The Origins of Affirmative Action: Civil Rights and the Regulatory State

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By HUGH DAVIS GRAHAM

ABSTRACT: Affirmative action policy developed during the 1960s and 1970s in two phases that embodied conflicting traditions of government regulation. The first phase, culminating in the Civil Rights Act of 1964 and the Voting Rights Act of 1965, was shaped by the presidency and Congress and emphasized nondiscrimination under a "race-blind Constitution." The second phase, shaped primarily by federal agencies and courts, witnessed a shift toward minority preferences during the Nixon administration. The development of two new agencies created to enforce the Civil Rights Act, the Equal Employment Opportunity Commission under Title VII and the Office of Federal Contract Compliance under Title VI, demonstrates the tensions between the two regulatory traditions and the evolution of federal policy from nondiscrimination to minority preferences under the rubric of affirmative action. The result has strengthened the economic and political base of the civil rights coalition while weakening its moral claims in public opinion.

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IN 1978, in *Regents of the University of California* v. *Bakke*, Supreme Court Justice Harry Blackmun voted to uphold the exclusion of white applicants from affirmative action programs like the minority set-aside at the Davis medical school. Blackmun was apologetic about supporting a government policy of racial exclusion: "I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past."[1] Defending the Davis program as a stage of "transitional inequality," he expressed the hope that "within a decade at the most," American society "must and will reach a stage of maturity where acting along this line is no longer necessary." "Then persons will be regarded as persons and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us."

Blackmun misjudged the period of transition. A generation after the Civil Rights Act of 1964, which prohibited "discrimination because of race, color, religion, or national origin," minority preferences have become standard policy, and their supporters seldom defend them as temporary. Yet public controversy over affirmative action has increased, not faded. Most other major government initiatives of the 1960s had worked their way into the public consensus: Medicare, federal aid to education, protection of the environment, regulation of consumer products, requirements for transportation and workplace safety. But the public remained profoundly divided over affirmative action programs keyed to minority preferences. The history of affirmative action helps to explain the way the policy evolved and its consequences.

Much of the polarization, confusion, and resentment shared by both sides in the affirmative action dispute can be traced to a crucial but poorly understood moment of transition in the late 1960s. Between 1964 and 1972, the federal government apparatus was committed to a pervasive new structure of social regulation.

The shift was largely unplanned and unforeseen. A breakthrough in civil rights policy, codified in the Civil Rights Act of 1964, marked the beginning of the transition. Yet the Civil Rights Act also represented the culmination of an older tradition of regulation whose mainstream assumptions and methods differed sharply from the norms of the new social regulation. Thus in 1964 two traditions of government regulation were combined in a major regulatory initiative that rested on contradictory assumptions.

The main intended results were dramatic: the destruction of legal segregation in the South and a sharp acceleration in the drive for equal rights for women. The unanticipated result, however, was a social cleavage that fractured the American consensus on the meaning of justice itself.[2]

1. *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 403 (1978).

2. Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960-1972* (New York: Oxford University Press, 1990), pp. 450-76.

THE FAIR-EMPLOYMENT COMMISSIONS

During the spring of 1964, debate over the civil rights bill concentrated on Title VII, which would create the Equal Employment Opportunity Commission (EEOC) to police job discrimination in commerce and industry. This was the "FEPC" title under a less controversial name. To conservatives it summoned memories of Franklin Roosevelt's wartime Committee on Fair Employment Practices (FEPC) of government bureaucrats telling businesses whom they must hire. To liberals, it offered the nationwide extension of an enlightened and effective model of employment fairness: the independent state commissions against discrimination.

Patterned after the Progressive and New Deal tradition of national regulatory commissions like the Federal Trade Commission (1915) and the National Labor Relations Board (NLRB) (1935), the state commissions had been pioneered in New York, where the legislature in 1945 established the State Commission against Discrimination (SCAD). Based on the NLRB model sponsored by Senator Robert Wagner, Democrat of New York, SCAD was a regulatory commission that received complaints, screened them for probable cause, negotiated conciliations, and, when persuasion failed, held formal hearings. SCAD had subpoena power and could issue desist orders enforceable in the courts.

By 1960, the New York model had spread across the northern urban-industrial states from Massachusetts to the Midwest and then to the West Coast. The FEPC states included a majority of the U.S. population, although most blacks still lived in the segregated South.[3]

Even among employers, the state and municipal fair-employment commissions earned a reputation for efficiency and fairness. One study found that, in 12 major industrial states between 1945 and 1961, only 62 of 19,394 job discrimination complaints required public hearings and, of these, only 26 led to desist orders.[4] Most studies found that the threat and expense of the full hearing process was enough to persuade employers to satisfy commission officials "voluntarily."[5] Racial discrimination by employers appeared to be minimized under such a system. If extended nationwide through Title VII, this system promised to destroy the segregated political economy of the South and enforce nondiscrimination throughout the nation.

CONTRACT COMPLIANCE

During the debates of 1963-64, little attention was paid in Congress or the media to the civil rights bill's Title VI, which prohibited discrimination in programs receiving funds from federal grants, loans, or contracts. Unlike the long and compli-

3. Jay Anders Higbee, *Development and Administration of the New York Law against Discrimination* (Tuscaloosa: University of Alabama Press, 1966): Paul H. Norgren and Samuel E. Hill, *Toward Fair Employment* (New York: Columbia University Press, 1964).

4. The most comprehensive study of state and municipal fair-employment commissions is Morroe Berger, *Equality by Statute: The Revolution in Civil Rights* (New York: Farrar, Straus & Giroux, 1978).

5. Graham, *Civil Rights Era*, pp. 129-32.

cated Title VII, to establish a controversial new enforcement agency, Title VI was brief and general. Its vague provisions for enforcement by federal funding agency regulations were hedged with requirements for judicial review and congressional oversight. Yet Title VI turned out to be the sleeper provision of 1964.

Title VI drew its authority from the law of contract compliance, which flows from the responsibility of public executives—kings, presidents, governors—to stipulate and enforce the terms of government contracts. Since the founding of the Republic, executive departments have contracted for goods and services: warships for the navy, rifles for the army, dams for the rivers, funds for highway and hospital construction. The contracts detailed the technical specifications, performance standards, work schedule, time of completion or delivery, costs, and so forth. Contract compliance was backed by the authority to cancel the contracts of failed performers and ban the contractors from future contract work.

President Roosevelt's FEPC (1941-46) was an advisory committee created by executive order under contract compliance authority, not an independent regulatory commission created by statute. The difference is fundamental, though "FEPC" became a generic term that muddied the distinction between contract enforcement by executives and regulation by statutory commissions. Roosevelt's fair-employment committee added to defense contracts a new social provision that required contractors to protect the civil rights of minorities. The Roosevelt and Truman administrations justified FEPC on the grounds that the national defense and economy were strengthened by bringing minorities into the skilled work force.

During the five stormy years that the tiny, courageous FEPC tried to enforce nondiscrimination in defense contracts, employers, the American Federation of Labor unions, the armed forces, Congress, and public opinion were inhospitable. When attempts to legislate a national fair-employment commission were blocked by a coalition of southern Democrats and conservative Republicans, President Truman appointed his own advisory committee to police job discrimination by government agencies and contractors. President Eisenhower established a similar committee, also by executive order.[6]

President Kennedy's 1961 fair-employment Executive Order 10925 differed from its predecessors in two respects. First, to compensate for his unwillingness to ask Congress for significant civil rights legislation, Kennedy signed the order at a highly publicized White House ceremony at which he emphasized his administration's executive initiatives on behalf of civil rights.[7] Second, Kennedy's order for the first time

6. William C. Berman, *The Politics of Civil Rights in the Truman Administration* (Columbus: Ohio State University Press, 1970); Donald R. McCoy and Richard Reutten, *Quest and Response: Minority Rights in the Truman Administration* (Lawrence: University of Kansas Press, 1973); Robert Fredrick Burk, *The Eisenhower Administration and Black Civil Rights* (Knoxville: University of Tennessee Press, 1984).

7. Carl M. Brauer, *John F. Kennedy and the Second Reconstruction* (New York: Columbia University Press, 1977).

linked the phrase "affirmative action" to civil rights enforcement policy. The phrase had been used in the Wagner Act of 1935, which had authorized the NLRB to redress unfair labor practices by ordering offending parties "to cease and desist from such . . . practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act."

In the administrations of Presidents Kennedy and Johnson, affirmative action meant that government employers and contractors had to recruit aggressively to bring minorities into the applicant pool. Decisions on hiring, promotions, and appointments, however, would continue to be governed by traditional criteria of merit selection.

Kennedy's order directed federal contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." The governing principle was classical liberalism's command not to discriminate. In the memorable phrase of Justice John Marshall Harlan, dissenting with lonely passion in the *Plessy* decision of 1896, the goal of federal policy must be a "color-blind Constitution."

BANNING RACIAL PREFERENCES

By 1963, the civil rights movement, through the accumulated pressure of the sit-ins, freedom rides, and especially the televised demonstrations in Birmingham led by Martin Luther King, had created a national demand for change that threatened to overwhelm conservative defenses in Congress. In June 1963, President Kennedy sent Congress a bill to prohibit segregation in public accommodations (Title II). By November, on the eve of Kennedy's assassination, the administration and congressional leaders of both parties had agreed to add a job-discrimination provision—Title VII—to be administered by a fair-employment commission called the EEOC.

During the spring 1964 Senate showdown, minority leader Everett Dirksen, armed with decisive bargaining leverage because Republican votes were essential to break the southern filibuster, demanded and won the addition of provisions to prohibit minority preferences. Conservatives had been alarmed when, in March 1964, a black hearing examiner for the Illinois fair-employment commission ordered the Motorola Corporation to hire a rejected black applicant who had flunked its general ability test. Finding that such tests were unfair to "culturally deprived and disadvantaged groups" because they did not take into account "inequalities and differences in environment," the examiner also ordered Motorola to stop using them.[8]

Alarmed by this incident, which raised anew the specter of bureaucrats telling businesses whom to hire, Dirksen assailed the prospect of racial quotas. Democratic leaders agreed to amend the civil rights bill to address his concerns. The bill's Democratic floor manager explained

8. Graham, *Civil Rights Era*, pp. 145-52.

that "any deliberate attempt to maintain a racial balance . . . would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited to any individual."[9]

Majority Whip Hubert Humphrey denied that the bill would permit "preferential treatment to any individual or group." He explained that Title VII barred intentional discrimination and "inadvertent or accidental discrimination will not violate the title or result in entry of court orders."[10] Humphrey promised to eat his hat if the civil rights bill ever led to racial preferences.

With Dirksen's support, the southern filibuster was broken. The House accepted the Senate language on 2 July, and on the same day President Lyndon Johnson signed the Civil Rights Act of 1964 into law.[11]

TITLE VII AND THE EEOC

Dirksen's compromise had concentrated on amending Title VII in order to confine the Civil Rights Act to nondiscrimination. No congressman defended the Motorola hearing examiner's order. To Republicans, the bureaucratic regulatory commission model posed a threat to free-market business enterprise. Virtually all of Dirksen's negotiations focused on the coverage and exceptions in Title VII and on the proposed EEOC. The Republican minority stripped the new agency of both cease-and-desist power and prosecuting authority.

What remained was essentially a defanged enforcement agency. The EEOC could receive and process individual complaints of discrimination due to race, color, religion, sex, or national origin and could seek conciliation by negotiating with the employers or unions named in the complaints. It could hold hearings, conduct studies, issue reports, make recommendations. Unlike state FEPCs, however, it could not issue desist orders or sue offending employers in court.[12]

The EEOC got off to a poor start in 1965. The agency was reasonably effective, working with the Justice and Labor departments, in dismantling the structure of segregated jobs and unions in the South. But it was attacked by black civil rights leaders for weakness and timidity in a period of violent racial crisis. Feminist leaders, who in 1966 formed the National Organization of Women, attacked the EEOC for halfhearted action against sex discrimination. Michael Sovern's 1966 study of equal employment called the EEOC a "poor enfeebled thing."[13]

During the long debate over the Civil Rights Act, most attention was devoted to the complex Title VII provisions on nondiscrimination and

9. Ibid., pp. 150-51.

10. Humphrey, quoted in U.S., Congress, Senate, *Congressional Record*, 88th Cong., 2d sess., 4 June 1964, pt. 10, pp. 12723-24.

11. Charles Whalen and Barbara Whalen, *The Longest Debate: Legislative History of the Civil Rights Act of 1964* (Cabin John, MD: Seven Locks Press, 1985).

12. *The Civil Rights Act of 1964* (Washington, DC: Bureau of National Affairs, 1964).

13. Michael I. Sovern, *Legal Restraints on Racial Discrimination in Employment* (New York: Twentieth Century Fund, 1966), p. 88.

their enforcement by the EEOC. Little time was spent on the brief Title VI on nondiscrimination in federally assisted programs, which gave statutory approval to the President's contract compliance authority.

Title VI began with an unambiguous ban on discrimination: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance."[14] Congress then directed federal agencies to enforce this ban by issuing rules and regulations. The main goal was to use the power of the federal purse to stop, rather than subsidize, segregated programs in the South.

TITLE VI AND THE PHILADELPHIA PLAN

While public attention during 1964-68 was focused on the hobbled EEOC, the Labor Department launched an initiative based on the government's multi-billion-dollar budget for contracts and grants. In June 1965, President Johnson told the graduates at Howard University's commencement:

> You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire. . . . You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, "You are free to compete with all the others," and still justly believe that you have been completely fair. . . . We seek . . . not just equality as a right and a theory but equality as a fact and equality as a result.[15]

In September, Johnson issued Executive Order 11246, abolishing the tangled arrangements for contract compliance and directing the Labor Department to create new enforcement machinery. Despite the Howard speech, affirmative action played no role in the planning for this order. Johnson's overarching concerns were interagency coordination and the avoidance of politically damaging battles between enforcement officials in Washington and Democratic organizations in the major cities, like Mayor Richard Daley's Chicago. His order repeated the boilerplate language of Kennedy's 1961 order tying affirmative action to nondiscrimination.[16]

To implement the order, Labor Secretary Willard Wirtz established the Office of Federal Contract Compliance (OFCC) and appointed as its director a black administrator with a degree in engineering, Edward Sylvester. Working closely with federal officials in metropolitan areas, Sylvester concentrated on the construction industry, where organized labor's hiring-hall contracts with builders gave job-assignment control to skilled craft unions. Father-son traditions and guildlike patterns in the American Federation of Labor had largely excluded minorities from apprenticeships and union membership, and, hence, from high-wage construction jobs.

14. Title VI, Nondiscrimination in Federally Assisted Programs, § 601.

15. *Public Papers of the Presidents: Lyndon B. Johnson, 1965* (Washington, DC: Government Printing Office, 1965), 2:636.

16. Graham, *Civil Rights Era*, pp. 180-89.

The OFCC designed a model of contract compliance based on a metropolitan Philadelphia plan. Assuming that nondiscrimination was inadequate to uproot white job entrenchment, building contractors were required to submit "pre-award" hiring schedules listing the number of minorities to be hired. The ultimate goal was to make the proportion of blacks in each trade equal to their proportion of metropolitan Philadelphia's work force: 30 percent.[17]

Both builders and unions attacked the minority preferences. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) brought pressure on Wirtz, and Pennsylvania construction contractors sued the Labor Department in federal court, charging that the Philadelphia Plan violated the nondiscrimination provision of the Civil Rights Act. The builders also appealed to the General Accounting Office, which enforced low-bid protocols in federal contracting. In November 1968, Comptroller General Elmer Staats ruled that the plan violated federal contract law. The lame-duck Johnson administration did not resist; the Philadelphia Plan appeared to be dead.[18]

By fall 1968, federal civil rights policy still seemed anchored in the nondiscrimination doctrine of the 1964-65 statutes. Richard Nixon, avowed opponent of racial quotas, had won election to the presidency. Yet by 1972, when Nixon was reelected by landslide margins in a campaign that included his call for a constitutional amendment to ban school busing for racial balance, federal policy had shifted away from the equal-treatment standard toward proportional results that required minority preferences.

How can we explain this shift? Four reasons can be given: (1) a new etiology of social disadvantage that implied more radical remedies; (2) clientele control of civil rights agencies; (3) the Nixon administration's commitment to affirmative action preferences; and (4) the federal courts' intervention in social policy.

INSTITUTIONAL RACISM

During the 1960s, a significant shift occurred in the theory of social disadvantage. The Kennedy-Johnson war on poverty had emphasized the stunting effects of deprivation: the "culture of poverty" trapped its victims in a chain of disadvantage. Antipoverty planners therefore concentrated on compensatory programs, like Head Start interventions in early childhood education.

In civil rights, black disadvantage was explained not only as a legacy of slavery and segregation but as a consequence of institutionalized racism woven into the fabric of American life. Discrimination was thus seen to persist even in the absence of conscious prejudice and specific acts of discrimination.[19] This was held to explain the fact that, in the late 1960s, the unemployment rate of blacks was double that of whites, even in the

17. William B. Gould, *Black Workers in White Unions* (Ithaca, NY: Cornell University Press, 1972), pp. 172-88.

18. Graham, *Civil Rights Era*, pp. 278-97.

19. Julie Roy Jeffrey, *Education for the Children of the Poor* (Columbus: Ohio State University Press, 1977).

industrial North, where fair-employment commissions had policed discrimination for a generation.

The urban riots of 1965-68, following the triumph of nondiscrimination in 1964-65, seemed to confirm these explanations. The "long, hot summers" of racial violence burned through northern and western cities, leaving little mark on the South. The 1968 Kerner Report, blaming the black rioting on "white racism," reinforced an apocalyptic vision. Alarmed by social chaos and racial warfare, liberal theorists found nondiscrimination inadequate to overcome institutional racism. Liberals concluded that a temporary, results-driven recourse to minority preferences was necessary.[20]

CLIENTELE CAPTURE

The pressures for change converged upon an expanding network of civil rights agencies receptive to more aggressive, results-centered methods. After 1965, the EEOC quickly became the national coordinating center and personnel networking hub for state and local fair-employment agencies.

By 1968, the OFCC was mirrored by contract-compliance offices in 27 federal agencies. These included the Department of Health, Education, and Welfare's Office of Civil Rights, which in 1965 had threatened a fund cutoff to speed school desegregation, and the Department of Justice Civil Rights Division, which after 1964 coordinated Title VI enforcement. In 1969, President Nixon added the Office of Minority Business Enterprise in the Department of Commerce. Like the OFCC, the Office of Minority Business Enterprise had no statutory basis but leveraged federal contract funds toward minority-owned businesses.

During the 1970s, affirmative action personnel and administrative units became standard in state, municipal, and county governments; in private industry and commerce; in educational systems and nonprofit organizations; and in all but the smallest enterprises and institutions.[21]

The groups allied in the civil rights coalition, politically coordinated by the Leadership Conference on Civil Rights, gravitated toward the network of program and enforcement agencies. Following the traditional practice of clientele capture, whereby interest groups seek a dominant voice in programs and agencies that enter their turf—veterans in the Veterans Administration, farmers in the Department of Agriculture, unions in Labor, small businesses in Commerce—the minority constituencies—especially African Americans and, in the bilingual programs, Hispanics—rapidly dominated the new civil rights bureaucracies.[22]

20. James W. Button, *Black Violence: Political Impact of the 1960s* (Princeton, NJ: Princeton University Press, 1978); *Report of the National Advisory Commission on Civil Disorders* (Washington, DC: Government Printing Office, 1968); Hugh Davis Graham, "Riots and Riot Commissions," *Public Historian* 2:7-27 (Summer 1980).

21. Alfred W. Blumrosen, *Black Employment and the Law* (New Brunswick: Rutgers University Press, 1971), pp. 9-20; Jeremy Rabkin, *Judicial Compulsions* (New York: Basic Books, 1989), pp. 147-81.

22. Paul Sabatier, "Social Movements and Regulatory Decay: Toward a More Adequate—and Less Pessimistic—Theory of Clientele

THE REVIVED PHILADELPHIA PLAN

This kind of political leverage, however, was insufficient to overcome the Civil Rights Act ban on minority preferences. The urban riots and Nixon's 1968 victory led observers to expect weakened enforcement by federal agencies. Nixon's "southern strategy" was seen as a cynical appeal to racial backlash, and his early nomination of conservative southern jurists to Supreme Court vacancies drew sharp attacks from the civil rights coalition. Nonetheless, Nixon institutionalized numerical hiring goals and timetables.

The Nixon administration during its first year joined with liberal congressmen to rescue the Philadelphia Plan from conservative attack. This strange turn of events pitted the Nixon White House and the Leadership Conference against an equally expedient alliance of organized labor and southern conservatives. In 1969, Nixon's Secretary of Labor, George P. Shultz, a labor economist and former dean of the University of Chicago business school, revived the Philadelphia Plan in order to free the construction industry from the guildlike grip of craft unions. Nixon hoped to expand the black middle class and to split the Democrats' black-labor alliance.

In the autumn of 1969, congressional conservatives led by Senator Sam Ervin of North Carolina sought to prohibit the plan's proportional minority hiring requirements. The AFL-CIO agreed and rallied to defend labor contracts and the seniority principle. In a December 1969 showdown, Nixon's ad hoc coalition of loyalist Republicans and liberal Democrats defeated Ervin's conservative coalition and saved the Philadelphia Plan.[23]

COURT APPROVAL OF PREFERENCE

The tide of affirmative action thereby turned sharply toward minority preferences. In February 1970, Labor Department Order No. 4 required all federal contractors to submit written affirmative action plans modeled on the Philadelphia Plan. Numerical goals and timetables were required to achieve approximate proportional representation for minorities in the area work force.

In a parallel development in 1968, impatience with the glacial pace of school integration prompted the Warren Supreme Court, in *Green* v. *New Kent County School Board*, to direct desegregating school systems to "take race into account." The Court charged school boards with an "affirmative duty" to produce racial integration in classrooms and in teaching and administrative staffs.[24] In 1971, the Supreme Court affirmed lower court rulings that the minority preferences of the Philadelphia Plan did not violate the Civil Rights Act.[25]

Capture," *Policy Sciences* 6:301-42 (1975); Nathan Glazer, *Affirmative Discrimination* (New York: Basic Books, 1975); Abigail Thernstrom, *Whose Votes Count?* (Cambridge, MA: Harvard University Press, 1987).

23. Graham, *Civil Rights Era*, pp. 322-45.

24. J. Harvie Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration* (New York: Oxford University Press, 1979), pp. 115-18.

25. The OFCC's Philadelphia Plan was upheld in federal appeals court in *Contractors*

The EEOC, which was more tightly circumscribed by Title VII's elaborate codicils than was the OFCC by Title VI, pursued a similar strategy. The EEOC attempted to circumvent the Title VII equal-treatment requirement by applying an equal-results standard of statistical proportionality to employee testing. In 1970, the commission issued testing guidelines based on a disparate-impact standard that challenged tests whose results led to hiring proportionally fewer minorities than whites.

The disparate-impact standard, like the Philadelphia Plan's proportional hiring requirements, sought to correct institutional racism rather than identifiable discriminatory acts. In disparate impact, intentional discrimination, which was difficult to prove, was irrelevant. In the landmark 1971 case *Griggs* v. *Duke Power Co.*, the Supreme Court, deferring to EEOC regulations as expressing the intent of Congress, adopted the agency's disparate-impact theory of discrimination.[26]

In 1972, Congress extended the EEOC's jurisdiction to state and local governments and educational institutions, exempted in 1964 for political reasons. Thereafter, Congress expanded the model of affirmative action incrementally, adding rights and benefits for specific constituencies—Hispanics, Asians, American Indians, the physically and mentally disabled. But Congress did not change the core language of nondiscrimination in the Civil Rights Act of 1964. Thus, over the years, Congress implicitly accepted, without explicitly endorsing, the model of minority preferences fashioned by agency officials and affirmed by federal courts.

THE STRANGE CAREER OF AFFIRMATIVE ACTION

In the decade following Kennedy's 1961 Executive Order, affirmative action policy evolved in two phases. The first phase, culminating in the Civil Rights Act of 1964 and the Voting Rights Act of 1965, emphasized familiar ingredients of the liberal reform tradition: grass-roots mobilization by social movements, presidential sponsorship, a congressional coalition, a constitutional grounding in individual rights, compromise in coverage, and due process constraints in enforcement. The second phase, which peaked during 1969-71, was characterized by agency implementation and court approval of a regulatory process that was technically complex, obscure to the public, and based on a model of group rights and proportional representation. This peculiar, dual origin has had dual coalition policy consequences: it has strengthened the economic and political base of the minority while weakening its moral claims and public support.

Numerical goals and timetables resemble the compliance standards that environmentalists and consumer-protection regulators have set

Association of Eastern Pennsylvania v. *Secretary of Labor*, 442 F.2d 1959 (3rd Cir. 1971); the Supreme Court denied certiorari in the autumn of 1971.

26. Derrick A. Bell, Jr., *Race, Racism and American Law*, rev. ed. (Boston: Little, Brown, 1980), pp. 619-23; Gary Bryner, "Congress, Courts, and Agencies," *Political Science Quarterly*, 96:411-30 (Fall 1981).

for clean air or product safety. Such wholesale no-fault rule making is faster and more efficient than investigating charges of discrimination against individuals case by case.

The economic impact of compensatory preferences is still debated. Most economic gains by African Americans came during 1964-1975, when nondiscrimination policy destroyed segregation in the South. The slowing of relative black economic progress since 1975 has coincided with increased enforcement in affirmative action. The chief beneficiaries have been the black middle class, which has expanded from some 10 to 30 percent of black families in the generation since 1964.[27]

The "iron triangles" formed by the civil rights coalition have greatly strengthened the political power of previously excluded minorities. The umbrella Leadership Conference on Civil Rights, which represented 20 organizations at its founding in 1949 —and lost most congressional battles during the 1950s—represented more than 150 organizations by 1980 and was rarely denied its policy preferences by Congress.

These regulatory, economic, and political gains, however, have not led to the public acceptance characteristic of such other social programs of the 1960s as Medicare and Medicaid, federal aid to education, food stamps, Head Start, and environmental and consumer protection. On the contrary, affirmative action has evoked growing controversy.

Minority preferences conflict with the historical commitment of liberals to nondiscrimination.[28] During the late 1960s, when black and Hispanic organizations were shifting from the latter policy toward the former, organized labor was attacking the Philadelphia Plan. Feminist groups, moreover, were moving in an opposite direction, away from special protection for women and toward a sex-blind Constitution. Led by highly educated, middle-class white women under the open-competition banner of the Equal Rights Amendment, the feminist movement neither concentrated on nor greatly benefited from affirmative action preferences.[29] Neither did Asian-Americans, whose numbers were swollen by immigration and whose culture stressed traditional notions of competition and merit.

Though affirmative action was introduced as a weapon in the war on poverty, middle-class groups appear to have been its major beneficiaries. This is not surprising. Well-orga-

27. John J. Donohue III and James Heckman, "Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks," *Journal of Economic Literature*, 29:1603-43 (Dec. 1991).

28. Edward G. Carmines and James A. Stimson, *Issue Evolution: Race and the Transformation of American Politics* (Princeton, NJ: Princeton University Press, 1990).

29. Feminist leaders of the 1960s and 1970s routinely supported affirmative action but not gender preferences. The Equal Rights Amendment drive was rooted in nondiscrimination. Affirmative action for feminists, for example, meant aggressive enforcement of Title IX of the education amendments of 1972, where contract compliance required equal opportunity for women in graduate and professional school admissions and in intercollegiate athletics. See Hugh Davis Graham, *Civil Rights and the Presidency* (New York: Oxford University Press, 1992), pp. 232-34.

nized, affluent groups have often benefited more from government programs than poorer groups the programs have sought to serve—by mortgage deductions, farm subsidies, college loans, veterans' hospitals. The tendency of minority preferences to assist the middle classes in college and professional school admissions, civil service appointments, corporate promotions, and government contracts has fueled criticism and embarrassed supporters of affirmative action.[30]

The original rationale for affirmative action stressed its temporary nature. But minority constituencies have followed the standard script for successful interest groups. To protect their programs and benefits, they have entrenched themselves deeply in networks of clientele groups, legislative committees, and program agencies.[31]

In summary, the regulatory, economic, and political consequences of the strange career of affirmative action have strengthened the policy's institutional base while weakening its claims to public legitimacy. The constitutional command that the rights of all citizens be equally protected has been compatible with the expansion of social regulation to protect citizens from harmful water, workshops, highways, and toys. But the equal-results model of social regulation, when applied to civil rights policy, has clashed with the vision of a color-blind Constitution. As a consequence, American society is polarized, with both blocs—the supporters of equal individual opportunity and of equal group results—claiming moral grievance and social injustice.

30. William Julius Wilson, *The Truly Disadvantaged* (Chicago: University of Chicago Press, 1987).

31. Jeremy Rabkin, "Office for Civil Rights," in *The Politics of Regulation*, ed. James Q. Wilson (New York: Basic Books, 1980), pp. 304-53.