construction	Subcontract	Goods	Services	Services	Total
African Americans						
Median	0.47	0.51	0.34	0.00	0.46	0.34
Number of Studies	23	6	20	15	15	73
Latinos						
Median	0.42	0.75	0.20	0.74	0.16	0.27
Number of Studies	23	6	20	15	15	73
Asians						
Median	0.28	0.70	0.16	0.19	0.20	0.19
Number of Studies	23	6	20	15	15	73
Native Americans						
Median	0.43	NA	0.15	0.00	0.13	0.13
Number of Studies	16	NA	14	11	11	52
All Minorities						
Median	0.46	0.53	0.41	0.61	0.49	0.47
Number of Studies	24	6	21	15	16	76
Women						
Median	0.43	0.78	0.21	0.12	0.23	0.25
Number of Studies	24	6	22	16	16	78

Source: Urban Institute analysis of disparity studies

This table is based on findings from areas and time periods where there were no race-based mandatory or voluntary goals programs in place at that time; results are included for an area for study years after a program had been suspended.

NA means results for a particular cell were based on fewer than 5 studies, and therefore not required.

Table A.10 Median Disparity Ratios for Minorities and Women
by Industry Using Results from Areas with an Affirmative
Action Program in Place During Each Study Year

	Construction	Construction Subcontract	Goods	Professional Services	Other Services	Total
African Americans						
Median	0.61	0.95	0.67	0.27	0.49	0.51*
No. of Studies	37	10	30	24	17	108
	(-0.97)	(-0.92)	(-1.28)	(-1.53)	(-0.98)	(-2.11)
Latinos						
Median	0.66*	0.94	0.40	0.45	0.29	0.48*
No. of Studies	35	10	27	23	15	100
	(-1.80)	(-0.92)	(-0.56)	(0.93)	(-1.14)	(-1.72)
Asians						
Median	0.77*	1.07	0.27	0.50	0.39	0.50*
No. of Studies	35	10	28	24	16	102
	(-1.72)	(-0.49)	(-0.96)	(-0.87)	(0.14)	(-1.94)
Native Americans						
Median	0.71	NA	0.19	0.00	0.16	0.16
No. of Studies	21	NA	14	17	8	61
	(-1.33)		(-0.69)	(0.00)	(0.04)	(-0.27)
All Minorities						
Median	0.73	1.01	0.70	0.57	0.36	0.61
No. of Studies	35	10	31	23	19	108
	(-1.36)	(-1.57)	(-1.42)	(0.01)	(-0.31)	(-1.61)
Women						
Median	0.45	0.99	0.35	0.18	0.43	0.29
No. of Studies	36	10	31	25	17	109
	(0.17)	(-0.27)	(-0.91)	(-0.41)	(0.85)	(-0.73)

Source: Urban Institute analysis of disparity studies

This table is based on findings from areas and time periods when there was a race-based mandatory or voluntary goals program in place.

NA means results for a particular cell were based on fewer than 5 studies, and therefore not reported.

The tests of statistical significance compare the median disparity ratios for areas with and without an affirmative action program in place during the study years. The latter medians are reported in table 2.3(g). These tests were conducted using the Mann-Whitney-Wilcoxon test of the equality of medians from independent samples. Test statistics are reported in parentheses.

Cells for which there is less than 5 percent chance that the true medians are equal are denoted with an asterisk. One-tailed tests of statistical significance were used.

Table A.11 Disparity Ratios for Minorities and Women in the Construction Industry, Comparing Distributions of Average Disparity Ratios by Study Author

	Number of Studies			
	NERA	BBC	D. J. Miller	Other Contractors
African Americans				
Disparity Ratio				
0.0 to 0.8	9	7	8	9
0.8 to 1.2	0	2	1	3
1.2 & over	1	5	1	4
Total Number of Studies	10	14	10	16
Latinos				
Disparity Ratio				
0.0 to 0.8	4	9	5	11
0.8 to 1.2	4	2	3	1
1.2 and over	2	3	2	3
Total Number of Studies	10	14	10	15
Asians				
Disparity of Ratio				
0.0 to 0.8	6	6	8	11
0.8 to 1.2	2	2	0	1
1.2 and over	2	6	2	3
Total Number of Studies	10	14	10	15
Native Americans				
Disparity Ratio				
0.0 to 0.8	2	9	3	4
0.8 to 1.2	0	2	1	1
1.2 and over	1	3	1	5
Total Number of Studies	3	14	5	10
All Minorities				
Disparity Ratio				
0.0 to 0.8	7	9	4	11
0.8 to 1.2	4	2	4	1
1.2 and over	0	4	1	4
Total Number of Studies	11	15	9	16
Women				
Disparity Ratio				
0.0 to 0.8	8	14	6	14
0.8 to 1.2	3	0	2	1
1.2 and over	0	1	2	1
Total Number of Studies	11	15	10	16

Source: Urban Institute analysis of disparity studies

Table A.12 Supreme Justice of the Bakke Decision

Decision: Swing vote by Justice Powell to apply judicial strict scrutiny to racial and ethnic classification cases. However, ruling that the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions.

Name	Service Dates	Birth Place	Political Party	Nominating President	Views[67]
William Brennan	1956-1990	New Jersey	Republican	Eisenhower	Liberal
Potter Stewart	1958-1981	Michigan	Republican	Eisenhower	Conservative
Byron White	1962-1993	Colorado	Democrat	Kennedy	Liberal
Thurgood Marshall	1967-1991	Maryland	Democrat	Johnson	Liberal
Warren Burger	1969-1986	Minnesota	Republican	Nixon	Conservative
Harry Blackmun	1970-1994	Illinois	Republican	Nixon	Liberal[68]
Lewis Powell	1972-1987	Virginia	Republican	Nixon	Moderate[69]
William Rehnquist	1986-2005	Wisconsin	Republican	Reagan	Conservative
John Paul Stevens	1975- now	Illinois	Republican	Ford	Moderate
Source: Infoplease. http://www.infoplease.com/ipa/A0101281.html					

[67] Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

[68] Blackmun, a lifelong Republican, was generally expected to adhere to a conservative interpretation of the constitution. The Court's Chief Justice at the time, Warren Burger, who had been a long-time friend of Blackmun's and for whom Blackmun served as best man at his wedding, had recommended Blackmun for the job to President Richard M. Nixon. The two were often referred to as the "Minnesota Twins" (a reference to the baseball team, the Minnesota Twins) because of their common history in Minnesota and because they so often voted together. A turning point came in 1973 with the Roe vs. Wade decision. Blackmun became a passionate advocate for abortion rights. Burger and Blackmun drifted apart, and as the years passed, their lifelong friendship degenerated into a hostile and contentious relationship. In Burger's last year on the court, he and Blackmun voted together in about 50% of the cases while Blackmun voted with Justices Brennon and Marshal over 90% of the time. By the time Justice Blackmun retired, he was considered the most liberal Justice on the Court. http://en.wikipedia.org/wiki/Harry_Blackmun

[69] Justice Powell developed a reputation as a judicial moderate, and was known as a master of compromise and consensus-building; thus cultivating a reputation as a swing vote with a penchant for compromise. For example, his opinion in *Regents of the University of California v. Bakke* (1978) joined by no other justice, represented a compromise between the opinions of Justice William J. Brennan, who, joined by three other justices, would have upheld affirmative action programs under a lenient judicial test, and the opinion of John Paul Stevens, also joined by three justices, who would have struck down the affirmative action program at issue in the case under the Civil Rights Act of 1964. Powell's opinion striking down the law urged that "strict scrutiny" be applied to affirmative action programs, while hinting that some affirmative action programs might pass Constitutional muster. http://en.wikipedia.org/wiki/Lewis Powell

Table A.13 Supreme Justice of the Fullilove Decision

Decision: The MBE provision of the Public Works Employment Act of 1977 did not violate the Constitution					
Name	Service Dates	Birth Place	Political Party	Nominating President	Views[70]
William Brennan	1956-1990	New Jersey	Republican	Eisenhower	Liberal
Potter Stewart	1958-1981	Michigan	Republican	Eisenhower	Conservative
Byron White	1962-1993	Colorado	Democrat	Kennedy	Liberal
Thurgood Marshall	1967-1991	Maryland	Democrat	Johnson	Liberal
Warren Burger	1969-1986	Minnesota	Republican	Nixon	Conservative
Harry Blackmun	1970-1994	Illinois	Republican	Nixon	Liberal
Lewis Powell	1972-1987	Virginia	Republican	Nixon	Moderate
William Rehnquist	1986-2005	Wisconsin	Republican	Reagan	Conservative
John Paul Stevens	1975- now	Illinois	Republican	Ford	Moderate[71]
Source: Infoplease. http://www.infoplease.com/ipa/A0101281.html					

[70] Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

[71] On the Seventh Circuit Court of Appeals, Justice Stevens had a moderately conservative record. Early in his tenure on the Supreme Court, Justice Stevens had a moderate voting record. He voted to reinstate capital punishment in the United States and opposed the affirmative action program at issue in *Regents of the University of California v. Bakke*. But on the more conservative Rehnquist Court, Stevens tended to side with the more liberal-leaning Justices. His Segal-Cover score, a measure of liberalism/conservatism of Court members, places him squarely in the ideological center of the Court. A 2003 statistical analysis of Supreme Court voting patterns, however, found Stevens the most liberal member of the Court. Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

Table A.14 Supreme Justice of the Wygant Decision

Decision: Decision: Justices Powell, Burger, Rehnquist and O'Connor used terminology to describe a strict scrutiny review. Justices Marshall, Brennan and Blackmun noted differences in the standard of scrutiny applied in past cases and felt that the case should be sent back to the district court for a development of the facts. Justice Stevens questioned whether the program provided benefits for the future.

Name	Service Dates	Birth Place	Political Party	Nominating President	Views[72]
William Brennan	1956-1990	New Jersey	Republican	Eisenhower	Liberal
Byron White	1962-1993	Colorado	Democrat	Kennedy	Liberal
Thurgood Marshall	1967-1991	Maryland	Democrat	Johnson	Liberal
Warren Burger	1969-1986	Minnesota	Republican	Nixon	Conservative
Harry Blackmun	1970-1994	Illinois	Republican	Nixon	Liberal
Lewis Powell	1972-1987	Virginia	Republican	Nixon	Moderate
William Rehnquist	1986-2005	Wisconsin	Republican	Reagan	Conservative
John Paul Stevens	1975- now	Illinois	Republican	Ford	Mderate
Sandra O'Connor	1981- 2006	Texas	Republican	Reagan	Conservative
Source: Infoplease. http://www.infoplease.com/ipa/A0101281.html					

[72] Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

Table A.14 Supreme Justice of the Croson Decision

Decision: Justices Rehnquist, Stevens, O'Connor, Scalia and Kennedy joined to hand down a finding that the Richmond Plan violated the constitution because it was not justified by a compelling interest and the 30 percent set-aside was not narrowly tailored to accomplish a remedial purpose.

Name	Service Dates	Birth Place	Political Party	Nominating President	Views[73]
William Brennan	1956-1990	New Jersey	Republican	Eisenhower	Liberal
Byron White	1962-1993	Colorado	Democrat	Kennedy	Liberal
Thurgood Marshall	1967-1991	Maryland	Democrat	Johnson	Liberal
Harry Blackmun	1970-1994	Illinois	Republican	Nixon	Liberal
William Rehnquist	1986-2005	Wisconsin	Republican	Reagan	Conservative
John Paul Stevens	1975- now	Illinois	Republican	Ford	Moderate
Sandra O'Connor	1981- 2006	Texas	Republican	Reagan	Conservative
Antonin Scalia	1986- now	New Jersey	Republican	Reagan	Conservative
Anthony Kennedy	1988 - now	California	Republican	Reagan	Conservative

Source: Infoplease. http://www.infoplease.com/ipa/A0101281.html

[73] Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

Table A.15 Supreme Court Justice of the Metro Broadcasting Decision

Decision: The Court, in a 5-to-4 decision, held that the FCC's minority preference policies were constitutional because they provided appropriate remedies for discrimination victims and were aimed at the advancement of legitimate congressional objectives for program diversity. The decision includes a majority opinion with a new level of scrutiny and a minority opinion completely against the majority opinion. Justices Brennan, White, Marshall, Blackmun and Stevens support intermediate scrutiny. Chief Justice Rehnquist, and Justices Scalia and Kennedy dissented stating that strict scrutiny standard applies to all reviews of racial classification.

Name	Service Dates	Birth Place	Political Party	Nominating President	Views[74]
William Brennan	1956-1990	New Jersey	Republican	Eisenhower	Liberal
Byron White	1962-1993	Colorado	Democrat	Kennedy	Liberal
Thurgood Marshall	1967-1991	Maryland	Democrat	Johnson	Liberal
Harry Blackmun	1970-1994	Illinois	Republican	Nixon	Liberal
William Rehnquist	1986-2005	Wisconsin	Republican	Reagan	Conservative
John Paul Stevens	1975- now	Illinois	Republican	Ford	Moderate
Sandra O'Connor	1981- 2006	Texas	Republican	Reagan	Conservative
Antonin Scalia	1986- now	New Jersey	Republican	Reagan	Conservative
Anthony Kennedy	1988 - now	California	Republican	Reagan	Conservative

Source: Infoplease. http://www.infoplease.com/ipa/A0101281.html

[74] Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

Table A.16 Supreme Court Justice of the Adarand III Decision

Decision: The decision includes a majority opinion with a new level of scrutiny and a minority opinion completely against the majority opinion. Justices Brennan, White, Marshall, Blackmu					
Name	Service Dates	Birth Place	Political Party	Nominating President	Views[75]
William Rehnquist	1986-2005	Wisconsin	Republican	Reagan	Conservative
John Paul Stevens	1975- now	Illinois	Republican	Ford	Moderate
Sandra O'Connor	1981- 2006	Texas	Republican	Reagan	Conservative
Antonin Scalia	1986- now	New Jersey	Republican	Reagan	Conservative
Anthony Kennedy	1988 - now	California	Republican	Reagan	Conservative
David Souter	1990-now	Massachusetts	Republican	Bush	Converted to Liberal[76] in 1992
Clarence Thomas	1991 - now	Georgia	Republican	Bush	Conservative
Ruth Ginsburg	1993 - now	New York	Democrat	Clinton	Liberal
Stephen Breyer	1994 - now	California	Democrat	Clinton	Liberal
Source: Infoplease. http://www.infoplease.com/ipa/A0101281.html					

[75] Wikipedia Free Encyclopedia. http://en.wikipedia.org/wiki

[76] From 1990-1993, Justice Souter tended to be a conservative-learning Justice, although more in the mold of Justice Kennedy, Scalia, Rehnquist. In his first year, Justice Souter and Scalia voted alike close to 85 percent of the time. Justice Souter voted with Kennedy and O'Connor about 97 percent of the time. This changed in 1992 in the Planned Parenthood v. Casey case in which the Court reaffirmed the essential holding in Roe v. Wade. Justice Souter and Kennedy each considered overturning Roe and upholding all the restrictions at issue in Casey. After consulting with O'Connor, however, the three (who came to be known as the "troika") developed a joint opinion which upheld all the restrictions in the Casey case except for the mandatory notification of a husband while asserting the essentials holding of Roe, that a right to an abortion is protected by the Constitution Roe was decided by a 7 to 2 vote, though Casey was 5 to 4. Although appointed by a Republican President, thus expected to be conservative, Justice Souter is usually associated with the Liberal wing of the Court.

Table A.17 Presidential Executive Orders Impacting Discrimination

President	Year	Action	Purpose
Roosevelt	1941	Executive Order 8802	To eliminate discrimination in defense contracts and federal employment and training programs
Roosevelt	1943	Executive Order 9346	Broadened to include all federal contractors and unions
Truman	1948	Executive Order 9980	Fair Employment Board created to monitor department heads and investigate complaints of discrimination
Truman	1948	Executive Order 9981	To end segregation in the military
Truman	1948	Executive Order 10227	Select government agencies instructed to incorporate nondiscriminatory clauses in their procurement contracts
Truman	1951	Five Executive Orders passed	To assess the effectiveness of nondiscriminatory clauses in procurement contracts
Eisenhower	1953	Two Executive Orders	Created and enlarge size of the Government Contracts Commission. Served as advisory and consultative only
Eisenhower	1954	Executive Order 10557	To assess effectiveness of nondiscriminatory employment provisions.
Eisenhower	1954	Executive Order 10590	Established Commission on Government Employment policy as advisory to department heads
Kennedy	1961	Executive Order 10925	Created Equal Employment Opportunity Commission to conduct compliance reviews and impose sanctions
Kennedy	1962	Executive Order 11063	Prevent discrimination in housing, established committee to implement and enforce the Order
Kennedy	1963	Executive Order 11114	Extended coverage of EEOC to employment on federally financed construction projects
Kennedy	1963	Executive Order 11126	Established a Committee and Council related to the Status of Women in America
Kennedy	1964	Civil Rights Act of 1964	Sought to end discrimination by large private employers on the basis of race and gender whether or not they have government contracts. Executive Order 10925 was incorporated into the Civil Rights Act
Johnson	1965	Executive Order 11246	Established Office of Federal Contract Compliance (OFCCP) and extended sanctions to contractors and subcontractors with contracts over $10,000.
Johnson	1967	Executive Order 11375	Extended sanctions to contract departments
Nixon	1969	Executive Order 11478	Established Civil Service Commission to assure equal employment opportunity in federal agencies
Nixon	1969	Executive Order 11598	Created Veterans Administration to provide for listing of certain job vacancies by federal agencies, government contractors, and subcontractors to aid veterans seeking employment

Table A.17—*Continued*

Nixon	1969	Philadelphia Plan	President Nixon's "Philadelphia Order" presents "goals and timetables" for reaching equal employment opportunity in construction trades.
Ford	1976	Executive Order 11914	Nondiscrimination with respect to handicapped to federal assisted programs
Carter	1977	Executive Order 11979	Established National Commission on the observation of international Women's Year.
Carter	1978	Executive Order 12050	Transfer to the Equal Employment Opportunity Commission of all the functions of the Equal Employment Opportunity Coordinating Council
Carter	1978	Executive Order 12067	Coordination of Federal Equal Employment Opportunity programs.
Carter	1978	Executive Order 12086	Consolidation of contract compliance functions reassigned to Secretary of Labor from Depts. of Defense, Treasury and Interior.
Carter	1978	Executive Order 12106	Transfer of certain equal employment enforcement functions to the Civil Service Commission.
Carter	1978	Executive Order 12114	Transfer of certain equal pay and age discrimination in employment enforcement functions
Carter	1979	Executive Order 12125	Amended Civil Service Rule 3.1. Established competitive status for handicapped federal employees
Carter	1980	Executive Order 12250	Required the Dept. of Justice to insure that all federal agencies extending financial assistance properly enforce Title VI of the Civil Rights Act.
Reagan	1983	Executive Order 12432	Encouraged grantees to utilize minority businesses. (No teeth to this Order – grantees received no pressure and were not compelled to comply)
Reagan	1985	Proposed end to EO 11246	The Reagan administration's attempt to eliminate Order 11246 was unsuccessful.
Bush	1991	Civil Right Act of 1991	Bush signed the Civil Rights Act of 1991 providing new protections for women and minorities and taking away others.
Clinton	1994	Executive Order 12892	Leadership and coordination of fair housing in federal programs: affirmatively furthering fair housing
Clinton	1994	Executive Order 12898	Federal actions to address environmental justice in minority populations and low-income populations.
Clinton	1994	Executive Order 12928	Promoting procurement with small businesses owned and controlled by socially and economically disadvantaged individuals
Clinton	1997	Executive Order 13050	Established an Advisory Board to advise the President on matters involving race and racial reconciliation
Clinton	1998	Executive Order 13078	Established Task Force to advise on way to increase employment of adults with disabilities

Table A.17—*Continued*

Clinton	1998	Executive Order 13107	Implementation of Human Rights Treaties which states that it shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Racial Discrimination (CERD)
Clinton	2000	Executive Order 13157	Increasing opportunities of Women-Owned Small Businesses
Clinton	2000	Executive Order 13160	Nondiscrimination in educational opportunities as it applies to the education programs and activities of State and local governments, and to private institutions receiving Federal financial assistance
Clinton	2000	Executive Order 13166	Improving access to services for persons with limited English proficiency
Clinton	2000	Executive Order 13169	Orders each executive branch to ensure nondiscrimination in Federal procurement opportunities for businesses in the Small Disadvantaged Business Program (SDBs) and Minority Business Enterprises (MBEs), and to take affirmative action to ensure inclusion of these businesses in Federal contracting.
Clinton	2000	Executive Order 13171	Established to improve the representation of Hispanics in Federal employment
Bush	2001	Appeal Clinton Exec. Order	A legal memorandum prepared for President Bush accuses Bill Clinton of having abused his presidential powers to issue executive orders, many of which are described as illegal, improper or political.
Bush	2001	Executive Order 13202	Preservation of open competition and government neutrality towards government contractors' labor relations on federal and federally funded construction projects
Bush	2001	Executive Order 13217	Requires federal agencies to evaluate their policies and programs to determine if any can be revised or modified to improve the availability of community-based living arrangements for persons with disabilities
Bush	2002	Executive Order for Equal Opportunity for Faith Based & Community Organizations	Organizations providing services supported with Federal financial assistance, should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice

Table A.18 Timeline of Key Legislation Affecting Decisions Regarding Discrimination

1791	Constitution and Bill of Rights legitimizes slavery
1860s	Although the thirteenth Amendment of 1865 abolishes slavery, southern states revive slave time codes, creating unattainable prerequisites for Blacks to live, work or participate in society. The Civil Rights Act of 1866 invalidates those codes, conferring "the rights of citizenship" on all people. Section 1981 of the Civil Rights Act of 1866 provides for all citizens the same right to "make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property." The Fourteenth Amendment grants citizenship to all persons born in the U.S., forbids states from denying "life, liberty or prosperity" without due process of law, and guarantees equal protection under the laws.
1870's	Fifteenth Amendment of 1870, gives freedmen the right to vote. Used in conjunction with section 1981 of the Civil Rights Act of 1866 is Section 1983 of the Civil Rights Act of 1871, granting citizens the right to sue if they feel they have been deprived of any rights or privileges covered by the Constitution. The 1875 Civil Rights Act guarantees equal access to public accommodations regardless of race or color. White supremacist groups, however, embark upon a campaign of terror against Blacks and their White supporters.
1896	Plessy v. Ferguson establishes "separate but equal" clause, which is immediately interpreted as "unequal". Segregation, lynching, severe economic hardship, and political powerlessness for Black people will begin to reach all time-highs, with few political or legal barriers.
1954	Brown v. Board of Education ends legal school segregation and sets a precedent for widespread desegregation. One year later, 4.9% of college students aged 18-24 are Black.
1961	President Kennedy issues Executive Order 10925, prohibiting discrimination in federal government hiring on the basis of race, religion or national origin.
1964	The Civil Rights Act of 1964 seeks to end discrimination by large private employers on the basis of race and gender whether or not they have government contracts. Quotas were a big theme during the Congressional debate following Johnson's proposal. Many were afraid that a White man would not be hired over a black man. As a result, the Civil Rights Act contained a sentence specifically repudiating quotas. Title VII of the Act establishes the Equal Employment Opportunity Commission (EEOC).
1965	The term "affirmative action" is used for the first time by President Johnson in Executive Order 11246, requiring federal contractors to take "affirmative action" to ensure equality of employment. This Executive Order is extended to women in 1968.
1969	President Nixon's "Philadelphia Order" presents "goals and timetables" for reaching equal employment opportunity in construction trades.
1970	Nixon's Philadelphia Order extended in 1970 to non-construction federal contractors. By this time, 7.8% of college students aged 18-24 are Black. Also, a stricter directive surfaced, Order Number 4, which required contractors to set up specific timetables and goals for the hiring of minorities to redress an "underutilization" of these minorities in the past.

Table A.18—*Continued*

1971	Nixon's Philadelphia Order was extended to include the protection of women. Numerous court cases surfaced in a effort to enforce and interpret these directives. The Supreme Court case on affirmative action, *Griggs v. Duke Power Company*, prohibited employers from practices that discriminate against blacks and restricted the use of test scores and educational requirements shown to be irrelevant to job performance.
1972	Title IX of the Education Amendments Act prohibits discrimination against girls and women in federally-funded education, including athletic programs.
1974	The Supreme Court judge William O. Douglas, was torn in his decision regarding the admission of Marco DeFunis to the University of Washington Law School. De Funis upon being rejected by the law school, sued them for reverse discrimination. After winning his case and entering the law school, the Washington State Supreme Court reversed the decision and ordered him out. His appeal to the U.S. Supreme Court allowed him to remain, and the Court to hear his case. The Court ultimately declined to rule on DeFunis' case due to lack of a clear majority position on the issue.
1975	*In Albermarle Paper Co. v Moody* it was alleged that the use of employment tests led to discrimination against Blacks. The case referred to job relatedness of Albermarle's testing program. It was decided that non-discriminatory alternatives to testing can be used by companies in an effort to bring blacks into their workforce. Contrarily, the Supreme Court rules in 1976 in *Washington v. Davis* that a valid test may be used to predict training performance, regardless of its ability to predict later job performance. A valid test was considered sufficiently job related even if more blacks than Whites failed the test.
1978	The quota system was declared illegal by the Supreme Court decision in the *Regents of the University of California v. Bakke* case. It was also decided that colleges and universities could consider an applicant's race as a factor in determining admission in order to achieve a diverse student body. However, in 1978, the Supreme Court ruled that racial quotas in hiring and promotions are constitutional and an important way of ending discrimination in a case initiated by the Bell Telephone System.
1979	Private employers were permitted to use racial preference in hiring and promotions (voluntary affirmative action plans) as a means to correct past discrimination resulting from the Supreme Court decision in *Kaiser Aluminum Co. and United Steelworkers of America v. Weber*.
1980	Ruling of the Supreme Court in *Fullilove v. Klutznick* stated that minority set asides or the limited use of quotas was appropriate for remedying past discrimination. At this time, Republican candidate Ronald Reagan, in his political campaign, promised to cease affirmative action upon entering office.
1981	Under the Reagan administration, employers were no longer required to maintain affirmative action programs or hire according to racial quotas.
1982	Supreme Court decision in *State of Connecticut v. Teal* stated that a bottom-line demonstration of no disparate impact does not shield an organization from an investigation of the disparate impact of each of the components of the selection system.
1985	The Reagan administration's attempt to eliminate Order 11246 was unsuccessful.

Table A.18—*Continued*

1986	Supreme Court case, *Wygant v. Jackson (Mich.) Board of Education*, racial preferences were ruled permissible in the context of hiring, as long as there was a history of discrimination. Also laying off White teachers with high seniority to protect the jobs of newly hired black teachers was deemed unconstitutional.
1987	Supreme Court case, *United States vs. Paradise*, in July 1970, a federal court found that the State of Alabama Department of Public Safety systematically discriminated against blacks in hiring: "in the thirty-seven-year history of the patrol there has never been a black trooper." The court ordered that the state reform its hiring practices to end "pervasive, systematic, and obstinate discriminatory exclusion of blacks." A full 12 years and several lawsuits later, the department still had not promoted any blacks above entry level nor had they implemented a racially fair hiring system. In response, the court ordered specific racial quotas to correct the situation. For every white hired or promoted, one black would also be hired or promoted until at least 25% of the upper ranks of the department were composed of blacks. This use of numerical quotas was challenged. The Supreme Court, however, upheld the use of strict quotas in this case as one of the only means of combating the department's overt and defiant racism.
1988	The Supreme Court ruled in *Watson v. Fort Worth Bank and Trust*, that statistical evidence indicating that an employer's practices have been discriminatory may be used to prove bias in subjective employment decisions. Additionally, an employee making such complaints need not prove intent to discriminate upon the employer's part.
1989	The Supreme Court struck down a minority set-aside program requiring Richmond, VA contractors to hire minority-owned subcontractors for 30 percent of its contracts *in City of Richmond v. J.A. Croson Co*. Set-asides by state and local governments were allowed only in cases of past discrimination. Also in 1989, in *Wards Cove Packing, Co. v. Antonio*, the burden of disproving an employer's action thought to be discriminatory was placed upon the employee. Again, discriminatory practices could be justified if they legitimately and significantly served the goal of the employers. Similarly, the burden of establishing that discriminatory practices have occurred was placed upon the employee in *Price Waterhouse v Hopkins*.
1990's	As Black enrollment reaches an all-times high (11.3 in 1990), a backlash against affirmative action begins.
1990	The difference between strict scrutiny and intermediate scrutiny was made salient in the Supreme Court decision *Metro Broadcasting, Inc. v. Federal Communications Commission*. A preference for minority-owned businesses in broadcast licensing was approved. Additionally, affirmative action plans approved by Congress only need to meet intermediate scrutiny, requiring that the law be substantially related to an important government purpose.
1991	Bush signed the Civil Rights Act of 1991 providing new protections for women and minorities.
1992	Concrete Works Construction v. City and County of Denver (Dissertation Case Study)
1995	Strict scrutiny, insisting that the government provide the law's necessity in achieving a compelling government purpose, became the criterion in *Adarand Constructors, Inc. v. Pena*. This case ruled that all affirmative action programs must meet strict scrutiny.

Table A.18-*Continued*

1995	President Clinton gave guidance on affirmative action as he asserted in a speech that while Adarand set "stricter standards to mandate reform of affirmative action, it actually reaffirmed the need for affirmative action and reaffirmed the continuing existence of systematic discrimination in the United States." In a White House memorandum on the same day, he called for the elimination of any program that "(a) creates a quota; (b) creates preferences for unqualified individuals; (c) creates reverse discrimination; or (d) continues even after its equal opportunity purposes have been achieved."
1996	Race-based admission practices at the University of Texas law school were struck down in *Hopwood v. State of Texas*. Cheryl Hopwood and three other white law-school applicants at the University of Texas challenged the school's affirmative action program, asserting that they were rejected because of unfair preferences toward less qualified minority applicants. As a result, the 5th U.S. Court of Appeals suspended the university's affirmative action admissions program and ruled that the 1978 Bakke decision was invalid—while Bakke rejected racial quotas it maintained that race could serve as a factor in admissions. In addition to remedying past discrimination, Bakke maintained that the inclusion of minority students would create a diverse student body, and that was beneficial to the educational environment as a whole. Hopwood, however, rejected the legitimacy of diversity as a goal, asserting that "educational diversity is not recognized as a compelling state interest." The Supreme Court allowed the ruling to stand. In 1997, the Texas Attorney General announced that all "Texas public universities [should] employ race-neutral criteria." Note: The June 23, 2003, Supreme Court ruling in *Grutter* v. *Bollinger* invalidates *Hopwood*.
1996	*Engineering Contractors v. Dade County*, 943 F. Supp 1546 (SD Fla 1996), emphasized the use of bidders to measure MWBE availability, a more detailed breakdown of utilization by SIC code, and the need to account for non-discriminatory explanations of disparity through techniques such as regression analysis
1997	The anti-affirmative action initiative Proposition 209 narrowly passes in California. A state ban on all forms of affirmative action was passed in California: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Proposed in 1996, the controversial ban had been delayed in the courts for almost a year before it went into effect. Enrollment of students of color at UCB decline within one year. Washington state passes a similar initiative, I-200
1998	The state Washington passed Proposition I-200 which is similar to Proposition 209. Washington becomes the second state to abolish state affirmative action measures when it passed "I 200," which is similar to California's Proposition 209.
1999	*Webster v. Fulton*, 51 F. Supp 2d 1354; 1999 US Dist Lexis 13989. The court's ruling followed *Engineering Contractors*. The court was critical of reliance on census data because it overstated MWBE availability and suggested an investigation of data on bidding as a measure of availability
2000	Florida legislature approves education component of Gov. Jeb Bush's "One Florida" initiative, aimed at ending affirmative action in the state.

Table A.18—*Continued*

2000	In *Gratz* v. *Bollinger*, a federal judge ruled that the use of race as a factor in admissions at the University of Michigan was constitutional. The gist of the university's argument was as follows: just as preference is granted to children of alumni, scholarship athletes, and other groups for reasons deemed beneficial to the university, so too does the affirmative action program serve "a compelling interest" by providing educational benefits derived from a diverse student body.
2001	In *Grutter* v. *Bollinger*, a case similar to the University of Michigan undergraduate lawsuit, a different judge drew an opposite conclusion, invalidating the law school's policy and ruling that "intellectual diversity bears no obvious or necessary relationship to racial diversity." But on May 14, 2002, the decision was reversed on appeal, ruling that the admissions policy was, in fact, constitutional
2003	In the most important affirmative action decision since the 1978 *Bakke* case, the Supreme Court (5-4) upholds the University of Michigan Law School's policy, ruling that race can be one of many factors considered by colleges when selecting their students because it furthers "a compelling interest in obtaining the educational benefits that flow from a diverse student body." The Supreme Court, however, ruled (6-3) that the more formulaic approach of the University of Michigan's undergraduate admissions program, which uses a point system that rates students and awards additional points to minorities, had to be modified. The undergraduate program, unlike the law schools, does not provide the "individualized consideration" of applicants deemed necessary in previous Supreme Court decisions on affirmative action.
2003	Supreme Court refused to hear Concrete Works vs. City and County of Denver.

Table A.19 Chronology of Adarand Decisions

Adarand I	*1992*: In *Adarand Constructors, Inc. v. Skinner*, 790 F.Supp.240, the District Court supports DBE program under *moderate scrutiny*.
Adarand II	*1994*: 10th Circuit (in *Adarand v. Pena*, 16 F.3d 1537) affirms the District Court ruling in Adarand. I
Adarand III	*1995*: Supreme Court rules for *retrial* of Adarand II by the Appeals Court *under strict scrutiny*.
Adarand IV	*1997*: District Court noted that strict scrutiny test included two questions: (1) whether the interest cited by the government for a racial classification is sufficiently compelling to overcome the suspicion that racial characteristics ought to be irrelevant so far as treatment by the government is concerned; and 2) whether the government has narrowly tailored its use of race so that race-based classifications are applied only to the extent absolutely required to reach the proffered interest. The Court rules that *DBE program was not narrowly tailored.*
Adarand V	*1999*: After District Court's judgment in 1997, Adarand sued Colorado challenging its DBE guidelines in administering federally assisted highway programs. (*Adarand v. Slater*, 169 F3d 1292). Colorado subsequently modified its regulations to eliminate the presumption of social disadvantage of its DBE inquiry solely on the applicant's certification that they was socially disadvantaged. When Adarand applied for DBE status, it was certified as a DBE. The court concluded that the certification made the challenge to the constitutionality of the DBE program moot. The 10th Circuit reversed Adarand IV and sent it back for dismissal.
Adarand VI	*2000*: Supreme Court states that the Appeals Court erred in saying the issue was moot and forces 10th Circuit to make strict scrutiny analysis
Adarand VII	*2000*: 10th Circuit rules that revised DBE program passes strict scrutiny
Adarand VIII	*2002*: Supreme Court decides to review Adarand VII (which was entitled Adarand Constructors, Inc. v. Mineta) but changes its mind. The Supreme Court dismissed the challenge as the Justices conceded that they had taken the wrong case to decide this major issue on the constitutionality of Disadvantaged Business Enterprise (DBE) Programs.

Table A.20 Six Criticisms and Six Fatal Flaws of Denver Disparity Study

Unconscious conditioning influences how we perceive, believe, and read to individuals and situations that are unfamiliar to us. My typology suggests that there are 3 points of influence that shape one's value perspective:

1. Contextual factors external to the decision maker that shape the area of debate;
2. Conceptual factors that consist of the decision maker's conceptualization of important ideas like political socialization, community, self interest, equity and fairness; and
3, The decision maker's subconscious reactions and socialization, which predict influences how they perceive, believe and respond to people, things and events.

Item #	Concern Articulated by the Court
Criticism #1	The census data relied upon is suspect because it uses a different definition of MWBE than that found in the Denver certification program and was believed to overstate the number of MWBEs
Criticism #2	Data offered by Denver did not distinguish the degree and specificity of the type of discrimination suffered by each group. According to the Justices: "it is contrary to common sense to believe that racial prejudice affects all racial/ ethnic groups equally
Criticism #3	Lack of adjustment made for size of firms, construction specialties or whether the firm worked mainly as a prime or subcontractor
Criticism #4	The failure to limit surveys on anecdotal discrimination to Denver, to follow-up on any allegation or to ask White men about discrimination against them
Criticism #5	Doubt was cast on the validity of disparity studies because of the inherent limitations in attempting to collect and measure useful information about the construction industry because of the nearly infinite number of variables affecting the fate of firms. In short, the sentiment was that the construction industry is varied and complex, therefore, there are many non-discriminatory reasons why a firm might chose to work consistently with a small set of subcontractors
Criticism #6	Aggregation of the MBEs and WBEs in estimating availability without regard for the size of a business or the particular type of service or work in which they specialize was a serious flaw in methodology and impairs the values of the results.
Flaw #1	Is there persuasive race, ethnic and gender discrimination through all aspects of the construction and professional design industry in the six county Denver MSA?
Flaw #2	Does the discrimination equally affect all the racial and ethnic groups designated for preference by the Denver MWBE program and all women?
Flaw #3	Does such discrimination result from policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity and gender?
Flaw #4	Would Denver's use of those discriminating firms without requiring them to give work to certified MBEs and WBEs in the required percentage of each project make Denver guilty of prohibited discrimination?
Flaw #5	Is the compelled use of certified MBEs and WBEs in the prescribed percentages on a particular project likely to change the discriminatory policies and programs that taint the industry?
Flaw #6	Is the burden of compliance with Denver's preferential program a reasonable one fairly placed on those who are justly accountable for the proven discrimination? (Or does the Denver MWBE program punish the right people.

Table A.21 List of Justices Ruling on the *Bakke, Fullilove, Wygant, Croson, Metro Broadcasting* and *Adarand*

Affirmative Action Cases

Justice	Appointed By	Oak Taken	Service Ended
Brennan	Eisenhower	October 16, 1956	July 20, 1990
Stewart	Eisenhower	October 14, 1958	July 3, 1981
White	Kennedy	April 16, 1962	June 28, 1993
Marshall	Johnson	October 2, 1967	October 1, 1991
Burger - Chief Justice	Nixon	June 23, 1969	September 26, 1986
Blackmun	Nixon	June 9, 1970	August 3, 1994
Powell	Nixon	January 7, 1992	June 26, 1987
Rehnquist – Justice	Nixon	January 7, 1992	
Rehnquist–Chief Justice	Reagan	September 26, 1986	September 3, 2005
Stevens	Ford	December 19, 1975	
O'Connor	Reagan	September 25, 1981	January 31, 2006
Scalia	Reagan	September 26, 1986	
Kennedy	Reagan	February 18, 1988	
Souter	Bush	October 9, 1990	
Thomas	Bush	October 23, 1991	
Ginsburg	Clinton	August 10, 1993	
Breyer	Clinton	August 3, 1994	

Source: Antonio & Robert. (2001). *Adarand chronicle: From Bakke to Adarand VII*. www.wifcon/analadar_Bakke.

Table A.22 Cases Reviewed by Justices and their Respective Standings on the Issues[77]

Justice	Bakke	Fullilove	Wygant	Croson	Metro Broadcasting	Adarand III
Brennan	D –Violates Title VI D – Race consciousness violates individual rights D –Violates 14th Amendment	M–Does not Violate 5th Amendment D – Applied test of *intermediate* scrutiny	D–Does not violate 14th Am. D – Strict Scrutiny should not apply D – Case needs more development and evidence	D – No compelling interest D – Violates 14th Amend D – No narrow tailoring Apply immediate scrutiny	M– Doesn't violate 14th Am. M – Apply Immediate Scrutiny M – Compelling government interest	
Stewart	M –Violates Title VI D –Violates 14th Amendment	D–Does not Violate 5th Amendment D –Strict scrutiny test				
White	D –Violates Title VI D – Race consciousness violates individual rights D –Violates 14th Amendment	M – Does not Violate 5th Amendment M – Applied test of strict scrutiny		M – No compelling interest M – Violates 14th Amend M – No narrow tailoring	M– Doesn't violate 14th Am. M – Apply Immediate Scrutiny M – Compelling government interest	
Marshall	D –Violates Title VI D – Race consciousness violates individual rights D –Violates 14th Amendment	M – Does not Violate 5th Amendment D – Applied test of *intermediate* scrutiny	D–Does not violate 14th Am. D – Strict Scrutiny should not apply D – Case needs more development and evidence	D – No compelling interest D – Violates 14th Amend D – No narrow tailoring Apply immediate scrutiny	M– Doesn't violate 14th Am. M – Apply Immediate Scrutiny M – Compelling government interest	

[77] M Indicates the Justice agreed with the majority vote; D indicates that the Justice joined a dissenting opinion.

Table 7.4—*Continued*

Burger Ch. Justice	M –Violates Title VI D –Violates 14th Amendment	M–Does not Violate 5th Amendment M–Strict scrutiny test	M – No compelling interest M – Violates 14th Amend M – Not narrowly tailored			
Blackmun	D –Violates Title VI D – Race consciousness violates individual rights D –Violates 14th Amendment	M – Does not Violate 5th Amendment D – Applied test of *intermediate* scrutiny	D–Does not violate 14th Am. D – Strict Scrutiny should not apply D – Case needs more development and evidence	D – No compelling interest D – Violates 14th Amend D – No narrow tailoring Apply immediate scrutiny	M– Doesn't violate 14th Am. M – Apply Immediate Scrutiny M – Compelling government interest	
Powell	M –Violates Title VI M – Race consciousness violates individual rights M–Violates 14th Amendment	M – Does not Violate 5th Amendment M – Applied test of strict scrutiny	M – No compelling interest M – Violates 14th Amend M – Not narrowly tailored			
Rehnquist Justice	M –Violates Title VI D –Violates 14th Amendment	D–Does not Violate 5th Amendment D –Strict scrutiny test	M – No compelling interest M – Violates 14th Amend M – Not narrowly tailored			
Rehnquist Ch. Justice				M – No compelling interest M – Violates 14th Amend M – No narrow tailoring	D– Strict Scrutiny should apply D – Violates 14th Amend D – Not narrowly tailored	M – No compelling interest M – Violates 14th Amend M – Not narrowly tailored

Table 7.4—*Continued*

Stevens	M –Violates Title VI D –Violates 14th Amendment	D–Does not Violate 5th Amendment D –Strict scrutiny test	D–Narrowly tailored D – Strict Scrutiny should not apply D- Affirmed judgment of the Court of Appeals	M – No compelling interest M – Violates 14th Amend M – No narrow tailoring	M– Doesn't violate 14th Am. M – Apply Immediate Scrutiny M – Compelling government interest	D – No compelling interest D – Violates 14th Amend D – No narrow tailoring
O'Connor			M – No compelling interest M – Violates 14th Amend	M – No compelling interest M – Violates 14th Amend M – No narrow tailoring	D– Strict Scrutiny should apply D – Violates 14th Amend D – Not narrowly tailored	M – No compelling interest M – Violates 14th Amend M – No narrow tailoring
Scalia				M – No compelling interest M – Violates 14th Amend M – No narrow tailoring	D– Strict Scrutiny should apply D – Violates 14th Amend D – Not narrowly tailored	M – No compelling interest M – Violates 14th Amend M – No narrow tailoring
Kennedy				M – No compelling interest M – Violates 14th Amend M – No narrow tailoring	D– Strict Scrutiny should apply D – Violates 14th Amend D – Not narrowly tailored	M – No compelling interest M – Violates 14th Amend M – No narrow tailoring

Table 7.4—*Continued*

Souter						D – No compelling interest D – Violates 14th Amend D – No narrow tailoring
Thomas						M – No compelling interest M – Violates 14th Amend M – No narrow tailoring
Ginsburg						D – No compelling interest D – Violates 14th Amend D – No narrow tailoring
Breyer						D – No compelling interest D – Violates 14th Amend D – No narrow tailoring

Source: Antonio & Robert. (2001). Adarand chronicle: From Bakke to Adarand VII. www.wifcon/analadar_Bakke

Table 7.5 Key Decisions by the Supreme Court on Affirmative Action Policy*

Case	Court Ruling	Decision	Pro/Anti Affirmative Action	Majority/Dissent Opinions
Regent of University of California vs. Bakke (1978	Violation of Title VI of the Civil Rights Act. Justice Powell states that it is also a violation of the 14th Amendment Permitted by the 14th Amendment	Special minority admission programs that deny applicants admission on the basis of race was deemed unlawful However, race may be considered as one factor in admission	Anti Pro	Powell, Rehnquist, Stevens, Stewart, Burger Blackmun, Brennan, Marshall, White Powell, Blackmum, Brennan, Marshall, White Stevens, Stewart, Rehnquist, Burger
Fullilove v. Klutznick (1980)	Permitted by Title VI of the Civil Rights Act and t5th Amendment	Minority set aside programs created by Congress was upheld	Pro	Brennan, White, Powell, Marshall, Blackmum, Brennan Stewart, Rehnquist, Stevens
Wygant v. Jackson Board of Education (1986)	Violation of the 14th Amendment	Union approved layoff plan designed to retain a specific proportion of minority teachers was invalidated	Anti	Powell, Burger, Rehnquist, O'Connor, White Marshall, Brennan, Blackmum, Stevens

Table 7.5—*Continued*.

Richmond v. Croson (1989)	Violation of the 14th Amendment	City contracting minority set aside program was invalidated	Anti	O'Connor, Rehnquist, White, Kennedy, Stevens, Scalia Marshall, Brennan, Blackmum
Metro Broadcasting v. FCC (1990)	Permitted by the 5th Amendment	Program to increase minority ownership of broadcasting licenses was upheld	Pro	Brennan, Stevens, White, Blackmum, Marshall O'Connor, Rehnquist, Scalia, Kennedy
Adrand III v. Pena (1995)	Violation of 5th Amendment	Federal minority set aside contracting program was invalidated	Anti	O'Connor, Scalia, Kennedy, Rhenquist, Thomas Stevens, Ginsburg, Scouter, Breyer

Table 7.6 Theoretical Perspective on Discrimination of Justices Examining Precedent-Setting Affirmative Action Cases

Justice	Bench Tenure	Opinions Align w/Transparency Theory	Case Heard	TPD	PAA
Brennan	34 years	No No No No No	Regents v. Bakke Fillilove v. Klutznick Wygant v. Jackson et al Richmond v. Croson Metro Broadcasting v FCC	L	+
Stewart	23 years	Unclear Yes	Regents v. Bakke Fillilove v. Klutznick	C	---
White	31 years	No No Yes Yes No	Regents v. Bakke Fillilove v. Klutznick Wygant v. Jackson et al Richmond v. Corson Metro Broadcasting v FCC	L	+
Marshall	23 years	No No No No No	Regents v. Bakke Fillilove v. Klutznick Wygant v. Jackson et al Richmond v. Croson Metro Broadcasting v FCC	L	+
Burger	17 years	Unclear No No	Regents v. Bakke Fillilove v. Klutznick Wygant v. Jackson et al	L	+
Blackmun	24 years	No No No No No	Regents v. Bakke Fillilove v. Klutznick Wygant v. Jackson et al Richmond v. Croson Metro Broadcasting v FCC	L	+
Powell	15 years	Yes No Yes	Regents v. Bakke Fillilove v. Klutznick Wygant v. Jackson et al	C	---
Rehnquist	31 years	Unclear Yes Yes Yes Yes Yes	Regents v. Bakke Fillilove v. Klutznick Wygant v. Jackson et al Richmond v. Croson Metro Broadcasting v FCC Adarand v. Pena	C	---

Table 7.6—*Continued*

Stevens	28 years	Unclear No No Unclear No No	Regents v. Bakke Fillilove v. Klutznick Wygant v. Jackson et al Richmond v. Croson Metro Broadcasting v FCC Adarand v. Pena	L	+
O'Connor	22 years	Yes Yes Yes Yes	Wygant v. Jackson et al Richmond v. Croson Metro Broadcasting v FCC Adarand v. Pena	C	---
Scalia	17 years	Yes Yes Yes	Richmond v. Croson Metro Broadcasting v FCC Adarand v. Pena	C	---
Kennedy	15 years	Yes Yes Yes	Richmond v. Croson Metro Broadcasting v FCC Adarand v. Pena	C	---
Scouter	13 years	Unclear	Adarand v. Pena	---	+
Thomas	12 years	Yes	Adarand v. Pena	C	---
Ginsburg	10 years	No	Adarand v. Pena	L	+
Breyer	9 years	Unclear	Adarand v. Pena	---	+

TPD = Theoretical Perspective on Discrimination --- C- Conservative or L- Liberal
PAA = Perspectives on Affirmative Action Policy

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BIOGRAPHICAL INFORMATION

Rosalyn has graduated from UT of Arlington with her Bachelor's of Science in Interdisciplinary Studies and from Amberton University with her Master's of Science in Human Relations and Business. She is currently pursing her Ph.D. in Urban Affairs and Public Administration from UT of Arlington. In her last position with Dallas Rapid Transit (DART) she performed analyses to determine the root cause of the "continued" appearance of an underutilization of females in technical, professional, management and senior management positions within the organization. Rosalyn also designed a combined qualitative and quantitative analysis approach to further research this issue. Within the last five years in her employment with DART ,she has performed case study reviews; conducted analyses of employment trends (recruitment and separations); designed and conducted a survey of current and separated female employees; analyzed the discriminatory effects of policies on female employees, conducted round-table exchanges with female employees to obtain open feedback and live discussion regarding perception within the organization; conducted an environmental scan of the transportation industry (airlines, bus systems, trucking organizations, and railways) to research upward mobility of females (authored a white-paper); suggested improvements and developed an action plan based on feedback, research and survey results. Rosalyn plans to use her combined knowledge and experience to further her career in Human Resources.