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**Affirmative Action Policies: An International Perspective**

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## Affirmative Action Policies: An International Perspective

Broadly defined, affirmative action encompasses any measure that allocates goods – such as admission into universities, jobs, promotions, public contracts, business loans, and rights to buy and sell land – on the basis of membership in a designated group, for the purpose of increasing the proportion of members of that group in the relevant labor force, entrepreneurial class, or university student population, where they are currently underrepresented as a result of past or present discrimination<sup>1</sup>. These measures go beyond antidiscrimination policy strictly conceived. Their existence may result from constitutional mandates, laws, administrative regulations – such as requirements on public contractors –, court orders or voluntary initiatives. Their goal is to counter deeply entrenched social practices that reproduce group-structured inequality even in the absence of intentional discrimination.

Beyond this most general definition, affirmative action policies vary substantially across countries, regarding the *identification of their intended beneficiaries*, the *form of the programs involved* (quota/non-quota), the *level (constitutional, legislative, administrative) of the legal norms from which they derive*, and their *domain of implementation*.

As for the first of these parameters, the most common categories are ethnic, national, or racial groups held to be economically or socially disadvantaged, aboriginal peoples, women, people with disabilities, and war veterans<sup>2</sup>. But this pattern is by no means universal. While affirmative action policies for women has been a major issue in the United States, they are only beginning to take up in India – mostly in the field of political representation<sup>3</sup> –, and are not even considered in Malaysia. Religion, not covered by legislation in Britain, has the most extensive legislative coverage in Northern Ireland, with specific provisions for affirmative action in favor of the Catholic minority. Most important, the term « affirmative action » also applies to cases in which a politically dominant *majority* group introduces preferential policies to raise its economic status as against that of an economically more advanced minority, as in Malaysia and – more recently – South Africa. Here, the groups that receive the benefits of affirmative action are the ones that have the power to legislate them<sup>4</sup>.

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<sup>1</sup> Weiner (1983).

<sup>2</sup> On the specific case of veterans in the United States, see Skrentny (1996), at 41-45.

<sup>3</sup> Tawa-Lama (2002); Tawa-Lama (2001).

<sup>4</sup> In Malaysia, such policies deal with the *Bumiputras* (« sons of the soil ») who comprise 66 percent of the estimated 22.2 million population, while the Chinese are 25.3 percent, and the Indians 7.4 percent (Treasury, Economic Report 2000). In South Africa, aside from women, the main beneficiaries of affirmative action are Africans (76.7 percent of the approximately 40.5 million population, according to the 1996 census) and mixed-race people (« coloureds ») (8.9 percent). Other examples where preferences favor politically dominant groups include Nigeria (Hubbell (1990)), Sri Lanka (Sowell (1990), at 41-89), and Fiji (Howard (1991)). In Nigeria, affirmative action was designed to reduce the predominance of non-northerners – mostly Ibos – in coveted jobs in the north, with preferences in education and public employment spreading from the northern regional government to the federal government. In Sri Lanka, the 1956 law making Sinhalese the only official language throughout the island (Official Language Act, No. 33) – eventually nullified by the 1987 13<sup>th</sup> Amendment to the Constitution – had the effect (and the purpose) of closing the many job opportunities in the government and in the professions that education in the English language had opened up for the better-educated, economically successful Tamil minority (about 20 percent of the population). Besides, between 1971 and 1977, a new «standardization» policy was implemented, which ensured that the number of students qualifying for university entrance from each language group was proportionate to the number of students who sat for university entrance examination in that language. As a practical matter, this meant that Tamil-speaking students had to score much higher than Sinhalese-speaking students to gain admission to universities.

The specific – more or less rigid – requirements imposed by affirmative action programs and their legal underpinnings are also different from one country to another. Thus, at first sight, one could contrast experiences with constitutionally sanctioned, mandatory quota/reservation policies such as those in Malaysia and India with non-constitutionally-grounded « goals and timetable » policies to be found in North America<sup>5</sup>. This connection, however, does not always hold: while South African affirmative action policies are constitutionally sanctioned, they set up supposedly flexible « goals », not quotas. Besides, even within the group of countries where affirmative action is not constitutionally mandated (the US and Canada, but also all European countries), institutional differences are not insignificant. To take but one example, in contrast to the US system where affirmative action (for federal contractors and subcontractors) was introduced by Presidential Executive Orders and its limits are left for the courts to define, in Canada there is detailed legislation that specifies the scope of the policy<sup>6</sup>.

Finally, the range of the programs involved also varies across countries. Thus, while in the United States, Canada, South Africa, Australia and Northern Ireland, affirmative action programs tend to cover both the public and the private sectors, in India, the entire sphere of private employment is excluded from reservations. On the other hand, besides quotas in admission into colleges, medical and engineering schools, government employment and public enterprises, a predefined proportion of seats in Parliament and state legislatures are also reserved for « Scheduled Castes » and « Scheduled Tribes », a scheme the equivalent of which does not exist in most other « affirmative action » countries<sup>7</sup>. As for preferential policies in higher education – a prominent element in the affirmative action debate in the United States, India and Malaysia –, they are almost non-existent in Europe<sup>8</sup>.

As far as employment, university admissions and public contracting are concerned, affirmative action policies may be divided into two different kinds of programs. For the sake of simplicity, let us consider the example of employment in the US context, assuming (unrealistically) that it can be defined as a zero-sum game between two racial groups (blacks and whites). In that case, one first kind of « affirmative action » may simply consist in measures designed to increase the pool of black applicants, by running job advertisements in

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<sup>5</sup> In Latin America, most countries do not have affirmative action programs of any kind, and civil rights law is generally underenforced. Besides, « the few countries with enabling statutes have tended to focus on criminal law provisions as the primary vehicle for combating acts of discrimination, in part because the criminal law venue does not require an investment of financial resources on the part of the victim » (Kateri Hernandez (2002), at 1129).

<sup>6</sup> Indeed, the Canadian 1986 Federal Employment Equity Act outlines the departure from the principle of equal treatment inherent to affirmative action more explicitly than any US statute or regulation : « The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of ‘visible minorities’ by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences » (at <http://laws.justice.gc.ca/en/E-5.401/48801.html>).

<sup>7</sup> On the efforts to create political districts in which a majority of the eligible voters are ethnoracial minority group members capable of electing minority candidates to state, local and federal offices in the United States, see Kousser (1999). Another exception is New Zealand, where the descendants of the aboriginal Maori population are guaranteed five seats in Parliament. Thus, there are five Maori districts that overlay the general election districts. To vote in one of these Maori districts, a Maori voter must register on the Maori roll. Registration on this roll is optional, however; Maori can choose to register in the general election instead (see generally Fleras and Spoonley (1999)).

<sup>8</sup> For a narrowly limited exception, see Sabbagh (2002). In the United States, these programs might look all the more acceptable as « admission to leading American colleges and universities, in particular the private institutions that form a large part of the college and university system, is not determined exclusively by tests or academic achievement » (Glazer (2000), at 146).

black newspapers or by setting up special training programs in areas where blacks are heavily concentrated<sup>9</sup>. This type of affirmative action, also known as « outreach », does take race into account, but in a rather limited way: race is allowed to enter the picture only within the preliminary process of enlarging the set from which individuals will eventually be selected, not at the selection level itself. However, in other affirmative action programs, the recruitment process is entirely permeated by color-consciousness, even during the final, decision stage. « Affirmative action » then refers to measures that grant a more or less flexible kind of *preferential treatment* in the allocation of scarce resources to the members of groups formerly targeted for legal discrimination<sup>10</sup>. The phrase « preferential treatment » should not be understood as having any negative implication. It simply identifies a situation where, for example, a black applicant, B1, would be selected for a job in spite of there being at least one white applicant whose qualifications were deemed to be « higher », « higher » meaning that if another black applicant, B2, had come up with exactly the same qualifications as the white one, the employer would have hired him, instead of B1<sup>11</sup>. In other words, racial identification is the key factor here: B1 succeeds in obtaining the job that he applied for – and would have failed but for his being identified as black. Because this definition of affirmative action brings into relief the main subject of political and legal controversy, it will serve as a starting-point for the developments that follow<sup>12</sup>.

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<sup>9</sup> See Glazer (1975), at 196-197.

<sup>10</sup> This is not meant to suggest that the « outreach » variety of affirmative action has no preferential component whatsoever. As a practical matter, the fact of specifically devoting resources to setting up training programs designed to reach the members of designated groups will reduce the amount of resources available for setting up training programs that might have targeted other groups. To a certain extent, there is also a zero-sum-game involved. The difference is that in one case, the goods that are being preferentially allocated are in fact resources – namely the probability of being in a position to participate in a training program that might open new job opportunities –, whereas in the other case, the goods are the jobs themselves. In short, affirmative action may operate either at the level of the final distribution of goods or at the level of the distribution of other resources that might prove instrumental in securing those goods through a competitive and *supposedly meritocratic* selection process (at least as far as jobs and university admissions are concerned).

<sup>11</sup> See Nagel (1977), at 3. « Qualifications » are the relevant informational data that one will take into account in order to predict the level of job performance that each applicant can be expected to reach. It is worth emphasizing that this definition of « preferential treatment » does not imply that the methods currently used by firms and universities to assess the applicants' « qualifications » are indeed optimal – or even adequate.

<sup>12</sup> In Europe, with the exception of gender quotas in representative assemblies (see Siim (2000), and more generally Caul (2001); Matland (1998)), almost all affirmative action policies are of the « outreach » variety. The United Kingdom is a case in point – although there are substantial differences between Britain and Northern Ireland. In Britain, the law permits, but does not require, special actions to aid minority group members. Under the 1976 Race Relations Act, employers are allowed to specially encourage racial minorities to apply when they are underrepresented in the workforce (RRA, pt.6, sec. 38), and they may grant « persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare, or any ancillary benefit » (RRA, pt. 6, sec. 35). Most important, the law permits employers to grant « only those ... employees working at that establishment who are of a particular racial group access to facilities for training which would help fit them for that work » (RRA, sec. 35, pt. 38). On the other hand, using differential standards to benefit minority groups is called « positive discrimination » and is explicitly forbidden. There are no requirements for government to do business with minority-owned enterprises, and no required record-keeping of a firm's employment of minorities, as exist in Canada, South Africa and the United States. While the Race Relations Act – in contrast to the U.S. Civil Rights Act of 1964 – exceptionally permits the use of race when it can be shown to be a genuine occupational qualification in relation to the performance of a particular job (for instance, « when the holder of the job provides persons of that racial group with personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group » (RRA, pt. 2, sec. 5)), the courts have interpreted this « genuine occupational qualification » provision narrowly, and it did not open the door to stronger types of affirmative action. In a nutshell, « positive action » did not lead to preferential treatment – despite substantial inequalities in labor market outcomes between the various ethnic and racial groups. To take but one example, in 1996, the unemployment rate for nonwhite males was 19 percent compared to 9.1 percent for white males, and for nonwhite females, 15 percent compared to 5.9

Unsurprisingly, the broadest and most radical kind of affirmative action is to be found in countries where the groups who stand to benefit from the programs involved form a numerical majority holding political power, namely Malaysia and South Africa. These specific cases will be considered first. Since there is much more reliable empirical evidence available on the United States than on any other country, the next section assessing the effects of affirmative action policies in employment and university admissions will mostly focus on the US experience – with an aside on France as an interesting point of comparison. This will lead to a more general evaluation of the different conceivable *justifications* for such programs. Lastly, the central problem of delineating the groups targeted for favorable treatment will be approached through an analysis of the Indian case, in which it was – and remains – particularly salient.

### **Preferential Treatment for Disadvantaged Majority Groups: Malaysia and South Africa**

Beyond their obvious differences as far as colonial legacy is concerned, these are two cases in which not only were the disadvantaged groups numerical majorities, but the extent of economic group inequalities was especially impressive. Thus, in 1957 – the year Malaysia became independent –, while the Malays made up 62.1 percent of agricultural workers, they comprised only 4.3 percent of architects, 7.3 percent of engineers, and 6.8 percent of accountants<sup>13</sup>. That same year, Malay business constituted only 10 percent of the 89,000 registered business establishments and accounted for only 1.5 percent of the capital invested in registered companies<sup>14</sup>. In South Africa, in 1995, whites, constituting 12.9 percent of the population, had 58.6 percent of total personal income, whereas Africans – who made up 76.2 percent of the population – received 29.3 percent of income share<sup>15</sup>. In 2000, according to one

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percent for white females (Jain, Sloane and Horwitz (2003), at 65). Among the main factors accounting for this absence of preferential treatment, one should rather emphasize the importance of demographics : in contrast with the United States, where about 30% of the population identify themselves as members of ethnoracial minorities (according to the Census 2000 figures, there are now 12.3 percent blacks, 12.5 percent Hispanics, 3.6 percent Asians and 0.9 percent Native Americans), in Britain, as of 1994, 93 percent of those in the General Household Survey identified themselves as white (Teles (2001), at 248). Aside from their low numbers, minorities are also distributed rather evenly across a number of groups that do not see themselves as having much in common (Indians are the largest group, followed by Afro-Caribbeans, Pakistanis, African Asians (largely refugees from Uganda and Kenya), Africans, Chinese, and Bangladeshis ; see Jones (1996), at 23; Modood and Berthoud (1997), at 13). Unlike in the United States, there is no *leading* minority group whose historical experience of discrimination would be acute enough for them to obtain special treatment – thus paving the way for a generalized affirmative action regime. Moreover, activists' efforts to popularize the term « black » as an umbrella for Africans, African Caribbeans, and South Asians have failed. On the other hand, in Northern Ireland, continued violence and persistent discrimination on a religious basis led to the 1989 Fair Employment Act, which was consciously modelled, in a way that the Race Relations Act was not, on some aspects of contemporary US practice. Thus, all public authorities and private sector employers with more than ten employees are required to register with the Fair Employment Commission – now the Equality Commission – and submit annual reports on the religious composition of their workforce. Large employers are required to collect similar information on applicants as well (McCrudden (1992), at 171). Unlike the experience in mainland UK where positive action remains voluntary, when the workforce is unbalanced, the employer is under an obligation to implement a program of affirmative action. For more details on Britain and Northern Ireland, see Teles (2001) and Teles (1998) – from which this development derives.

<sup>13</sup> Brown (1994), at 218.

<sup>14</sup> Lim (1985), at 256.

<sup>15</sup> Van der Westhuizen (2002), at 127.

survey of 161 large firms employing 560,000 workers, whites made up 80 percent of managers still<sup>16</sup>. The racial wage differential was also substantial: at the end of the 1990s, the average wage of a white worker was five times as great as the average for an African, although half of that discrepancy was explained by differences in education and location<sup>17</sup>. Thus, the sheer size of the existing inequalities was a powerful argument for the introduction of affirmative action policies, whose existence was to be guaranteed in the Constitution itself.

In Malaysia as well, not only does Article 8(5) of the Federal Constitution of 1957 state that the general principle of equality does not ban provisions for the advancement of Malays; in line with the compromise eventually reached wherein non-Malays, in return for receiving citizenship based on the principle of *jus soli*, agreed to having special rights conferred on the Malays in order to uplift their economic position, Article 153 explicitly recognized the Malays and the Indigenous people of Sarawak and Sabah as endowed with certain protected privileges designed to help them enter into the modern sectors of the economy and to attain economic parity with non-Malays. In particular, it was stipulated that the government should reserve for the Bumiputras a reasonable proportion of positions in the public service<sup>18</sup> and educational institutions, scholarships, and business permits or licenses. Article 89 also empowered state authorities to reserve areas of land for exclusive Bumiputra ownership provided that they were not already occupied by non-Bumiputras<sup>19</sup>. Last but not least, these Malay special rights could not be amended through the normal legislative process, and their existence could not even be questioned: under the 1948 Sedition Ordinance – eventually incorporated into the Constitution in 1971 –, to do so constituted a criminal offence<sup>20</sup>. In South Africa, no similar provision exists, but Section 9 (2) of the Bill of Rights inserted in the 1996 Constitution states in part: «To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken ». Affirmative action in hiring, promotion, university admissions, and the award of government contracts is specifically mentioned<sup>21</sup>.

In both countries, the constitutionalization of affirmative action has probably facilitated its radicalization. In Malaysia, in line with the demographic shift that saw the

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<sup>16</sup> Of these managers, 79 percent were male and 21 percent female. Two years earlier, in 1998, the percentages of blacks, coloureds, and Indian were 6, 4, and 4, respectively, with 86 percent white managers (see Jain, Sloane and Horwitz (2003), at 35); in 1995, according to the University of Cape Town's Graduate School of Business bi-annually published *Breakwater Monitor*, the proportion of black managers in the private sector amounted to about 4 percent of the total (Adam (1997), at 233).

<sup>17</sup> Schultz and Mwabu (1998).

<sup>18</sup> In the Malaysian Civil Service (MCS), for instance, the goal defined thereafter called for a recruitment ratio of 4 Malays to every non-Malay. As a matter of fact, the « Malayization » of the MCS proceeded quickly. In 1957, expatriates constituted 61.7 percent of the MCS, Malays 34.6 percent and non-Malays 3.6 percent; by 1970, there were no expatriates, Malays formed 86.6 percent and non-Malays 13.4 percent (Lim (1985), at 256-257).

<sup>19</sup> Nesiah (1997), at 201. That provision only expanded a pre-independence policy set up by the British colonial administration; as soon as 1913, the Malay Reservation Enactment was passed which designated certain areas to be reserved for Malay ownership only. Yet, by preventing Malay reserve land from being sold to non-Malays, that supposedly « protective » legislation restricted Malay access to capital. Moreover, since only a limited number of agencies could hold Malay reserve land, it also meant that prices would always be defined below market value.

<sup>20</sup> Jain, Sloane, and Horwitz (2003), at 184.

<sup>21</sup> See generally Cédiey (2002). Section 9 (3) also indicates that « the state may not *unfairly* discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth » (our emphasis). Section 9 (5) makes clear that, in some cases, discrimination may be considered « fair ».

Malay population expanding and Chinese numbers contracting as a result of Singapore's departure from the federation of Malaya in 1965, and as a response to the severe interethnic rioting of 13 May 1969<sup>22</sup>, in 1971, the government launched a « New Economic Policy » (NEP) designed to ensure that the distribution of the workforce in each economic sector should reflect the ethnic composition of the population. The avowed objective was « to eradicate poverty among all Malaysians and to restructure Malaysian society so that identification of race with economic function and geographical location is reduced and eventually eliminated, both objectives being realized through rapid expansion of the economy over time »<sup>23</sup>. The project of bringing about a radical, large-scale social transformation which arguably underlies affirmative action policies even in liberal democracies<sup>24</sup> was thus made strikingly – and most unusually – explicit. As a practical matter, the NEP consisted in a set of policies reflecting a complete departure from the laissez-faire economic model that had guided development since independence and geared towards forcing the private sector to increase Bumiputra participation, in addition to the public employment reservations already mandated by the Constitution : the government has legislated Malay quotas for the issuance of trading/business licenses and permits and ownership of equity ; it provides special assistance such as credit<sup>25</sup>, training, and business sites to Malay businessmen; it undertakes responsibility to acquire shares in private corporations on behalf of *Bumiputras*, with a view to reaching an objective of 30 percent *Bumiputra* corporate ownership. These programs are virtually unique to Malaysia<sup>26</sup>. Last but not least, the National Language Act of 1967 designating Malay to be the sole official language – with English-medium schools converting to the Malay medium three years later – also had a major impact on employment in the public sector, where the requirement of Malay proficiency both eased and legitimated Malay

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<sup>22</sup> In the official – generally acknowledged to be understated – figures, 196 people died, 439 were wounded, and 9,143 were arrested (Wyzan (1990), at 53).

<sup>23</sup> In Nesiah (1997), at 203 (our emphasis). The clustering of the different ethnic groups in specific occupational areas was indeed remarkable, with Chinese concentrated in urban commerce and in tin-mining communities, Indians in rubber plantation labour, and Malays in the rice-farming peasantry (by 1957, 97.5 percent of rice farmers were Malays; 66 percent of individuals employed in commerce and 72 percent of those in mining and manufacturing were Chinese (Brown (1994), at 218)). The meaning of « geographical location » in the quotation above refers to Bumiputra overrepresentation in the rural areas and non-Bumiputra domination of the urban, industrial, and mining centres. Apparently what is desired is not so much the redistribution of the races between the different states or provinces as redistribution between urban and rural areas, i.e., in effect, a large measure of rural-urban migration of the Bumiputra population. As for the spatial distribution of the Chinese population, it is such that their influence cannot be confined to certain regions by any scheme of devolution or regional preferences: they are spread in substantial numbers over all the states of the Malaysian federation except the remote north-eastern states of Trengganu and Kelantan (Nesiah (1997), at 99).

<sup>24</sup> On the United States, see Koppelman (1996), at 24-27; Sabbagh (2003a), at 314-319.

<sup>25</sup> Initially, in August of 1974, banks were required to provide at least 12 percent of their loans to *Bumiputras*; this was raised to 20 percent in October 1976 (Lim (1985), at 263).

<sup>26</sup> In South Africa, the Black Economic Empowerment Commission has recently proposed further legislation to increase control of both companies and productive land by black individuals until it attains proportions similar to those defined in the Malaysian case (25 percent and 30 percent respectively): see Jain, Sloane and Horwitz (2003), at 210. Yet, the particular sectors in which the « black » conglomerates are most active so far (finance, insurance, tourism, the leisure industry, media and publishing...) tend to be typical knowledge-intensive, post-Fordist industries, with limited potential to create massive job opportunities. « Whereas these are undoubtedly the necessary sectors upon which South Africa should focus in order to gradually reduce its heavy reliance on primary commodity exports and enhance its position in the new International Division of Labor, growth in these sectors is likely to favor a highly skilled, mostly male, and therefore mobile elite, rather than the mass of unskilled and unemployed » (van der Westhuizen (2002), at 143). In short, the pressures for globalization severely constrain the state's ability to pursue a *joint strategy* of growth with ethnic redistribution.

preferential employment, restricting the upward mobility that English had afforded to many non-Malays in the past<sup>27</sup>.

Did the NEP succeed in attaining its quantitative goals? By all measures, advances made by the *Bumiputras* in the fields of education, employment, occupational mobility, and ownership of small businesses and large corporations have been substantial. Thus, the percentage of Malays in the student population of local universities rose from 40 per cent to 73 per cent between 1970 and 1980<sup>28</sup>. The mean household income of Malays went from 43.7 per cent of the Chinese (national) mean in 1970 to 55% in 1995<sup>29</sup>. In private sector employment, the Malays exceeded the initial 50 percent target, reaching 61.8 percent by 1990 in the professional and technical categories<sup>30</sup>. They also improved their representation in the administrative and managerial occupational groups from 22.4 percent in 1970 to 31.3 percent in 1990 – even though their targeted representation level was 49.3 percent<sup>31</sup>. While the Malays had 2% equity in firms in 1969, in 2000, they owned 22% of their national Economic Assets<sup>32</sup>. As for the ultimate end of creating a harmonious and unified society – assuming that end is being pursued at all –, success is definitely more doubtful<sup>33</sup>.

South African affirmative action, as defined in the 1998 Employment Equity Act (EEA), also displays some radical features compared to the programs set up in most other countries. Indeed, not only does the law stipulate that « every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups (...) [in order] to ensure their equitable representation in all occupational categories and levels of the workforce »<sup>34</sup>, but it explicitly includes include « preferential

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<sup>27</sup> Grove (1986).

<sup>28</sup> Lim (1985), at 269.

<sup>29</sup> Wyzan (1990), at 55; Yusof (2001), at 91. This reflects not only the impact of preferential policies but also the increased urbanization of the Malays over these years – rising from 27 percent urban in 1970 to 37 percent urban in 1985 – and the declining proportion of Chinese in the Malaysian population (Sowell (1990), at 50).

<sup>30</sup> Jain, Sloane, and Horwitz (2003), at 16.

<sup>31</sup> Hodges-Aeberhard and Raskin (1997).

<sup>32</sup> Jain, Sloane, and Horwitz (2003), at 43. As soon as 1982, the process of Malaysianization of the primary sector was nearly complete, with Malays controlling about 60 percent of corporate shares in mining and plantations through state enterprises, far beyond the original target of 30 percent set for both sectors in 1973 (Jesudason (1989), at 91). Yet, in other fields, it has been argued that a substantial percentage of Malay businessmen resell their licenses to non-Malays for a lucrative fee or allow their names to be used as fronts for non-Malays who actually operate the business: see Bakri Musa (1999), at 187-188.

<sup>33</sup> Gomez and Jomo (1997), at 168. In particular, educational opportunities for non-Malays, particularly at the college level, have shrunk so much as a result of the 55 percent *Bumiputra* quota that an increasing proportion of Chinese students are forced to attend universities in other countries such as Singapore. Thus, as soon as 1980, nearly 40,000 students from Malaysia were studying overseas, three-fifths of them Chinese. By 1985, there were approximately 60,000 students from Malaysia studying overseas – as many as were enrolled in degree programs in Malaysia itself (Sowell (1990), at 50). In 2003, in order to counter this depletion of human capital, a merit-based enrolment system was finally introduced in all public colleges and universities.

<sup>34</sup> Employment Equity Act, No.55 of 1998, Sections 13 (1) and 13 (2). A « designated employer » is :

- an employer who employs fifty or more employees.
- an employer who employs fewer than fifty employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business.
- a municipality or an organ of state, excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service.
- an employer appointed as a designated employer in terms of a binding collective agreement and to the extent provided for by that agreement.

People from « designated groups » are :

- « black people », a generic term meaning Africans, Coloured and Indians ;
- women ;
- people with disabilities.

treatment and numerical goals »<sup>35</sup> – though not quotas. Moreover, in contrast with most other national legislations where the issue of fair pay is usually addressed in relation to women rather than people of color, the prohibition of « indirect discrimination »<sup>36</sup> enacted through the 1998 law covers the area of remuneration for both groups. Section 27 of the Employment Equity Act thus requires employers to submit, in their employment equity plan, data on compensation and benefits received for each occupational category (and level) by race and gender<sup>37</sup>. Where disproportionate income differentials exist, the employer must take measures to progressively reduce them. Finally – and most distinctively –, under Section 20 (5) of the Act, a designated group member's lack of the necessary qualifications is not a sufficient reason for hiring a non-designated group member instead: the employer « may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience »<sup>38</sup>. As far as the law is concerned, what matters is only the applicant's « capacity to acquire, within a reasonable time, the ability to do the job »<sup>39</sup>. By wholeheartedly rejecting the very criterion of merit as conventionally defined by the current level of qualification, South African law thus embraces the principle of affirmative action most explicitly, while depriving it of its conceptual distinctiveness as an *exception* to the (otherwise still-prevalent) meritocratic rule<sup>40</sup>.

## The US Experience: The Historical and Legal Background

Like in Malaysia and South Africa, US affirmative action programs were originally predicated upon the existence of multidimensional, far-ranging, intergenerational patterns of group inequality between the two numerically predominant ethnoracial groups – whites and blacks. Although these inequalities have significantly subsided over the past three decades, they have not disappeared. Thus, in 1997, the median household income for blacks was only 64% of the corresponding figure for whites<sup>41</sup>. The percentage of households earning less than \$10,000 per year was 17 percent for blacks, and 5.3 percent for whites<sup>42</sup>. The discrepancy in the assets detained by black and white households is much higher still: here, the ratio is about

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(Employment Equity Act, No.55 of 1998, Section 1 - Definitions).

<sup>35</sup> Employment Equity Act, No.55 of 1998, Section 15 (3).

<sup>36</sup> See below, at 11.

<sup>37</sup> Yet, as far as employment itself is concerned, the EEA does not require companies to disaggregate their information on race and disability by gender – and vice versa. This presents the possibility that targets for women will be met mostly by advancing the already privileged white women, thereby denying black women access to training and traditionally male jobs. In addition, companies below the threshold limit of fifty employees are not covered by the EEA. Thus, since the vast majority of African women work either in such small companies or as domestic workers – or in the informal sector –, most of them will remain uncovered by the legislation (Samson (1999). On the related unfairness of excluding Asians as a whole from affirmative action programs in university admissions in the United States resulting from a similar failure to take into account the *internal diversity* of the group involved, certain fractions of which – defined by national origin – are indeed underrepresented in selective universities, see Brest and Oshige (1995), at 855-856.

<sup>38</sup> Employment Equity Act, No.55 of 1998, Section 20 (5).

<sup>39</sup> Id.

<sup>40</sup> For a more detailed analysis of the 1998 Employment Equity Act, see Cédiey (2001).

<sup>41</sup> U.S. Census Bureau, *Statistical Abstract of the United States: 1999*, Washington, D.C., U.S. Bureau of the Census, 1999, at 478 (table 750). That discrepancy is due mostly to the high proportion of single-parent, female-headed families within the black population (48 percent of black households in 2000).

<sup>42</sup> U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1999*, at 478 (table 749).

one-to-ten<sup>43</sup>. The unemployment rate among whites was 4.2% in 2001; it was 8.7% among blacks<sup>44</sup>. In 2000, 7.5% of non-Hispanic whites lived in poverty; for blacks, the figure was 22.1%<sup>45</sup>. And one could add many other examples<sup>46</sup>.

In the United States, however, the very existence of affirmative action policies is somewhat paradoxical. For not only did Congress fail to provide such policies with a constitutional foundation ; it also passed a law – the 1964 Civil Rights Act – which did seem to exclude them in advance. Now covering private employers with fifteen or more employees, federal, state, and local governments, educational institutes, employment agencies and labor unions<sup>47</sup>, that statute prohibited discrimination on the basis of race, color, religion, national origin, and sex<sup>48</sup>. One of its key provisions was its « Title VII », which declared it « an unlawful employment practice for an employer (...) to fail or refuse to hire or to discharge *any individual (...)* because of such individual's race, color, religion, sex or national origin »<sup>49</sup>. Obviously, the phrase « any individual » meant that even though the motivating force behind the introduction of the 1964 Civil Rights bill was most certainly to end the discrimination suffered by blacks – which was then pervasive, particularly in the South –, whites would also be protected from employment discrimination. This had been endlessly reiterated by the leading supporters of the bill, such as Senator Humbert Humphrey:

« Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission [enforcing Title VII] or to any court to require hiring, firing or promotion of employees in order to meet a racial « quota » to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but it is nonexistent. In fact the very opposite is true. Title VII prohibits discrimination »<sup>50</sup>.

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<sup>43</sup> Oliver and Shapiro (1995), at 197; Conley (1999).

<sup>44</sup> U. S. Department. of Commerce, Bureau of Census, *Statistical Abstract of the United States: 2002*, at 368 (table 562).

<sup>45</sup> U. S. Department of Commerce, Bureau of Census, *Poverty in the United States: 2000*, at 291 (table A).

<sup>46</sup> See generally Cherry and Rodgers (2000); Cole (1999); Miller (1996).

<sup>47</sup> The Equal Employment Opportunity Act of 1972, which extensively amended the 1964 Act, reduced the number of employees necessary for its application from twenty-five to fifteen. It also extended it to state and local governments and gave the agency responsible for its enforcement – the Equal Employment Opportunity Commission (EEOC) – the power to file suits in its own name, along with private action.

<sup>48</sup> The inclusion of women among the groups to be protected by the 1964 Civil Rights Act was an accident of politics. As a matter of fact, the term « sex » was added to the legislation in an effort to defeat it. The amendment was introduced by Representative Howard Smith, a senior Southern Democrat who assumed that the inclusion of « sex » among the forbidden categories would render the bill impassable. His assumption was that banning sex-based discrimination would be such an obviously absurd decision that a bill including that provision would necessarily be rejected: see United States. Equal Employment Opportunity Commission, *The Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, Washington, D. C., U.S. Government Printing Office, 1968, p. 3213, 3222.

<sup>49</sup> The entire text is as follows : « It shall be unlawful employment practice for an employer :

- (1) to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin ». (Civil Rights Act (1964). 42 U. S. Section 2003, § 703 (a)).

<sup>50</sup> Congressional Record, 88th Congress, 2d session, 1964, 110, part 5, p. 6549.

Besides, another section of the law explicitly disavowed the notion that the Civil Rights Act could require any preferential treatment to correct statistical imbalances. Thus, Section 703 (j) stated:

« Nothing contained in this title [Title VII] shall be interpreted to require any employer (...) to grant preferential treatment to any individual or to any group because of race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by an employer... »<sup>51</sup>.

Yet, the first affirmative action programs were to be implemented only a few years later, in spite of that seemingly unambiguous commitment – and in spite of their persistent unpopularity with a substantial majority of the American public<sup>52</sup> –, through an administrative and legal process on which a few comments are in order.

From the point of view of the agencies charged with monitoring the implementation of Title VII – the abovementioned EEOC and the Office of Federal Contract Compliance (OFCC) –, the individualized approach to antidiscrimination enshrined in the Civil Rights Act had many disadvantages. First, the practice of investigating each case separately soon proved inadequate given the unexpectedly high number of complaints received by the EEOC, of which the agency was able to handle only a very small proportion. Second, the burden of proving the employer's discriminatory intent was almost impossible to meet. Third, the enforcement mechanisms were often unable to reach the employers most egregious for their discriminatory practices: the fact that hardly any black worker would bother to apply for a position in such firms anyway allowed them not to become the subjects of complaints, thereby making it impossible for the EEOC to start an investigation.

In order to solve the most pressing problem – that of overwhelming caseload –, the EEOC eventually resorted to the technique of « class-action suits »<sup>53</sup>. Instead of squandering its meagre resources by undertaking time-consuming and cumbersome investigations the impact of which was to be restricted to one single individual, the agency chose to focus on a few large firms, in hope that the courts would prescribe compensatory racial quotas in case of previous discrimination – which they did<sup>54</sup> –, whether these quotas were to benefit the actual victims of such discrimination or not. For although the official mission of the EEOC was to stop discrimination, the new antidiscrimination law was generally expected to result in greater numbers of employed African-Americans<sup>55</sup>. In this light, insofar as *improving black employment through the elimination of discrimination* could be conceived as the ultimate *raison d'être* of the agency, it was natural to expect that this same standard – the proportion of blacks in the workforce – would be used for assessing EEOC achievements. Forcing the employers to set up « goals and timetables » to increase minority representation, then, would

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<sup>51</sup> *Civil Rights Act* (1964). 42 U. S. Section 2003, § 703 (j)).

<sup>52</sup> Sniderman and Carmines (1997); Steeh and Krysan (1996).

<sup>53</sup> See Fiss (1996).

<sup>54</sup> The set of remedial measures that the courts would be entitled to impose on those employers held to be guilty of persistent discrimination in violation of Title VII had been left undefined. Judges were simply invited to « order such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay (...) *or any other equitable relief that the court deems appropriate* » (U.S. Congress, Civil Rights Act of 1964, Title VII, section 706 (g)). Words in italics are those that Congress added in the Equal Employment Opportunity Act of 1972, mostly in order to legalize some of the first affirmative action programs.

<sup>55</sup> See Blumrosen 1971, Appendix I.

enable the agencies to point toward the appearance of some *immediately measurable* progress. In this respect, the emergence of contemporary affirmative action partly appears as a side-effect of « administrative pragmatism »<sup>56</sup>, a logic of action all the more powerful as the very survival of institutions such as the EEOC and the OFCC probably turns on the results that they might be able to claim credit for. That is, their *legitimacy* largely depended upon their *demonstrable effectiveness* in reaching their underlying goals, and these included black economic advancement – even by arguably illegal means.

The next step in the administrative and legal construction of affirmative action policies is a 1971 Supreme Court decision, *Griggs v. Duke Power Company*<sup>57</sup>. There, the Supreme Court declared that the ban on employment discrimination enshrined in Title VII of the Civil Rights Act of 1964, far from prohibiting only the most blatant forms of intentional discrimination, also applied to recruitment procedures that were « fair in form but discriminatory in operation », such as hiring tests which, though « neutral on their face », would have the effect of « freez[ing] the status quo of prior discriminatory employment practices » because of their « adverse impact » on blacks and other disadvantaged minority groups<sup>58</sup>. From then on, any statistically significant discrepancy in the racial distribution of the workforce traceable to one or several hiring procedures or criteria that could not be justified on grounds of « business necessity » were to be held illegal. As a result, the meaning of the word « discrimination » in the employment context underwent a dramatic expansion : the Supreme Court included within the purview of Title VII all forms of *indirect discrimination*, that is, recruitment practices that do not rely on any of the unlawful grounds for employment decisions enumerated in the Civil Rights Act (race, color, religion, sex, or national origin) but still work to the disadvantage of a disproportionate number of minority group members – regardless of the employer’s actual motivations<sup>59</sup>. As for identifying the *extent* of the disproportion that would qualify as evidence of « adverse impact » under *Griggs*, this was settled in the 1978 Uniform Guidelines on Employee Selection Procedures, a document that was meant to draw up operational prescriptions that the EEOC and the OFCC could rely on in

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<sup>56</sup> See generally Skrentny (1996), at 110-144 – from which this development derives.

<sup>57</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>58</sup> *Griggs v. Duke Power Company*, at 431, 430. As a practical matter, only women, ethnoracial minorities and the handicapped may be protected against such indirect discrimination. This was established by the 1973 Supreme Court decision *San Antonio Independent School District v. Rodriguez* – in which Justice Lewis Powell’s majority opinion declared that « the poor » were not entitled to protection against discrimination as « disparate impact » because of the « amorphous » character of that group and because its members had not been « subjected to a history of purposeful unequal treatment » (*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), at 28)).

<sup>59</sup> A few years later, Britain adopted the *Griggs*-derived, extended conception of discrimination in its Sex Discrimination Act of 1975 and Race Relations Act of 1976. So did the Netherlands in 1983, and Sweden in 1999, among others: see Guiraudon and Geddes (2003) ; Soinen and Graham (2000), at 195. The notion of « indirect discrimination » was also incorporated in EC legislation by a 1997 Council Directive regarding sex equality (Council Directive 97/80/EC of December 15 1997), and was subsequently extended to types of discrimination newly prohibited by the Treaty of Amsterdam: discrimination on grounds of racial or ethnic origin (June 2000 Directive) and on grounds of religion or belief, disability, age or sexual orientation (November 2000 Directive).

their enforcement activities. The key point was the following one:

« For any hiring test used by a firm subject to (...) Title VII (...), if the success rate achieved by any racial, ethnic or gender group is less than four-fifths of the rate of the most successful group, the test will be considered to have an adverse impact on the first group »<sup>60</sup>.

As a consequence, it would be held unlawful. Under this « four-fifths rule », if, for instance, 50% of the white applicants and less than 40% of the black applicants succeeded on a given test, then, that test would have to be withdrawn and replaced by another devoid of any « adverse » impact on racial minorities – unless carrying on with the first test could be justified on grounds of « business necessity ».

Yet, at the beginning of the 1970s, because the average level of qualification among blacks was significantly lower than among whites as a result of school segregation, there were a host of cases where just any color-blind recruitment procedure would have proved « discriminatory » under the *Griggs* principle. Therefore, an employer determined to reach a « nondiscriminatory » result had no other choice but to differentiate his requirements somehow according to the race of the applicant, a differentiation that could be made more or less explicitly. « Affirmative action » is simply the name given to that differentiation, when it is openly acknowledged as such.

### **The U.S. Experience: Assessing Affirmative Action in Employment and University Admissions**

Economists have used two approaches to measure the impact of antidiscrimination and affirmative action policies in the United States. The first one – time-series studies – attempts to link trends in earnings of program beneficiaries to the implementation of these policies, using macro-economic data in the absence of establishment-level ones. Such studies find that between 1940 and 1980 there has been a steady improvement in the economic status of blacks: while incomes of white men were growing at a rate of 2.2 percent during that period, incomes of black men registered a growth of 3.5 percent per year<sup>61</sup>. Yet, this improvement is due mostly to positive changes in the provision of education for blacks at the school and high school level and to their migration from south to north and from menial agricultural jobs to better-paid, industrial ones<sup>62</sup>. Affirmative action itself has only had a marginal effect on black wages : during that forty-year period, the wage gap narrowed as rapidly during the 20 years prior to 1960 – before affirmative action was even on the agenda – as it has during the 20-year period after 1960 – when affirmative action was in place for part of the time<sup>63</sup>. Even within the 1960-1980 period, the decrease in the black/white wage differential – from 38 percent in 1964 to 28 percent in 1974 – clearly predates the implementation of affirmative action policies and is more closely related to the mere enforcement of the 1964 Civil Rights

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<sup>60</sup> *Code of Federal Regulations*, Section 1607.4 (1998).

<sup>61</sup> Smith and Welch (1984), at 522.

<sup>62</sup> Donohue (1991), at 44-45.

<sup>63</sup> Smith and Welch (1984).

Act prohibiting discrimination in employment<sup>64</sup>. Neither does affirmative action account for the *increase* in that differential recorded from 1975 to 1985<sup>65</sup>, as a result of declining wages for low-skilled workers – among which African Americans are overrepresented<sup>66</sup> – and of the surge in the number of single-parent households within the black population<sup>67</sup>.

The second method uses a cross-section approach comparing the relative labor market position of minorities and women in firms which are subject to affirmative action requirements under the federal contract compliance program and in firms which are not. The data are drawn from the reports that all firms with 100 or more employees and all federal contractors with 50 or more employees and contracts of \$500,000 or more are required to file with the EEOC (EEO-1 reports). These reports contain information on the firm's total employment in each of the nine occupational categories by race and sex. They also indicate whether or not the firm is a contractor. Among the firms required to file EEO-1 reports, only those federal contractors with at least fifty employees and with a single contract of \$50,000 or more are under the obligation to have an affirmative action program.

These studies have on the whole found that the employment of minorities and women has increased a little more rapidly among federal contractors subject to affirmative action than in other, non-covered firms, at least during the 1970s. The author of the most extensive study, Jonathan Leonard, finds that black male employment relative to white male employment grew 0.82 percent faster per year in contractor establishment than in non-contractor establishments, and faster still among contractors which had been subject to compliance reviews by the OFCC<sup>68</sup>. This finding has been replicated in many other studies<sup>69</sup>. Turning to the more recent period, Leonard reports that the effects of affirmative action on employment weakened in the early 1980s, as a result of lax enforcement of the policy and shrinking resources allocated to the OFCC in the early years of the Reagan administration. He summarizes the evidence as indicating that before 1980, the elasticity of black male employment growth to total employment growth was 1.7 among contractors, versus 1.2 percent among non-contractors. In contrast, after 1980, the corresponding numbers were 1 among contractors versus 1.1 among non-contractors<sup>70</sup>. Perhaps because the main legal and public battles over affirmative action no longer center on the area of employment, no similar, large-scale study is available for the most recent period<sup>71</sup>.

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<sup>64</sup> Donohue and Heckman (1991), at 1604, 1637-1640. See also Chay (1998) (finding that the relative pay – and employment level – of blacks appear to have been boosted at small establishments that were brought under the coverage of Title VII by the Equal Employment Opportunity Act of 1972).

<sup>65</sup> Jencks (1992), at 56-57.

<sup>66</sup> Wilson (1987).

<sup>67</sup> Tucker and Mitchell-Kernan (1995).

<sup>68</sup> Leonard (1984), at 380.

<sup>69</sup> Badgett (1999); Ashenfelter and Heckman (1976); Heckman and Payner (1989); Leonard (1994); Rogers and Spriggs (1996). The correlation seems to obtain in Canada as well, where the 1986 Federal Contractors Compliance Program – covering 845 contractors with a workforce of 1.1 million – requires organizations with 100 or more employees bidding on federal government contracts of \$200,000 or more to implement an «employment equity» policy (Jain and Lawler (2002)). Even beyond that specific requirement, in the private sector firms that were covered by the 1986 Employment Equity Act from the outset – mostly those operating in the fields of banking, transportation, and communications –, the overall representation of members of «visible minorities» (i.e. non-white persons, aborigines excepted) more than doubled between 1987 and 1999, from 4.9 percent to almost 10 percent; see Jain, Sloane and Horwitz (2003), at 21-23 and Longfield (2002).

<sup>70</sup> Leonard (1990).

<sup>71</sup> For a local study basically confirming the results of the former, see Button and Rienzo (2003). Cross-sectional impact studies do not take into account the likelihood that a successful affirmative action program among federal contractors may have a demonstration effect on non-contractors and induce them to also increase the employment of affirmative action beneficiaries, thus leading to an underestimation of the impact of the program. On the other hand, it has been pointed out that the difference which these studies register between contractors

As for university admissions, the data are similarly encouraging. Between 1972 and 1996, the percentage of blacks enrolling in college the fall after completing high school rose from 44.6 percent to 56 percent, and the percentage of Hispanics enrolling rose from 45 percent to 50.8 percent<sup>72</sup>. Black enrolment as a percentage of all enrolments in universities other than « Historically Black » – i.e. Southern and formerly segregated – colleges rose from 1.8 percent in 1960 to 4.2 percent in 1970, 8.2 percent in 1980, and 9 percent in 1994<sup>73</sup>. Changes are also evident in professional schools, with the percentage of blacks growing from 1 percent in 1960 to 7.5 percent in 1995 in law schools, and from 2.2 percent in 1964 to 8.1 in 1995 in medical schools<sup>74</sup>. Finally, while in 1971, among young adults age twenty-five to twenty-nine, only 11.5 percent of blacks and 10.5 percent of Latinos had college degrees – compared to 22 percent of whites –, by 1998, the black rate was up to 17.9 percent and the Latino number was 16.5 percent – with the white rate still significantly higher at 34.5 percent<sup>75</sup>. Yet, since the period of most rapidly rising enrolments – roughly the 1960s and the 1970s – was one of sharp declines in poverty among minorities, following closely upon the desegregation of public schools, and was accompanied by antidiscrimination forces in the labor markets that likely affected the returns to higher education for them, simple time-series trends in minority enrolments may overstate the independent effects of affirmative action.

More specific evidence in this regard is now available, however. William Bowen and Derek Bok, the former presidents of Princeton and Harvard Universities, have recently published a study based on a statistically sophisticated analysis of the undergraduate admissions process and subsequent university and post-university experience of more than 90,000 students who entered thirty-four selective<sup>76</sup> colleges and universities during the falls of 1951, 1976, and 1989, thus providing the first comprehensive examination of the actual effects of thirty years of affirmative action in American higher education<sup>77</sup>.

Their findings are encouraging in many respects. First, notwithstanding the « mismatch » hypothesis according to which racial preferences in college admissions actually hurt their intended beneficiaries, by enticing minority youth to enter highly competitive colleges for which they are underprepared and in which they are more likely to fail<sup>78</sup>, it turns out that black students at selective institutions are far more likely to graduate from college than either their black or white counterparts nationwide : 75 percent of black students entering selective colleges graduate within six years, as compared with a 40 percent graduation rate for all black colleges students and a 59 percent rate for white college students<sup>79</sup>. As a matter of fact, black students – even those with the lowest SAT scores – graduated at higher rates the more selective the school they attended, even though the difference between their scores and

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and non-contractor firms could well reflect a mere reshuffling of workers from one group of firms to another without improvement in the overall position of the group (Heckman and Wolpin (1976), at 545).

<sup>72</sup> Orfield and Whitla (2001), at 144.

<sup>73</sup> Holzer and Neumark (2000), at 509.

<sup>74</sup> Id.

<sup>75</sup> Orfield and Whitla (2001), at 144.

<sup>76</sup> As a matter of fact, race-based preferential treatment is confined to the most academically selective fifth of all four-year institutions.

<sup>77</sup> Bowen and Bok (1998).

<sup>78</sup> Sowell (1993); D'Souza (1995).

<sup>79</sup> Bowen and Bok (1998), at 55-59. The policy also hurts white applicants less than it seems : if race-neutral standards had been used and fewer blacks therefore admitted, the antecedent probability of being admitted of any particular white applicant who was in fact rejected would have risen only from about 25 percent to about 26.5 percent, because there were so many rejected white candidates at approximately the same level of test scores and other qualifications that adding a few more places would not much have improved the chances of every one of them (Id, at 33-34). Race-based preferential treatment only slightly reduces the ex ante statistical group probability of elite school admission of whites.

grade point averages and those of their classmates was greater. The net effect of attending a more selective institution on completion rates for students with similar tests scores is positive, not negative – for black and white students alike<sup>80</sup>.

Besides, the more selective a black graduate's school, the higher his or her anticipated income – holding all else equal. Attending a selective school thus reduces the apparent discrimination African Americans face in the labor market considerably, especially for black women: within the sample population, the average black female graduate earned 2 percent less than her white classmate, whereas the national average showed a 14 percent differential. The disadvantage for black men was cut in half – 17 percent for the graduates of these selective schools, compared to 35 percent in the national population<sup>81</sup>. As a general matter, the effect of college quality on the later wages of black men is roughly triple that for nonblack men<sup>82</sup>. Thus, affirmative action in university admissions does seem to have a broader, positive impact on the economic condition of African Americans<sup>83</sup>.

It also has other, desirable *side effects* of a different kind. Thus, to the question whether there has been a diffusion of benefits conferred upon the immediate recipients of preferential policies, the study brings a positive answer. While black and white college graduates are equally likely to participate in various kinds of civic and professional groups nationwide, among the graduates of these selective schools, blacks are strikingly more likely to do so, especially in social service, youth clubs, and elementary school organizations<sup>84</sup>. Most important among those *positive externalities* of affirmative action is the expansion of medical service to underserved communities: black and Hispanic physicians are twice as likely to work in locations designated as health manpower shortage areas by the federal government as white physicians<sup>85</sup>. Since those communities tend to be predominantly black<sup>86</sup>,

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<sup>80</sup> Id, at 59-75, 114-115. Bowen and Bok offer two primary explanations for this finding. First, the more selective schools tend to have greater resources for scholarships and other forms of student aid – on which black students are more dependent than white students. Second, the more selective schools might be able to identify applicants who are more likely to graduate than might be predicted from the factors for which the study controlled (Id, at 63-64). Since the economic value of a college degree increases with the prestige of the school, moreover, all students have a greater financial incentive to remain in a more selective school.

<sup>81</sup> Bowen and Bok (1998), at 125.

<sup>82</sup> Kermit, Black and Smith (223).

<sup>83</sup> The evidence on how attending institutions of varying selectivity affects future earnings is mixed, however: compare Bowen and Bok (1998), at 128 (without controlling for pre-college aptitude, finds wage premium for attending selective institution), with Berg Dale and Krueger (1999) (controlling for pre-college aptitude, finds no wage premium for attending selective institution for either whites or blacks, though sample of blacks was small). Besides, these analyses do not distinguish effects of college quality on wages resulting from increased productivity from those resulting from the value of college quality as a signal in the labor market. Finally, it seems that African American earnings are much more sensitive than white earnings to differences in college grade point average and choice of major (Datcher Loury and Garman (1993)). Thus, among the 1976 cohort of the Bowen and Bok study, mean earnings of white men in 1995 who finished in the top-third of their class were \$114,900. For African Americans they were actually higher at \$115,800 (though this difference is not statistically significant). However, among those finishing in the bottom-third of their class, mean earnings for whites were \$83,200, whereas mean earnings for blacks were \$68,500 (Wydick (2002), at 17). This may suggest that in an environment of race-based preferential college admissions policies, the labor market discounts the signalling value of college degrees held by college graduates of targeted groups, with employers placing a greater weight on other signals such as class rank, choice of major, and grade point average.

<sup>84</sup> Bowen and Bok (1998), at 155-173.

<sup>85</sup> Id.

<sup>86</sup> This is not just an effect of class. Predominantly black communities are four times more likely to be underserved than communities with the same average income: see Komaromy, et. al. (1996), at 1306-1307, tbl. 1 and 1307-1309.

race-based affirmative action in medical schools does promote a redistribution of medical resources that reduces inequality in that field<sup>87</sup>.

Naturally, the Bowen and Bok study can be criticized on a number of grounds. For one thing, the study is confined to affirmative action in higher education, and its results may have little bearing on the effects of preferential policies for other purposes – in hiring or awarding opportunities to minority-owned businesses in particular. Also, it does not examine how these selective schools' preferences may affect « the institutions and students that are lower down the academic food chain »<sup>88</sup>. The success of race-based affirmative action at the elite schools might come at the cost of making integrated education more problematic at somewhat less selective institutions, whose potential pool of qualified black and Hispanic applicants has been drained as a result of the policy<sup>89</sup>. Bowen and Bok also tend to ignore that the graduation rate of « affirmative action » students is probably lower than the one for all African American matriculants on which their assessment of the policy largely relies, since some of the black students had academic credentials strong enough to be admitted regardless of affirmative action and were thus presumably in a better position than the « special admits » to complete their undergraduate studies successfully<sup>90</sup>. Finally, beyond these methodological imperfections, a more fundamental difficulty with using graduation rates to measure the success of preferential admission policies is that the former are not independent of the latter. Graduation standards do not exist independently of faculty decisions about the quality of work that should be regarded as minimally acceptable, and these decisions are strongly influenced by the quality of work actually produced by students – a variable on which race-based affirmative action is bound to have an impact. In short, « the rates at which 'specially admitted' African-American students graduate (...) are not satisfactory measures of the academic success of minority preference policies because [they] are influenced by the existence of such policies »<sup>91</sup>. Alternative data regarding whether « affirmative action » admits are « qualified » enough are thus needed. In this respect, the first comprehensive analysis of national passage rates on the bar examination undertaken in a study recently published by the Law School Admission Council – based on data from the class that entered law school in 1991 – draws a less comforting picture. It found that only 61% of blacks, as compared to 92% of whites, passed the exam on their first attempt. Besides, the failure of over a fifth of black law school graduates who sought entry into the profession ever to pass the bar is evidence that some law schools are not merely admitting, but graduating, a large number of students who lack the minimal competence necessary to enter the profession<sup>92</sup>.

Consistent with other research, Bowen and Bok also found that within their sample, the average class rank (based on four-year cumulative grade point averages) of black matriculants was significantly lower than the average rank of white matriculants *within every SAT interval*. In other words, African Americans with the same SAT scores as white students underperform in college (considering grades as a measure of performance)<sup>93</sup>. This raises the question of whether black students at selective institutions – who do as a group have lower

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<sup>87</sup> See generally Curtis (2002); Ready (2001); Xu et. al. (1997); Cantor, Miles, Laurence Baker and Dianne Baker (1996); Komaromy et. al. (1996); Moy and Bartman (1995). Keith, Bell and Williams (1987) report some information relating performance on Board exams to practicing in medically underserved areas. For nonminority physicians, those with higher performance are less likely to practice in such areas. But for minority physicians, performance is positively related to practicing in underserved areas, which appears to contradict the hypothesis that the higher incidence of minority practice in an underserved area might stem from lower qualifications.

<sup>88</sup> Schuck (2003), at 148.

<sup>89</sup> Klitgaard (1985), at 174-175; Sowell (1990), at 110.

<sup>90</sup> Sandalow (1999), at 1885.

<sup>91</sup> Id., at 1926.

<sup>92</sup> Id., at 1895-1896.

<sup>93</sup> Bowen and Bok (1998), at 55-59.

test scores<sup>94</sup> – underperform *relative to how they would have done in the absence of affirmative action*, in which case some of them would have gone to less selective institutions.

According to a recent study by Stephen Cole and Elinor Barber<sup>95</sup>, this might very well be the case. These authors find that African Americans who attend « Historically Black Colleges and Universities » (HCBU) do not underperform significantly, and that African Americans who attend elite schools are much more likely to underperform than African Americans who attend nonelite schools. *Controlling for SAT scores*, there is an inverse correlation between grades and school selectivity for African Americans and – to a smaller extent – for Latinos, while there is apparently none for Asians and whites<sup>96</sup>. This suggests that the underperformance phenomenon – possibly due to the competitive disadvantage these students initially face – might be a function of the race-based preferential treatment specifically granted to black and Hispanic applicants, in line with the « mismatch » hypothesis erroneously discarded by Bowen and Bok on the basis of graduation rates only.

The grade differential between black/Hispanic and Asian/white students may also have far-reaching effects on the career choices of the former, in particular as far as selection of academia is concerned. Grades do influence academic self-confidence, which in turn has a strong impact on the likelihood that such a choice be made. As a matter of fact, Cole and Barber show that for African Americans, « attending an elite school rather than a less selective school is a deterrent to selecting academia as a final-choice career »<sup>97</sup>. According to their estimates, black students are twice as likely to persist with academic aspirations if they go to either a state university or an HBCU than if they go to an elite school<sup>98</sup>. Paradoxical as it may seem, race-based affirmative action in college admissions may thus help account for the still-dramatically low proportions of black and Latino faculty members at American institutions of higher education<sup>99</sup>.

Yet, absent affirmative action, the percentage of Black and Latino *students* at the most selective colleges and universities would be even lower. Thus, in the institutions included in Bowen and Bok's sample, the adoption of a strict race-neutral standard would have reduced the number of blacks by between 50 percent and 75 percent<sup>100</sup>. Similarly, another study by Linda Wightman, the former director of research for the Law School Admissions Council, showed that if a « color-blind » and strictly credential-based admissions process – one taking into account only undergraduate grade point average and LSAT scores – had been applied to the group of persons applying to the 173 law schools approved by the American Bar Association in 1990-1991, then 90 percent of those self-identified as « black » would not have been admitted to any law school in the United States<sup>101</sup>. Blacks would have made up only 1.6% of the total number of accepted students – instead of 6.8%<sup>102</sup>.

Wightman's findings are consistent with the actual experience at state law schools in California and Texas that have been barred from using racial or ethnic information in making admission decisions<sup>103</sup>. Thus, at Boalt Hall, the law school at the University of California-

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<sup>94</sup> Jencks and Phillips (1998).

<sup>95</sup> Cole and Barber (2003).

<sup>96</sup> *Id.*, at 138, 203.

<sup>97</sup> *Id.*, at 37.

<sup>98</sup> *Id.*, at 38.

<sup>99</sup> Nationally, at four-year institutions, African Americans made up only 5% of the faculty and Latinos 2% in 1999. When « Historically Black » institutions are excluded, the percentage of African American faculty was 3%. (National Center for Educational Statistics (1999)).

<sup>100</sup> Bowen and Bok (1998), at 34-35, 39.

<sup>101</sup> Wightman (1997), at 50-51.

<sup>102</sup> Bowen and Bok (1998), at 44.

<sup>103</sup> In Texas, this was a result of a decision by the Court of Appeals for the Fifth Circuit, *Hopwood v. State of Texas*, (78 F.3d 932 (5<sup>th</sup> Circuit 1996)). In California, the citizenry voted in November 1996 in favor of the so-

Berkeley – which had enrolled an average of 24 black students each year between 1968 and 1996 –, in 1997, the first year after passage of Proposition 209, none of the African-Americans or Native Americans who applied was admitted, and only seven of the Latino applicants were<sup>104</sup>. Even more significant drops in African-American enrolment can be seen at the law schools at the University of California-Los Angeles (UCLA) and the University of Texas: from 10.3% in 1996 to 1.4 % in 2000 at UCLA and from 7% in 1996 to 1.7% in 1999 at Texas<sup>105</sup>. Considering the two most selective law schools in California during the period from 1998 to 2002, African-Americans comprised only 2.9% of the students at UCLA Law School, and 3.4% of the students at Boalt Hall<sup>106</sup>.

In order to counter this arguably disturbing trend, various measures have been considered. One of the most widely discussed would shift the focus from preferences based on race or ethnicity to race-neutral preferences based on economic disadvantage<sup>107</sup>. This would channel affirmative action benefits to those in the currently favored groups who most need help, while extending them to low-income whites. Because black and Hispanic youth are more likely to be from low-income backgrounds than whites and other non-Hispanics, the argument goes, income-based preferences in college admissions would benefit them disproportionately. However, unless elite colleges dramatically reduce their reliance on high school grades and standardized test scores, class-based preferences cannot do much to mitigate the impact of the elimination of race-based preferences. This is so because blacks and Hispanics constitute only a small fraction of all high-scoring disadvantaged youth. Although blacks or Hispanics with test scores in the top ten percent are three times as likely to have incomes less than \$20,000 than whites and other non-Hispanics, only 17.2 percent of high-scoring black or Hispanic youth come from such low-income families<sup>108</sup>. Because test scores are so strongly related to family incomes, a small share of the high-scoring minority youth – those most likely to benefit from a race-based criterion at selective schools – are actually low-income. Thus, for one black or Hispanic student who both comes from a low-income family and has scores that are above the threshold for gaining admission to the academically selective universities, there are almost six times as many white students<sup>109</sup>. Consequently, a college now administering a race-based affirmative action plan would have to grant preferences to six times as many low-income students to « yield » the same number of black and Hispanic freshmen – an option widely perceived as unrealistic. This leads to the conclusion that « class-based preferences cannot be substituted for race-based policies if the objective is to enrol a class that is *both academically excellent and diverse* »<sup>110</sup>.

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called « Proposition 209 », which amended the Californian Constitution in order to abolish all affirmative action programs in public employment, public education, or public contracting. One of the arguments advanced against affirmative action in California emphasized the policy's « disparate impact » on Asian Americans, whose stronger academic credentials made them particularly vulnerable to any departure from a purely « meritocratic » rule in university admissions. Given the zero-sum-game nature of the competition involved, the decrease in the Asian American admission rate registered in the 1980s at several elite universities was indeed a logically inevitable side effect of affirmative action policies designed to boost the admission rate of other, underrepresented ethno-racial minorities; see Takagi (1992); Dong (1995); Tsuang (1989).

<sup>104</sup> The one African-American who enrolled at Boalt Hall in 1997 had been previously admitted under the old affirmative action program but had deferred entry into the law school. Half the Latinos who entered in 1997 were also deferred admits; see Moran (2000), at 2247.

<sup>105</sup> Defendant-Intervenors Final Reply Brief at 18, *Grutter v. Bollinger*, No. 01-1447 (6<sup>th</sup> Circ.), available at [http://www.umich.edu/~urel/admissions/legal/grutter/gru\\_fin.reply.html](http://www.umich.edu/~urel/admissions/legal/grutter/gru_fin.reply.html).

<sup>106</sup> *Id.*

<sup>107</sup> Kahlenberg (1996); Patterson (1997), at 193.

<sup>108</sup> Kane (1998a), at 990.

<sup>109</sup> *Id.*, at 988.

<sup>110</sup> Bowen and Bok (1998), at 47 (our emphasis).

Another strategy is that of « percentage plans ». Thus, on 15 April 1997, the legislature of Texas responded to the drop in the number of black and Hispanic students due to the elimination of affirmative action programs in state universities by voting a bill instructing those universities to admit the top 10% of every high school's graduates regardless of grades and test scores<sup>111</sup>. Similar policies have been introduced in other states where affirmative action is no longer part of the public higher education system, such as California – where the percentage of automatically admitted graduates has been set at 4% – and Florida (20%)<sup>112</sup>. As expected, this new arrangement has helped reduce the ongoing decline in the proportion of blacks and Hispanics among state university students, since in these states there are still a large number of high schools where virtually *all* pupils – including the top x% – belong to either one of these two minority groups. Because high school grades, like test scores, correlate somewhat with race – with whites and Asians having higher grades than blacks and Latinos –, a percent plan in a state where all high schools were racially integrated would not yield much racial diversity at the university level. It is the persistence of de facto school segregation that provides state authorities with a functional substitute for race-based affirmative action<sup>113</sup>.

But this is just one of the many difficulties that percentage plans raise. Another one is that in California and Florida, while the plans may ensure diversity within the state university system as a whole, they do not achieve diversity at the most prestigious colleges: black and Hispanic enrolment is simply shifted from more to less selective institutions<sup>114</sup>. As far as the minority parents are concerned, the plans may also set up perverse incentives: should they attempt to send their child to an integrated high school that provides a better education, or rather to a low-performing, segregated high school where she will have a greater chance of performing in the top x%, and thus gaining college admission? Moreover, since the new procedure does not draw any qualitative distinction between high schools, it often introduces a less stringent qualification standard for admission than the one involved in the former, openly acknowledged affirmative action programs, and thus may well end up yielding a less well-prepared population of black and Hispanic matriculants. Last but not least, the plans' purported « color-blindness » is clearly disingenuous, since they were adopted with the specific intent of increasing the representation of African Americans and Hispanics in the public higher education system. What we have here is simply a « substitution strategy » in which what looks like the secondary effect of a formally neutral principle of allocation is in fact the reason why that principle has been adopted in the first place, given the perceived

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<sup>111</sup> See Montejano (1998).

<sup>112</sup> In California, the top 4 percent of graduating students from public and private high schools win automatic acceptance to a University of California campus – but not necessarily the school of their choice. In Florida, the top 20 percent of graduating public-school students win automatic acceptance to a state institution – not necessarily the one of their choice. In Texas, the top 10 percent of graduating students from public and private high schools win automatic acceptance to the public Texas university of their choice.

<sup>113</sup> A recent study by the Harvard Civil Rights Project documents that in 2001, 71.6% percent of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. About 36% of both African-American and Hispanic students attended « intensely minority » schools in which less than 10 percent of the students are white : see Erica Frankenberg, Chungmei Lee, and Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (January 2003), at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf> (accessed June 14, 2003).

<sup>114</sup> University of California, « New California Freshman ADMITS : Fall 1997 through 2001 », at <http://www.ucop.edu/news/factsheets/2001/ethnicity.pdf> (accessed June 29, 2001); see also Thernstrom and Thernstrom (1999), at 1626-1627. This reasoning does not apply in professional and graduate fields in which the number of applicants is sufficiently high that virtually all institutions are selective. In such fields, abandoning race-sensitive admission policies would mean a reduction, quite possibly a very significant reduction, in the absolute number of blacks trained for work in the field.

illegitimacy of pursuing the decision maker's true objective in a more straightforward manner<sup>115</sup>. The underlying assumption seems to be that Americans object to race-based selection rules, but do not object to the pursuit of explicitly race-egalitarian outcomes through public policies that are formally color-blind. Paradoxically enough, « the explicit use of race in a college admissions formula is forbidden, while the intentional use of a proxy for race publicly adopted so as to reach a similar result is allowed »<sup>116</sup>.

In this respect, a case can be made that the United States is slowly – and most irregularly – moving toward a French-like model of formally « color-blind » but arguably « race-oriented »<sup>117</sup> public policies, whose most distinctive feature lies in a principled negation of race as a *legal* category leading to a similar search for proxies of different kinds<sup>118</sup>.

In France, as opposed to the United States, the Constitution is *indisputably* color-blind: Article 1 of the 1958 Constitution provides that « the Republic (...) guarantees the equality of all citizens in the eyes of the law, regardless of origin, race or religion »<sup>119</sup>. Because this provision prohibits not only *discriminations* but all racial *distinctions* whatsoever<sup>120</sup>, there is no census question on race or ethnicity, and under current legislation, public bodies are generally forbidden from storing data « revealing, in any direct or indirect way, a person's racial origins »<sup>121</sup>. As a consequence, disproportional distribution of goods – housing, jobs, placement in higher education – by race and ethnicity is virtually impossible to observe. Members of ethnic minorities are typically described as « immigrants » or as « second-generation immigrants » – even those who are French citizens –, and most surveys of social mobility and acculturation focus on foreign residents – identified by country of origin<sup>122</sup>. In addition to the integrative Republican tradition of the French Revolution, memories of mass arrests and deportation of Jews during the Vichy Era have deeply delegitimized any policy that categorize individuals on the basis of ethnic origin<sup>123</sup>. The aversion to recognizing race is such that in the initial draft of the foundational law of July 1972 banning discrimination and incitement to racial violence and punishing perpetrators in criminal courts with stiff fines and jail sentences, the word « race » itself was omitted. Only at the last moment did the law committee accept to weave race into the bill as an explicitly

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<sup>115</sup> Elster (1992), at 116-120.

<sup>116</sup> Loury (2002), at 134.

<sup>117</sup> Calvès (2001).

<sup>118</sup> The following development largely derives from Calvès (2003); Calvès (2001); Calvès (1998).

<sup>119</sup> It is worth remembering that no such provision is included in the US Constitution as far as race is concerned; in particular, the Equal Protection Clause of the 1868 Fourteenth Amendment, according to which no state should « deny to any person within its jurisdiction the equal protection of the laws », was not originally intended to incorporate such a principle of « color-blindness ». When one of the most influential Republican leaders of that time, Wendell Phillips, proposed a constitutional amendment prohibiting the states from drawing legal distinctions along racial lines, that amendment was rejected and the « equal protection of the laws » formula was chosen instead, on account of its more flexible character. In particular, while Phillips's proposal would have had the (then unwanted) consequence of ending school segregation and of prohibiting laws restricting interracial marriage, the political advantage of the phrase « equal protection of the laws » was that its meaning remained comparatively uncertain in that respect; see generally Kull (1992), at 65-87.

<sup>120</sup> Calvès (2002), at 174.

<sup>121</sup> January 6 1978 Act on Information Storage and Freedom (*Loi Informatique et liberté*).

<sup>122</sup> Favell (1998), at 72-73. For a major exception, see Tribalat (1995) and the criticisms of this study in Blum (1998) (arguing that the collection of ethnic statistics may well consolidate or even produce the emergence of ethnicity as a social fact, instead of simply reflecting it) and Le Bras (1998) (denouncing the use of the expression « Français de souche » (*indigenous French*) in a presumably « scientific » context as playing into the hands of the extreme right). For a general overview of that controversy initially waged among demographers, see Blum (2002).

<sup>123</sup> Bleich (2001), at 277-278. Similarly, Germany keeps no statistics on visible minorities, favoring instead data based on foreigners' country of origin.

illegal ground for discrimination. But for this belated decision, there would have been no mention of the word « race » in the French law against racism<sup>124</sup>.

Therefore, as far as affirmative action is concerned (the French phrase is « discrimination positive »), the main operational criterion for identifying its beneficiaries is obviously not race – nor gender<sup>125</sup>; it is geographical location: residents of socio-economically disadvantaged areas – where minority members tend to be concentrated – will indirectly benefit from the additional input of financial resources allocated by state agencies to that area as a whole<sup>126</sup>. Thus, problems that North American or British decision-makers would tend to conceptualize as « ethnic dilemmas »<sup>127</sup> are officially seen through a different, territorial lens.

However, since some of the criteria used for delineating these « priority educational zones » (*Zones d'éducation prioritaire* – ZEPs) or tax-free zones (« zones franches ») – namely, the rate of failure in high school, the unemployment rate, or the percentage of residents age under 25 – are themselves correlated with the proportion of children whose parents are foreign nationals<sup>128</sup> (assuming that the percentage of foreigners itself is not taken into account in the provision of public funds, which may also be the case), French affirmative action policies, although officially embodying a space-based and class-based approach of affirmative action, may also be understood as *indirectly and implicitly* targeting groups that, in the American context, would be considered as « ethnic » or « racial » minorities, in particular the group of second-generation North African immigrants. It may then seem plausible to read this formally color-blind policy as partaking of a « hidden agenda » specifically directed at accelerating the integration of these immigrants – through an ingenious « substitution strategy » similar to the newly adopted American one. In this light, the preferential distribution of state funding to ZEPs – as well as the urban development policies (« *la politique de la ville* ») also typical of affirmative action *à la française*<sup>129</sup> – would simply work as an (admittedly imperfect) *functional equivalent* of the openly color-conscious affirmative action programs, insofar as they do have an expected, *positive* « disparate impact » on individuals of North African extraction. Whether such indirect strategies – deeply embedded in many sectors of French public policy and recently experimented in the United States – actually succeed in avoiding the *polarization* and *stigmatization* effects triggered by race-based affirmative action remains to be seen.

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<sup>124</sup> Bleich (2000), at 58.

<sup>125</sup> On the exception of gender quotas for women in the electoral sphere (*parité*), see Bereni and Lépinard (2003) (emphasizing that most proponents of *parité* were eager to dismiss all analogies between gender and membership in an ethnic minority, in order not to make the reform look like the starting-point of a « slippery-slope » presumably leading to « ethnic » quotas).

<sup>126</sup> Calvès (1999), 15-18, 20-22.

<sup>127</sup> Glazer (1983).

<sup>128</sup> Costa-Lascoux (1992), at 93-94.

<sup>129</sup> Donzelot (2003).

## Justifications for affirmative action

The two predominant justifications for affirmative action policies developed in North America are the *corrective justice* argument – the notion that affirmative action offers a measure of *compensation* to the victims of past injustice – and the *multiculturalist* argument – the idea that these programs help promote an intrinsically or derivatively beneficial type of *diversity*, of a broadly « cultural » nature. Yet, upon further examination, neither of these arguments seems entirely satisfactory – to say the least.

Initially, affirmative action was often justified as a means of compensating members of groups that had been victimized in the past by some pervasive state-sanctioned and/or societal discrimination, the effects of which were still conspicuous. Under this backward-looking rationale, the imperative of compensatory justice would require society to do what it can to restore the victims' descendants to the position that they would have occupied had the wrongs not been committed. However, as a justification for the existing programs, the compensation argument fails on a number of grounds. First, the individuals who bear the cost of affirmative action are usually not guilty of any wrongdoing<sup>130</sup>. Second – and symmetrically –, the beneficiaries of affirmative action may not have suffered discrimination at the hands of the specific institution (public or private) responsible for setting up the program, and so may not be entitled to « compensation » strictly defined, in the absence of any judicially identifiable damage. The restitution rationale could arguably justify affirmative action for the descendants of slaves and Native Americans. It cannot justify extending preferential treatment to immigrants, linguistic minorities like Hispanics, or geographic origin groups like Asians and Pacific Islanders. Yet, in North America, millions of immigrants become automatically eligible for affirmative action the moment they set foot on U.S. or Canadian soil, competing for preferences with blacks and American Indians. Third, affirmative action policies generally award opportunities to the best qualified and most advantaged among the preferred class, thus distributing goods to those presumed to be least injured by discrimination. Such policies therefore fail to match the amount of compensation to the degree of individual injury and exclude the people possibly most entitled to it, who are the ones least likely to benefit from public procurement programs or to compete – or have their children compete – for admission to selective schools. Besides, employers and admissions officers have never determined the weight that they give to race in relation to the degree of damage that the individual applicant may or may not have suffered in the past. Therefore – and unless one is willing to settle for an unattractive model of group entitlement under which racial entities constitute the relevant units of moral agency, with whites identified as a debtor class –, the failure of affirmative action to meet the exacting standards of individualized remedies should lead to abandoning the compensation argument, for the mismatch between the *compensatory theory* and the *integrative practice* of affirmative action threatens the latter's moral legitimacy<sup>131</sup>.

At first sight, the multiculturalist argument may seem more to the point. In the United States, it appeared first in a 1978 Supreme Court decision, *Regents of the University of California v. Bakke*<sup>132</sup>, in which the Court, through the opinion of Justice Lewis Powell, struck down a racial quota that had been set up by the Medical School of the University of California at Davis. Yet, Powell insisted that race and ethnicity might still be taken into account in university admissions, provided that it be in a flexible and individual-centered

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<sup>130</sup> Sullivan (1986).

<sup>131</sup> On the failings of affirmative action as an instrument of corrective justice, see also Fullinwider (1995); Simon (1977).

<sup>132</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

way, as part of a legitimate concern for promoting the diversity of « experiences, outlooks and ideas » among members of the student body<sup>133</sup>. By casting racial diversity as just one more component of the kind of global diversity traditionally favored by university officials for educational purposes, he thus recharacterized affirmative action as a means of achieving an end internal to the academic sphere – rather than as a technique for promoting a redistributive goal external to it. His claim relied on two analytically distinct propositions: first, that diversity of experience and values was an educational good; second, that diversity of experience and values was strongly linked to diversity of race and ethnicity<sup>134</sup>. The (obviously reasonable) underlying assumption was that students were not merely consumers of educational services, but were themselves inputs into the educational process<sup>135</sup>.

As a justification for large-scale, race-based preferential treatment, however, the diversity argument is at best incomplete. First, while it is plausible that the racial diversity of a classroom would enhance discussion of social, political, and cultural subjects by enriching the variety of perspectives voiced, it is hard to see the cognitive relevance of racial diversity to investigations in the hard sciences, for instance. Yet, schools extend racial preferences in admission to graduate programs in the latter field, even though these disciplines aim at the understanding of structures and processes whose existence – in contrast to human institutions – is presumed not to depend upon acts of human judgment or valuation. In that case, diversity of experience and values is simply irrelevant. Second, this alleged correlation between *racial* diversity and diversity of *viewpoints* may well further entrench some existing stereotypes as to the typical features of the different racial groups<sup>136</sup>. Third, if the genuine educational interest is to ensure that a diversity of opinions be heard in the classroom, it is not entirely clear why schools should not select students directly for the ideological diversity they can be expected to bring, rather than use race as a crude proxy for this presumably desirable feature. If what really matters is some race-neutral quality of the beneficiaries, why doesn't the program target *that* quality without using the race proxy? And how strong must the proxy be, or rather, to what degree does race/ethnicity have to correlate to the characteristic in order for an institution to be allowed to look for the race proxy rather than to look for the underlying characteristic itself?<sup>137</sup> These questions remain unanswered. Finally, there are many *axes of differentiation* related to the opinions voiced by every individual student – race, religion, party identification, place of residence, to name but a few. The notion of diversity alone does not provide any clue as to which of them should get more attention from university officials. Thus, their focus on race, while downplaying or practically leaving aside other conceivable

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<sup>133</sup> Id, at 134.

<sup>134</sup> Id, at 312-314.

<sup>135</sup> On June 23, 2003, twenty-five years after *Bakke*, the Supreme Court unambiguously re-endorsed Justice Powell's view that obtaining a diverse student body is a « compelling state interest » that can justify the use of race as a « plus » factor in university admissions in *Grutter v. Bollinger* (No.02-241, 2003 WL 21433492), a 5-to-4 decision upholding the constitutionality of an affirmative action program at the University of Michigan's law school that sought to enroll a « critical mass » of underrepresented minority students for that purpose – without further specification. At the same time, in a 6-to-3 decision, *Gratz v. Bollinger* (No. 02-516, 2003 WL 21434002), the high court struck down the affirmative action policy of the University of Michigan's undergraduate school, which systematically distributed 20 points of the 100 needed to guarantee admission to all members of designated racial or ethnic minorities. Whether the specific element triggering that judgment of unconstitutionality was the extent of the bonus granted to minority candidates or simply its quantification is not entirely clear. Still, the automatic assignment of a predetermined, constant, numerical value to ethnoracial minority membership high enough to virtually guarantee admission to every minimally qualified minority student, because it lacked the flexibility of the « holistic » approach extolled in *Bakke* and *Grutter*, was held to be incompatible with the *individualized* assessment of each applicant's potential contribution to diversity necessary for an affirmative action plan to pass constitutional muster.

<sup>136</sup> Carter (1991).

<sup>137</sup> Gregory (2000), at 936.

criteria for social classification, does stand as an arbitrary restriction, at least within the diversity paradigm. In order to justify such a *discriminatory* selection, one would need to fall back on an openly *political* judgment as to which cleavages matter most, a judgment that the diversity argument was precisely meant to avoid.

The argument does contain a kernel of truth, however, which is well-captured by legal scholar Anthony Kronman's most sophisticated defense of it:

« Segregation implies differences of early experience which in turn entails differences of adult perception, belief and judgment (...) So long as segregation remains the fact it is in America today, the correlation between being white, on the one hand, and black or Hispanic on the other, and holding a certain set of beliefs about issues of moral and political importance – about the honesty of the police, the fairness of the courts, the openness of the economy to all with energy and talent – is bound to be a strong one. And so long as this correlation exists to a meaningful degree, it is reasonable to think that a program of racial and ethnic diversification is a means to, or a component of, the general goal of value diversification – the basic educational goal of assembling a student body diverse in attitudes and judgments regarding matters of normative importance »<sup>138</sup>.

In this light – and contrary to Justice Powell's notion that race ought to count as just one dimension of diversity among many others, not to enjoy any privileged status<sup>139</sup> –, the current practice of giving it more weight than other diversity-enhancing features in the admissions process might be supported by the *sociological* claim that race *does* remain the most salient dividing line in American society – as reflected in the still-pervasive patterns of residential and educational segregation<sup>140</sup>. However, these patterns are both *contingent and undesirable*. As Kronman aptly puts it, the relative strength of the diversity argument thus « depends, in part at least, on the affirmation of the force of certain facts we hope and mean to change »<sup>141</sup>. Ultimately, affirmative action is just a means to *that end*.

In other words, contrary to what the diversity argument suggests, race is *not* actually considered as a mere proxy for race-neutral variables in affirmative action programs. It is directly, causally relevant to the policy's most convincing goal – namely, as the U.S. Supreme Court once put it, « the *integration* of [subordinated groups] into the mainstream of American society »<sup>142</sup>. Properly conceived, affirmative action is an instrument of *social dehierarchization*. In the American context, the underlying strategy is that the immediate objective of preferential treatment – the increase in the number of African Americans working in occupations carrying power and prestige – should ultimately bring about a decrease in the degree of *racial identification* by reducing the existing correlation between color and social

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<sup>138</sup> Kronman (2000), at 880. There is some empirical support for this claim. To take but one example, in the United States, African Americans typically have a more positive view of the federal government than whites do. In surveys from 1964 to 1992, at least one-third and sometimes more than half of the white public believed that the federal government was « too powerful ». Only about one-fifth of blacks, and sometimes as few as 5 percent, typically shared that view. Similarly, in surveys between 1982 and 1994, whites were always more than twice as likely as blacks to favor cutting back services and government spending (Orfield et. al (2001), at 23); see generally Kinder and Sanders (1996).

<sup>139</sup> « The race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer » (*Regents of the University of California v. Bakke*, at 316).

<sup>140</sup> See generally Massey and Denton (1993).

<sup>141</sup> Kronman (2000), at 885.

<sup>142</sup> *United Steelworkers v. Weber*, 443 U.S. 193 (1979), at 202.

standing<sup>143</sup>. Improving blacks' economic and occupational predicament will hopefully diminish the *reliability* of race as a proxy for status in the existing hierarchy. For it is the relative concentration of blacks in its lower tiers that is now largely responsible for the perpetuation of invidious stereotypes as to their alleged inability to move beyond menial occupations, stereotypes that are bound to linger as long as their apparent evidential basis remains. That basis is the noticeable underrepresentation of blacks in mainstream institutions, especially in higher positions. By correcting for that underrepresentation and thus reducing the correlation between race and occupational status, affirmative action might help lessen the *instrumental value* of such stereotypes. Insofar as the enduring saliency of race as a criterion of social categorization largely stems from its *information-laden* nature – which is itself a function of the empirically observable inequality in the distribution of social goods between blacks and whites –, the policy's positive effects on blacks' position in the hierarchy of income and occupation may eventually work toward a deracialization of American society<sup>144</sup>.

Paying attention to the remaining inequalities in the distribution of goods between racial groups, however, does not necessarily lead to considering those groups as *subjects* in matters of distributive justice. The only justification for reducing those inequalities lies in the expected effect of that reduction in equalizing the distribution between – for example – black and white *individuals* of one social good of a specific kind – namely, *the absence of damage experienced as a result from one's race being empirically correlated with a given position at the bottom of the economic and occupational hierarchy*. From a moral point of view, the sole area of concern is the *extent* of the disadvantage suffered by those individuals identified as belonging to a stigmatized group, the only purpose of race-based affirmative action being to suppress the portion of that disadvantage for which racial identification is specifically responsible<sup>145</sup>. Insofar as the policy would succeed in eradicating the negative stereotypes attached to that group membership, it should prove all the more beneficial for all members of the group considered as individuals as their social experience is actually determined by the fact of being thus identified: in that way, the economic progress of African Americans partly due to affirmative action may well be described as a *collective good*<sup>146</sup>. Yet, the status of the group, its position in the social hierarchy, matter only insofar as they shape the set of options

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<sup>143</sup> Dworkin (1985), at 294-295.

<sup>144</sup> On this view, proportions are indeed important. When members of underrepresented racial groups are present only in token numbers, this heightens the salience of their racial identities and primes racial stereotypes (Taylor (1998)). A « critical mass » of individuals of a given racial group needs to be present for outsiders to notice the internal heterogeneity in that group.

<sup>145</sup> Thus, affirmative action programs « do not distinguish among individuals « *because of* » their ancestry or skin color. They distinguish among individuals based on whether they are subject to systematic social disadvantage because of the ways others classify them » (Anderson (2002), at 1235). The basis of the racial classification relevant for affirmative action is that disadvantage, not « race » itself. Or rather, race ought to be « conceived as a mode of social inequality based on *myths* of biological or other intrinsic difference » (Id.): there is nothing inconsistent in referring to the presence of a conception of race as an intrinsic characteristic in the minds of people who act on it without endorsing the truth of that conception. That implicitly *derivative* meaning of race is the relevant one as far as affirmative action is concerned. In that context, the word does not point to a commonly agreed-upon anthropological classification of human beings into a plurality of genetically distinct subgroups, but rather, in an elliptic fashion, to those collectivities who have experienced the most severe forms of discrimination originally predicated upon this now quasi-defunct « scientific » racism (Hollinger (1995), at 34-35). While « race » used to relate to a set of biologically determined, immutable, group-owned features, it now serves to designate a specific kind of *social* identities – essentially produced by some discriminatory behaviors that one can – and should – attempt to modify through political and legal action. According to what currently stands as its most legitimate definition, race thus tends to be reduced to a basis of illegitimate inequalities – hopefully bound to disappear over time.

<sup>146</sup> See Olson (1965), at 14-16, 36-43, 98-102.

available to its members. The moral importance of the group's welfare is purely derivative; it only depends on the impact of group membership on the *individuals* involved.

Yet, attempts to reach that – ultimately individual-oriented – goal of racial integration may also be frustrated by some negative side effects specifically induced by the visibility of affirmative action programs. For the very fact of acknowledging the existence of a system of allocation taking account of race may well jeopardize the deracialization that one is trying to bring about in the long run. It is at least conceivable that by openly integrating race into the decision process of firms and universities – and therefore confirming its meaningfulness without being able to impose a common understanding of the meaning involved –, affirmative action might risk rigidify and relegitimize the racial cleavages that it was meant to eradicate – as several US social psychology studies seem to suggest<sup>147</sup>.

Among the negative side effects one may consider, the most dangerous one is probably the additional stigma possibly inflicted on the intended beneficiaries of affirmative action programs. For insofar as these policies logically imply an acknowledgment of the fact that those who benefited from the « preference » involved would not have gained their current positions without it, there is a substantial risk of fostering the suspicion that they are not fully qualified for such positions. Since it is generally impossible to draw a line among the potential beneficiaries of affirmative action between those who did take advantage of it and those whose qualifications were already high enough to make any kind of preferential treatment appear entirely unnecessary, there is a chance that (to take the most obvious example) all African Americans should be further stigmatized as a result of the policy's race-specific nature<sup>148</sup>.

True enough, the difficulty here is to assess the extent of that additional effect of stigmatization specifically related to the visibility of affirmative action as compared with the stigma already attached to blackness as such – a stigma the programs may still help reduce in the long run, once all their consequences are taken into account. As a general matter, the relevant question is « whether affirmative action fosters *more* racial hostility and stereotyping than would exist without it »<sup>149</sup>. Most of the relevant studies conducted in the field of social psychology, however, do suggest that this additional effect of stigmatization specifically triggered by the official nature of affirmative action – whether or not it is ultimately compensated for by the programs' other positive effects – is not merely hypothetical<sup>150</sup>. The fact of officially defining among all competing applicants one or several categories of « potential beneficiaries of affirmative action » may actually have a negative impact on their relationships with those who remain outside of this newly created ensemble. In particular,

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<sup>147</sup> See Brewer and Miller (1988), at 320, 324; Rothbart and John (1985), at 95-96; Krull and Wyer (1980).

<sup>148</sup> Public opinion data on affirmative action suggest that blacks themselves are keenly aware of their vulnerability in this respect. For while support of that policy is fairly weak as a general matter, it is positively correlated with the number of groups included among its beneficiaries. For instance, the degree of hostility faced by affirmative action is significantly lower when the programs are presented as benefiting both blacks and women than when they are presented as benefiting African Americans alone (Steeh and Krysan (1996), at 137-138). Naturally, one may be tempted to believe that only racism and hostility towards blacks specifically can account for the stronger disapprobation of a policy when that policy is designed to assist no other group but them. Yet, black respondents *also* seem to prefer affirmative action programs that target other groups as well over those that target them exclusively, despite the relative loss of material resources that such a shift would entail as far as they are concerned (Kinder and Sanders (1996), at 183-184). A possible explanation for that somewhat counterintuitive result is that blacks take into account the potential stigmatization effect that affirmative action may have on them and believe, rightly or wrongly, that it will be mitigated if they are not the only group targeted for such special treatment.

<sup>149</sup> Rubinfeld (1997), at 446-447.

<sup>150</sup> See Hamilton Krieger (1995) and Hamilton Krieger (1998) (reviewing a substantial number of studies), as well as Howard and Rothbart (1980), Heilman, Block and Lucas (1992), Nascoste (1990), Nascoste (1987).

several experiments have shown that once the category « black » has been activated anew by the announcement of an affirmative action program at a given firm or university to benefit « blacks » among others, individuals become more inclined to use that category as an « anchoring ground for their interpretations »<sup>151</sup> of related (or unrelated) events. In other words, the *activation threshold* of the category declines<sup>152</sup>. Therefore, it would be unwise to dismiss the possibility that the distinctions among applicants reinstitutionalized by affirmative action should come to be understood as an implicit confirmation of the validity of existing racial and gender (negative) stereotypes, creating the impression that such stereotypes are actually endorsed by the authorities responsible for establishing the programs<sup>153</sup>. In order for the elevation of minority group members in the economic and occupational hierarchy to be taken as evidence of how inaccurate those stereotypes are, one should not be able to dismiss their success as resulting from an antimeritocratic scheme specifically designed to that end. Similarly, a minority member can only function as a « role model » if he or she is perceived as having been appointed because of qualifications rather than race or sex. The very visibility of affirmative action programs – of their preferential, non-strictly meritocratic component – may prove detrimental in this respect<sup>154</sup>. Therefore, while affirmative action can be justified in theory as a key element in a long-term strategy for dismantling well-entrenched structures of subordination<sup>155</sup>, as a practical matter, it might prove counter-productive to fully disclose its most distinctive and most contentious features. Unpleasant as it may be, affirmative action is a defensible, sometimes indispensable policy that might nonetheless require a measure of dissimulation to succeed<sup>156</sup>.

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<sup>151</sup> Dobry (1986), at 198.

<sup>152</sup> Rothbart and John (1985), at 96.

<sup>153</sup> See Garcia, et. al. (1981); Summers (1991). This is definitely not a trivial matter. After conducting a series of well-designed experimental studies, psychologists Claude Steele and Joshua Aronson have persuasively argued that academically talented black students tend to underperform on tests that they believe will be used to measure their intellectual ability partly because of the anxiety induced by their fear of confirming the still-pervasive stereotype as to their inferiority in that field (Steele and Aronson (1995)). That the existence of affirmative action programs may still intensify the sense that African American students are expected to underperform academically is therefore a serious concern. Besides, other public opinion studies suggest that the mere mention of affirmative action does reinforce negative stereotypes about blacks: see Sniderman and Piazza (1993), 97-104; Sniderman and Carmines, *Reaching Beyond Race*, at 37-40.

<sup>154</sup> The increasingly widespread tendency to launch a broader attack on the predominant conception of « merit » as defined mostly by test scores (see, for instance, Guinier and Sturm (1996); Guinier and Torres (2002)) may be understood in part as a short-term, radical strategy designed to defuse any stigma potentially induced by the conspicuousness of affirmative action by directly challenging the validity of the norm from which these policies stand as a departure.

<sup>155</sup> Fiss (1976); Sabbagh (2003a), at 251-301; Sunstein (1994).

<sup>156</sup> The temptation to conceal what affirmative action requires as a practical matter is clearly present in the United States (Sabbagh (2003b)) and elsewhere. Thus, Australian affirmative action legislation draws a distinction between public and confidential reports: while public reports provide statistical information on the workforce and an outline of the measures undertaken to reduce existing imbalances, a detailed analysis of these measures is found in confidential reports only. In Canada, too, information on the race and gender distribution of the workforce is available for public inspection, but the affirmative plans themselves are not (Faundez (1994), at 44).

## Identifying the beneficiaries: the Indian dilemma

Affirmative action is often criticized through « slippery-slope arguments »<sup>157</sup> that take for granted the theoretical and/or practical impossibility of restricting the reach of the programs to the groups that need them most and pinpoint the absurdity of their alleged underlying principle, according to which proportional representation in all positions of power and prestige should obtain for each and every possible « group »<sup>158</sup>. But this is a much too simplistic – if not altogether fanciful – account of what affirmative action is about. The problem of open-endedness that these arguments emphasize can be dealt with simply by acknowledging that affirmative action inevitably relies on a set of *historical, sociological* and *political* judgments as to the identity of the relevant reference groups – those whose members ought not to be overrepresented at the bottom of the economic and occupational hierarchy. For all « groups » are not of a similar kind<sup>159</sup>. Some are only *statistical aggregates* – in which case the distinctive feature of their « members » is defined on a quasi-random basis, and will be considered arbitrary by insiders and outsiders alike (think of the group of people with blond hair and brown eyes). Others are *associations* set up to promote some shared interests or ideas through individual affiliation with an organizational structure specifically designed to that end (political parties, unions, etc.). Only a limited proportion of all collective entities are ascriptive, *status groups* – whose existence, far from being the product of a foundation of any kind, remains largely independent from the will of their individual members, and whose impact on their social experience and subjective identity is the strongest. African Americans or Indian untouchables are the paradigmatic example:

« [They] are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based on these perspectives »<sup>160</sup>.

Naturally, one may well disagree over exactly which groups would qualify for a description of this kind. Yet, the margin of disagreement is not infinite. To take but one example, in the United States, while poverty surely curtails an individual's life prospects to a

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<sup>157</sup> The distinctive feature of « slippery-slope arguments » is their claim that the decision at issue will naturally lead to other decisions whose unwanted character remains undisputed among defenders and opponents of the first one alike. One may underline either the evil nature of the predicament lying at the bottom of the slope, or the element of arbitrariness supposedly involved in breaking out from such a perverse cycle before reaching that dreaded predicament (assuming that option is still available) ; see generally Bernard Williams (1995), at 213-222.

<sup>158</sup> See, for instance, the U.S. Supreme Court decision *Hughes v. Superior Court* (339 U.S. 460 (1949), at 464) – likening the pressure brought upon a Californian employer to increase the proportion of African Americans in his workforce to the structurally unlimited list of further demands that may then be voiced on account of « Hungarians in Cleveland, Polish in Buffalo, Germans in Milwaukee, Portuguese in New Bedford and Mexicans in San Antonio... ».

<sup>159</sup> See generally Young (1990), at 43-46 – from which the following development derives.

<sup>160</sup> Fiss (1976), at 148. See also the U.S. Supreme Court decision *Beauharnais v. Illinois* (343 U.S. 250, 263 (1952)) – arguing that « ... a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits (...). [There are] groups with whose position and esteem in society the affiliated individual may be inextricably involved ».

considerable extent, the matrix of such disadvantage lies in the very fact of being poor – not in the fact of being perceived as belonging to the *group* of « poor people ». In contrast,

« Black men and women (...) are not free to choose for themselves in what roles – or as members of which social groups – others will characterize them. They are black, and no other feature of personality or allegiance or ambition will so thoroughly influence how they will be perceived and treated by others, and the range and character of the lives that will be open to them »<sup>161</sup>.

In this light, there is an answer to the slippery-slope argument, in theory at least : the only groups eligible for affirmative action policies are those, membership of which stands as a crucial feature of the individual's identity – insofar as it shapes the expectations and behaviors of outsiders toward her<sup>162</sup>.

As a practical matter, however, this restriction does not provide any rule of thumb for solving the identification-of-the-beneficiaries problem – a problem that was not really perceived as such in the United States until quite recently. While it is true that the pivotal political and administrative decisions were taken when the population of Hispanics and Asian Americans was small – and before officials and civil rights leaders understood that the Immigration and Nationality Act of 1965 would produce so many new immigrants from Asia and Latin America<sup>163</sup> –, the question of whether ethnoracial minorities eligible for affirmative action (blacks, Hispanics, Asians and Native Americans) might have differential needs for it was then largely avoided by American policymakers and judges alike.

In India, the picture is dramatically different. Affirmative action began under British colonial rule as a set of programs designed for the advancement of the lowest caste – the so-called « Untouchables » –, first in the field of education – special schools were established on their behalf as early as 1892 –, then in the civil service, where in 1946 12.6 percent of the vacancies were reserved for them to reflect their proportion in the population. At the same time, the British also introduced quotas in political representation: starting in 1919, a given percentage of seats were reserved for the Untouchables on the provincial legislative councils as well as in the central legislative assembly. In the Poona Pact of 1932, after some heated debate between Gandhi's Indian National Congress Party and Dr Ambedkar – the first Untouchable leader to have a pan-Indian influence –, the British government maintained and extended this policy of reserving electoral seats for Untouchable candidates within a general electorate, while rejecting Ambedkar's demand for a system of separate electorates that would have allowed the Untouchables to select their own representatives, as had been the case for Muslims since 1909<sup>164</sup>. The difference was significant, because all voters were still qualified to vote for one candidate or another in any given district – and untouchable voters were never a majority. After independence, the 1950 Indian Constitution retained the principle of reserved seats for the Untouchables – renamed « Scheduled Castes » (SCs), in 1935 –, raising the percentage to 15 percent, their proportion of the Indian population according to the 1951

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<sup>161</sup> Dworkin (1985), at 294.

<sup>162</sup> See Balkin (1997), at 2360 (emphasizing that the « groups » affirmative action should be concerned with are those for whom « status identity (...) affect[s] a large percentage of one's personal interactions with others, and (...) has many mutually supporting and overlapping effects ») ; Melissa Williams (2000), at 65 (suggesting that « marginalized ascriptive groups » have four characteristic features : « (1) patterns of social and political inequality are structured along the lines of group membership ; (2) generally, membership in them is not experienced as voluntary ; (3) generally, membership in them is not experienced as mutable ; and (4) generally, there are negative meanings assigned to group identity by the broader society or the dominant culture »).

<sup>163</sup> Graham (2002).

<sup>164</sup> Jaffrelot (2002).

census<sup>165</sup>. Yet, it also provided for the possible extension of quotas to groups other than SCs and STs in its article 15 (4): « Nothing in this article [article 15, which states a general equality principle] (...) shall prevent the State from making any special provision for the advancement of *any socially and educationally backward classes of citizens* or for the Scheduled Castes and the Scheduled Tribes »<sup>166</sup>. At the same time, while the principle of preferential treatment was constitutionally sanctioned, the actual ratios, and even the definition of the relevant groups – in the case of these « other backward classes » –, were left for the executive to define, at the federal and at the state level.

From a comparative point of view, one of the most striking features of the Indian predicament is the contrast between, on the one hand, the objective expansion of affirmative action benefits in university admissions and public employment<sup>167</sup> – although not in electoral representation – from Scheduled Castes and Scheduled Tribes to the more numerous (52 percent of the Indian population in 1980) and somewhat better-off backward castes<sup>168</sup> and, on the other hand, the long-standing acknowledgement of the irreducibly specific nature of the Untouchables' condition, reflected in their noncontroversial designation as a caste for public policy purposes, in contrast to the protracted reluctance of the Indian authorities to use caste as the main criterion for identifying the other « backward classes of citizens » (OBCs) mentioned in article 15 (4)<sup>169</sup>.

At the federal executive level, that reluctance appeared most clearly in the 1950s, when the Nehru government, under the influence of the Marxist notion that class and class struggle was what ultimately mattered, repeatedly rejected the conclusions of the successively appointed « Backward Classes Commission », that all agreed in identifying membership in a lower caste as the most accurate proxy for economic and social disadvantage<sup>170</sup>. At the judicial level, after a decade in which selection of groups to receive preferential treatment was left largely to state governments – with the result that the Supreme Court repeatedly struck down plans that seemed primarily to benefit politically powerful groups or that were based on traditional assumptions about caste-based prejudice without empirical research to show which groups were truly in greatest need –, the most important development occurred in 1961. In the Supreme Court decision *Balaji v. State of Mysore* rendered that year, the Court, while not

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<sup>165</sup> Other groups called « Scheduled Tribes » (STs) – defined by their supposedly aboriginal status, religious, linguistic and cultural differences, and geographic isolation – were also granted reserved seats. Article 330 of the Constitution set aside seats for SCs and STs in proportion to their numbers in the Lok Sabha (lower house of parliament), while article 32 did the same in the case of the state legislatures. Originally, all these reservations were time-bound and were to expire after a period of 10 years, but they were systematically extended.

<sup>166</sup> Our emphasis.

<sup>167</sup> In which case the reservations were not time-bound.

<sup>168</sup> Only in North India – where the members of the high castes made up one-fifth of the population on average – was the extension of affirmative action to the lower castes exclusively a post-independence phenomenon; in the South – where they were less than 5 percent –, the movement had already started well before the end of the 1940s (Jaffrelot (2003)). That this development was actually an *extension* also stands in sharp contrast with the situation in the United States, where Hispanics, Asians and Native Americans were *immediately* and unreflectively included among the beneficiaries of affirmative action. (Another major difference is that in India, even though Article 15 (3) of the Constitution permits the state to make special provisions for women and children, affirmative action in university admissions and public employment was not extended to women). Finally, there has been a progression in the kind of reservations provided as well. Initially, reservations were provided for admission to schools and colleges, including engineering and medical schools; they were then provided for appointments to the state administrative services and, in the case of scheduled castes and tribes, to the central administrative services; eventually, they were extended to the entire public sector, though not to private employment (see Weiner (1993), at 44).

<sup>169</sup> Thus, since 1941 the category of caste has been withdrawn from the Indian census except as far as the Untouchables are concerned.

<sup>170</sup> Jaffrelot (2002).

objecting to the use of caste as a criterion for the identification of backwardness, held that it could not be the only criterion considered for that purpose. This holding is quite similar to the *Bakke* decision of the United States Supreme Court allowing race to be taken into account in university admissions as long as it was treated as just one among many potentially diversity-enhancing features, to be weighed against all the other ones<sup>171</sup>. Unlike the American court, however, the Indian judges did not find fault with the very principle of quotas for disadvantaged groups; they simply limited their extent by setting a ceiling of 50 percent on the number of positions reserved under Articles 15 (4) and 16 (4) of the Constitution<sup>172</sup>.

The status quo prevailed until the early 1990s, when the Indian authorities finally changed course and accepted caste as the main relevant criterion for identifying the beneficiaries of affirmative action. The first step was the decision by the Janata Party government in August 1990 to implement the report that the Mandal Commission – named after its chairman, B.P. Mandal – had drafted 12 years earlier. Unlike in the U.S. Supreme Court 1978 *Bakke* decision – in which Justice Powell argued that the courts were not in a position to undertake the study in comparative victimology required in order to select the policy’s beneficiaries among all the groups who may feel that they should qualify for a special treatment of some kind<sup>173</sup> –, the report listed no less than 3,743 castes – representing 52 percent of the country’s population – that it identified as forming these « Other Backward Classes », both Hindu and non-Hindu, eligible for « special provisions » under the Indian Constitution. Given that a proportional quota of 22.5 percent of government jobs and university spots had already been made for the Scheduled Castes and the Scheduled Tribes – who then represented 15 percent and 7.5 percent of the Indian population respectively –, in order to comply with the *Balaji* ruling and keep the total quantum of reservations below the 50 percent limit, the Commission recommended a 27-percent reservation for the OBCs, even though their population was almost twice this figure. In other words, the OBCs were to receive only what was left of the 50 percent available for reservation after the SC and ST quotas had been set aside. Thus, the SCs and STs had their own separate reservations; they did not have to compete for reserved seats against the more populous and frequently more affluent and influential OBCs. In sharp contrast with the North American and South African affirmative action regimes, members of the group generally considered as the most disadvantaged are thus being granted some kind of preferential treatment also *in relation to the policy’s other beneficiaries*<sup>174</sup>.

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<sup>171</sup> *Regents of the University of California v. Bakke*, at 315-318.

<sup>172</sup> *Balaji v. State of Mysore* (All India Reporter 1963 SC 649).

<sup>173</sup> According to Powell, one should not ask « [the] courts (...) to evaluate the extent of the prejudice and consequent harm suffered by various minority groups » – and decide that « those whose societal injury [wa]s thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications... » (*Regents of the University of California v. Bakke*, at 296-297). For even if it were « politically feasible and socially desirable » to cast affirmative action as an admittedly unusual method exclusively designed to address the unique predicament of African Americans, the argument would inevitably rely on a « kind of variable sociological and political analysis » which « does not lie within the judicial competence » (*Id.*, at 297), in part because the « subjective » judgments involved would have to be modified every now and then : « As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings [taking into account the progress of the targeted group] would be necessary », thus introducing an element of discontinuity inherently incompatible with the alleged regularity of constitutional adjudication (*Id.*, at 294, fn34, 297).

<sup>174</sup> Another distinctive feature of the Mandal report is its emphasis on the *political* virtues of affirmative action as an instrument for the empowerment of the lower castes: « ... We must recognise that an essential part of the battle against social backwardness is to be fought in the minds of the backward people. In India Government service has always been looked upon as a symbol of prestige and power. By increasing the representation of OBCs in government services, we give them an immediate feeling of participation in the governance of this country. When a backward class candidate becomes a Collector or a Superintendent of Police, the material

Then, in a November 16, 1992 decision upholding the government's implementation of the Mandal report by a majority of 6 to 3, *Indra Sawhney v. Union of India*<sup>175</sup>, the Supreme Court, while confirming that strictly economic criteria could not be the sole basis for identifying the Backward Class of citizens contemplated by the Constitution and removing all major hurdles in the implementation of the reservations for the OBCs, also pointed out the necessity of combining caste and class for ascertaining whether a specific *individual* ought to be eligible for affirmative action benefits. Thus, the court ruled that OBC membership only created a rebuttable presumption that a member needs preferential treatment<sup>176</sup>. To address the concern that the benefits of reservation were not distributed evenly throughout each backward group but instead were monopolized by persons at the socioeconomic top of the group, it directed the government to adopt an economic means tests in order to screen out those advanced backward class members – the so-called « creamy layer » – who did not need government assistance<sup>177</sup>, thus defusing a major issue of contention. As a result, the general procedure for determining individual eligibility is now as follows. First, since the unit that is tested for potential OBC status is a group that practices extensive endogamy, the person must be a member of such a group. Second, that endogamous group must be significantly below average levels of educational attainment. Third comes the means test, allowing for the exclusion of the « creamy layer ». However, this disaggregation of the group of potential affirmative action beneficiaries according to class criteria and the restriction that follows, often discussed but never implemented in the United States, apply only to the OBCs. In this respect as well, members of Scheduled Castes and Scheduled Tribes benefit from a kind of preferential treatment – insofar as they remain out of reach of this newly enforced trimming process<sup>178</sup>.

Last but not least, aside from the – rather moderate – effects of reservation policies on the *economic* and *educational* predicament of low-and-scheduled caste members<sup>179</sup>, support for these policies in the face of upper-caste resistance has become a highly effective device for *political* mobilization. Even after the *Sawhney* decision, when it became reasonably clear that such resistance would subside, politicians have largely succeeded in organizing members of their caste community around the demand for inclusion on the list of those to be given preferences. In short, backwardness has become a vested interest, with support for

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benefits accruing from his position are limited to the members of his family only. But the psychological spin off of this phenomenon is tremendous; the entire community of that backward class candidate feels socially elevated. Even when no tangible benefits flow to the community at large, the feeling that now it has its 'own man' in the 'corridors of power' acts as morale booster » (in Preet Hooda (1985), at 185).

<sup>175</sup> *Indra Sawhney v. Union of India*, All Indian Reporter 1993 S.C. 477 (India).

<sup>176</sup> *Id.*, at 558-560.

<sup>177</sup> *Id.*

<sup>178</sup> *Sawhney* also overruled a 1957 Supreme Court decision – *General Manger v. Rangachari* (A.I.R. 1962, S.C. 36) – that had upheld the practice of extending reservation of posts to cover promotions under departmental examinations. Thus, as far as jobs are concerned, reservations are now confined to initial appointment only, on the assumption that once hired, members of the backward classes can compete and earn promotions on merit as do other public employees. Finally, the judgment exempted from reservations appointments to certain high-skill positions, for example, defense personnel, medical scientists and university professors.

<sup>179</sup> Higher education, in particular, is not a practical possibility for all those who are officially eligible for affirmative action benefits. In that field, such benefits are really available only to those who can supplement them with other complementary inputs, including many years of prior education. Thus, unused reservations have been common: a 1977-78 survey showed that less than half the university places set aside for members of the scheduled castes or scheduled tribes were in fact filled; a later survey of medical schools in 1979-1980 and in 1980-1981 showed that only 23 out of the 77 institutions included in the sample had full utilization of their quotas for scheduled caste and scheduled tribe students, while 10 did not have a single student in either category (Sowell (1990), at 97). The same goes for high-skill positions in the civil service: as a general matter, untouchables are most substantially represented in the lowest levels of government employment.

reservations working like a litmus test for low-and scheduled caste voters<sup>180</sup>. While until the implementation of the Mandal recommendations reservation policy varied across states and remained mostly a state-level issue, in the 1990s the primary result of that policy has been to bifurcate the electorate into two national coalitions – the targeted and the nontargeted –, thus joining groups with potentially divergent interests – SCs and STs on the one hand, OBCs on the other hand – against those whose interests were even further away on that single dimension. So far, the creation of this new political arithmetic remains the most significant consequence of affirmative action in India, albeit an unintended one. Perhaps a more systematically comparative analysis of affirmative action on a global scale should thus focus on the *side effects* of that policy – and of the justifications advanced on its behalf.

## Conclusion

As a general matter, the consequences of affirmative action can be examined from at least two different perspectives. One may consider either the policy's immediate quantifiable objectives – did it entail an increase in the proportion of jobs, public contracts and seats at selective universities obtained by the targeted groups over a period of time, and to what extent? – or its contribution towards the ultimate goal of facilitating the integration of minority groups in society at large, beyond the distribution of these specific resources. Obviously, that second goal is not always present to the same degree: in India and Malaysia, for instance, reducing the inequality in the distribution of social goods between the different groups involved is clearly not conceived as partaking of the more utopian project of abolishing group boundaries within the nation-state – or even of promoting greater school or residential integration in the long run. Giving communities their proportional share of some – admittedly important – social benefits is not supposed to lead to the blurring of the lines that keep them separate from each other in other, non-allocative spheres. In the United States and in France, on the other hand, the connection between *policies equalizing patterns of economic distribution* and the *ideal of societal integration* is a much stronger one.

This distinction is relevant to the key question of how to define the preconceived social outcome the attainment of which would justify the eventual termination of affirmative action programs. In the first case – that of India and Malaysia –, the proportionality criterion provides an obvious « focal point »<sup>181</sup> to resolve controversy, generally acknowledged as such. In the second case – that of the United States –, proportional representation is emphatically rejected as a distributive *principle*, even though it arguably operates covertly at the policymaking level, by providing the benchmark against which « discrepancies » and « deficiencies » will be identified and compensated for. Yet, at the end of the day, one may argue that the ultimate goal of affirmative action will be reached only *when it will not occur to anyone* to check on the percentage of African American students or employees anymore. For if the reference to eye-color – as the prototypical example of a physical characteristic as non-salient as race should eventually become, according to the color-blind ideal – is such a familiar feature of the affirmative action debate<sup>182</sup>, it is actually not so much because we know for sure that there is no correlation whatsoever between that socially unimportant trait and the position held by individuals in the economic and occupational hierarchy, than because no one would even *think* of undertaking an empirical investigation designed to find out. In

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<sup>180</sup> Jaffrelot (2002).

<sup>181</sup> Schelling (1960), at 111ff.

<sup>182</sup> See, e.g., Wasserstrom (1980), at 15.

this respect, one of the many paradoxes of affirmative action precisely lies in this attempt to organize the disappearance of its own conditions of possibility. However, while the objective of special treatment for members of disadvantaged groups is to make the need for that special treatment disappear as rapidly as possible, the political reality, in the United States and elsewhere, is that once preferences are established, they are almost impossible to dismantle. Although affirmative action policies have almost always been rationalized as a temporary remedy, they tend to «become permanent in a democratic society, where benefits once given cannot be withdrawn»<sup>183</sup>.

Not only do affirmative action programs persist regardless of the conditions that ought to trigger their elimination over time<sup>184</sup>; they have also tended to expand in scope, either embracing more groups or spreading to wider realms for the same groups, or both. Thus, in the United States, affirmative action almost immediately spread from one unquestionably oppressed group (native-born blacks) outward to other groups with a lesser claim to exceptional treatment, including other ethnoracial minorities (most of whom were recent immigrants), and women. It was the exceptional experience of African Americans and the urgently felt need to correct it that permitted the principle of affirmative action to be (imperfectly) legitimized in the first place and subsequently to be picked up by other groups who would not have been able to make the original claim. Similarly, in India, affirmative action policies have evolved from quotas for Scheduled Castes and Scheduled Tribes only to sweeping national-and state-level programs that cover more than one-half the Indian population in representation, higher education, and government employment. Heavily criticized as it was, this expansion of the affirmative action regime proved irresistible nonetheless, at least in these two – otherwise sharply distinct – contexts. But if «the group whose history provides the moral rationale for initiating preferential policies is unlikely to remain the sole group preferred in a multi-ethnic society (...), the real issue then becomes: What are the likely consequences of an enduring policy of group preferences *for the whole range of groups that are likely to get them*? The (...) issue is then no longer whether group A or B deserves contemporary preferences, but whether groups C, D, E, etc. also deserve such preferences especially if these latter groups are larger, more educated, or otherwise better positioned to use the preferences, thereby diluting or destroying the value of preferences for group A or B, who may have stronger moral claims or more urgent social needs »<sup>185</sup>.

Last but not least, another dimension along which to assess these affirmative action regimes is their *degree of internal differentiation*. Most often than not, that differentiation is simply nonexistent. Thus, in Malaysia, all Malay individuals are potentially eligible for preferential treatment over individuals of Chinese extraction. In South Africa, the Black Management Forum's demand that the implementation of affirmative action programs take into account objective inequalities in the extent of the discrimination suffered by the «designated groups» during the Apartheid era was essentially ignored. In the United States, this structural tendency to avoid establishing any official hierarchy of disadvantage within the population of affirmative action beneficiaries was even reinforced by the «juridicalization of politics»<sup>186</sup> characteristic of the American public sphere. For while «*the legislative authority...* is not bound to extend its regulation to all cases which it might possibly reach...

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<sup>183</sup> Glazer (1983), at 272.

<sup>184</sup> Pakistan is a case in point: while originally the main rationale for affirmative action was to ameliorate socioeconomic differences between its eastern and western components and reduce the underrepresentation of East Pakistan's Bengalis in the civil service, the military, business, and the professions, the policy has persisted and is even more extensive today – long after East Pakistan broke away in 1971 to form the independent nation of Bangladesh (see Kennedy (1986), at 69).

<sup>185</sup> Sowell (1990), at 169-170 (our emphasis).

<sup>186</sup> Shapiro (1994).

is free to recognize degrees of harm... and... may confine its restrictions to those classes of cases where the need is deemed to be clearest »<sup>187</sup>, judges cannot openly indulge in such « sociological and political» assessments<sup>188</sup> – and judges happen to be those upon whom the fate of affirmative action depends. Hence their focus on the diversity argument which, faulty as it is, has at least the virtue of not forcing them to conspicuously encroach upon the province of the legislator. While Supreme Court decisions do confer additional legitimacy upon affirmative action – in the United States and in India<sup>189</sup> –, they may thus have the negative side effect of entrenching the policy's overinclusiveness.

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<sup>187</sup> *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937), at 400 (emphasis added).

<sup>188</sup> *Regents of the University of California v. Bakke*, at 297.

<sup>189</sup> In India, for instance, while the 1990 announcement by the Singh government that it would take up the Mandal report with a view to its swift implementation had led to widespread protest and antireservation violence – in the state of Bihar in particular –, there was a sharp decline in the number of incidents after the 1992 *Sawhney* decision (Cunningham and Menon (1999), at 1307).

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