4-1986

Affirmative Action: Problems and Perspectives

Clarence M. Pendleton
U.S. Commission on Civil Rights

TROTTER INSTITUTE

Affirmative Action: Problems and Perspectives

by

the Honorable
Clarence M. Pendleton

OCCASIONAL PAPER

WILLIAM MONROE TROTTER INSTITUTE
UNIVERSITY OF MASSACHUSETTS AT BOSTON
BOSTON, MASSACHUSETTS 02125-3393

Occasional Paper No. 18

Affirmative Action: Problems and Perspectives

by

the Honorable
Clarence M. Pendleton

April 1986

Transcription of presentation made on April 10, 1986, as part of the William Monroe Trotter Distinguished Lecture Series on Affirmative Action. Clarence Pendleton is chairman of the U.S. Commission on Civil Rights and president of Pendleton and Associates. He is the former president of the Urban League of San Diego.

Through this series of publications the William Monroe Trotter Institute is making available copies of selected reports and papers from research conducted at the Institute. The analyses and conclusions contained in these articles are those of the authors and do not necessarily represent the opinions or endorsements of the Trotter Institute or the University of Massachusetts.

The Trotter Institute publishes its research through the Occasional Papers Series, the Research Reports Series, the Monographs Series, and the Institute's quarterly publication, the *Trotter Review*. For information on any of these publications or the William Monroe Trotter Institute, please contact us at the address below.

Wornie L. Reed, Director
William Monroe Trotter Institute
University of Massachusetts at Boston
Harbor Campus
Boston, MA 02125

If I sound a little bit incoherent it is because I have only been in California for ten hours in the last three weeks, and that was just to change clothes and change bags and hug my little six-year-old tight and spend some time with my wife. I got back in last Tuesday night from a trip to the East Coast by way of Salt Lake City and got up at 2:00 a.m. to be at a local television show to be able to be on the "CBS Morning News." My options were slim–either go to New York and do it or stay in California and do it. Whichever one you take, you have to get up early in the morning so those of you on the East Coast can see what goes on at 7:00 a.m. live. Getting up for five or seven minutes of television is not the most profitable thing in the world. I got back on a plane yesterday afternoon and got to New York this morning at 2:00. I was up at 7:00 and am here now. So if you will pardon me, I will do the best that I possibly can under the circumstances.

The reason I am tired, as you know, is that tomorrow morning the Civil Rights Commission will consider a staff recommendation with respect to the Minority Set-Aside Program in the federal government–those three programs that are ongoing. There is a lot of attention on that. I just want to say to you that the commission's concerns are not to put people out of business. The commission's concerns for the most part–the majority of the commission's, I think–are that, if there are going to be small business programs, they should be available to all Americans and not be based on ethnicity or gender and that, if there are going to be remedies for discrimination, they should be given to those who are victims of discrimination; and people should understand that there can be beneficiaries and victims on both sides of the ledger. It is a kind of affirmative action program.

The report grew, in part, out of a consultation we had last year in Washington–a two-and-a-half-day consultation–and in part from new research work, census data, and a review of some statistics. The staff came to a kind of a conclusion, if you will, that set the recommendations and findings to come to the commissioners for a vote. Tomorrow should be a very interesting day, notwithstanding the fact that the *Washington Post* is now added to the list of those who have called for my resignation because of my tactics and style; the *Washington Post* did so this morning. I can only repeat to you that I have no intention of resigning over tactics and style. I begrudge no commissioner, no person's tactics and style in this civil rights battle, and would hope they would respect mine.

Let me just ask a question since we are talking about affirmative action here, and it is one that is important to me as I begin to discuss this issue: How many people, especially students, in the room have read Executive Order 11246? Probably

two or three. How many have read the revised orders that go along with Executive Order 11246–that is, Revised Order 4, among some other ones? I asked this question among the law students at several universities including Georgetown University and the University of Texas and was surprised to hear that they wanted to debate the civil rights laws but that no one had read the regulations around which affirmative action has its basis.

Now, you are going to hear a different point of view today from me than you would hear from probably most blacks. I think you are not surprised at that, but people should not confuse my politics and my pigment. I am a conservative Republican who happens to be black, and I happen to believe that there is a role for conservatives in the civil rights debate. I enjoy coming to college campuses because I think that is the place where people have the chance to exchange ideas and disagree without necessarily having to be disagreeable. One does not have to accept one's point of view, but one should be able, as in labor negotiations, to put everything upon the table and at least discuss it. So today I want to put some views upon the table so that you are not confused about what you read about me in the newspaper; so you can get these kinds of things first-hand.

I don't want to spend an awful lot of time on the legislative, judicial, and legal history of affirmative action. That history has been well-documented and often recited and written about, and there is no real need to again regurgitate it here. But certainly there are differing interpretations and analyses over what has been accomplished. The question that everybody is asking today is: Where do we go with affirmative action in the future? The question that I have been raising for three or four years has not had, I think, a full hearing yet; but hopefully it will. My question is: Is preferential treatment for government-designated minorities needed today? And you will notice that I have selected the term "preferential treatment" because that is exactly what affirmative action has been turned into by the actions of legislatures, courts, bureaucrats, civil rights organizations, and other interested parties. That which was originally planned as a way to legislate fairness has come to be a race, gender, and ethnic-origins spoil system.

Affirmative action began with the best of intentions. It attempted to include groups of Americans previously excluded from employment and educational opportunities into the American mainstream. This inclusion was to be without–and I repeat–without regard to race, sex, or national origin. Unfortunately, that whole process went haywire. The shift, if you will, from the prospective concept of equal opportunity to the retrospective concept of parity or statistical correction of

imbalance has occurred in stages. The change began with President Kennedy's Executive Order 10925 in 1961, which stated that federal contractors were to hire and treat employees without regard to certain immutable characteristics. This trend was followed by President Johnson's Executive Order 11246, which was put into effect on September 28, 1965. Things went well until 1968 when President Johnson authorized the Department of Labor's Office of Federal Contract Compliance to issue guidelines containing the terms, goals, timetables, and representation [in regards to affirmative action]. However, it was not clear that the employers were to have specific numbers or percentages of minorities in their work force. This continued until about 1971 when Richard Nixon gave us Revised Order No. 4, which implemented what are known as "results-oriented procedures" to affirmative action. This order was promulgated, I think, on January or February 4, 1971.

Now, over-zealous bureaucrats, supported by judicial decrees, have turned the original purpose of affirmative action into what I would call another original sin. Employers are required to confess deficiencies in utilization of minorities and women whenever the required statistical balance cannot be found in all job categories. And despite Humphrey's pleas during the Senate debate–those 84 days of debate in 1984–this really has happened. You may recall that it was Senator Humphrey who so eloquently assured his colleagues time and time again that group preferences were not to be tolerated. And I quote: "There is nothing in Title VII of this bill," he insisted, "that will give any power to the Equal Employment Opportunity Commission or to any court to require hiring, firing, or promotion of employees to meet a racial quota or to achieve a certain racial balance." That "bug-a-boo" has been brought up dozens of times and it's nonexistent.

Revised Order No. 4 really shifted the burden of proof, as a lawyer would say, from employees who felt as though they were discriminated against to the employer. And affirmative action became a numerical concept called goals or quotas.

It's indeed ironic that one of the principal architects of this results-oriented procedure in Revised Order 4, my good friend, former undersecretary of labor, now appeals court judge in Washington, Larry Silberman, should note the injustice and inequality of the procedures. In an article published in the *Wall Street Journal* in 1977, Judge Silberman said, and I quote: "I now realize that the distinction we saw between goals and timetables on the one hand, and the unconstitutional quota on the other hand, was not valid. Our use of numerical standards has led ineluctably to the very quotas we tried to avoid." Tom Sowell, who has probably written more extensively and more eloquently on this subject than most others, has had much to

say about affirmative action and its legal doctrine. And Tom says this: "Affirmative action goes way beyond assigning causation or blame to a personified society. It attributes intragroup statistical variations found in a particular institution to the actions of that particular institution. In legal theory, this is a breathtaking leap in logic and can only be considered a rebuttable presumption. But in practice, rebutting such a presumption is often either impossible statistically, or prohibitively expensive even if there has been no discrimination whatsoever by the accused employer."

Now certainly there is and always will be discrimination–all of the evidence points to that. I happen to believe that discrimination cannot be prevented; it can only be remedied. We have a simple problem here, one which I think we can all identify. Intellectually and legally, when the real basis for discrimination is replaced by the pseudo-scientific process of race balancing, we have a problem. Now I come to my job at the commission as its chairman with a somewhat different perspective than most of my predecessors, but that difference lies only in my unwillingness to accept, without question, certain remedies relied upon in the past. I remain unconvinced that forced busing is the best means of desegregating America's public school system–a school system that is crying out for educational needs, not transportation needs. Forced busing is not a civil right, but quality education is. And I am unpersuaded that we move far down the road toward the ideal of colorblindness by insisting on race-conscious hiring and firing in the work force simply to show a more perfect balance between black and white employees or majority/minority employees. But daring to raise these questions and undertaking to find other remedial alternatives does not break faith with minorities in this country. It is, after all, blacks who bear the heaviest burden of busing and have the least education to show for it. It happens all too often that when black employees find a quota, that quota is a ceiling and not a floor, and I think it is a shame that 22 years after the passage of the 1964 Civil Rights Act, it is still necessary to count noses to see if discrimination exists.

The equality of opportunity so ardently fought for and won in 1964 by many of today's civil rights leaders has given way to equality of results through such bureaucratic devices as fair share, proportional representation, special preferences, quotas, goals, set-asides, and timetables. Today many blacks believe that the laws were passed just to ensure our equal rights; and, further, many of us believe that we are due special preference from our government to make up for the despicable condition of slavery. And many of us sincerely believe that our government has not yet made up for those past atrocities. Thus, we must be given special preference, making blacks first among government-designated preferential groups.

Many blacks believe that special preference means what I call neo-reparation, or getting our fair share before any other group; and this is where I part company with most of my people. I believe that all that was required and due to blacks was the granting of equal status and equal protection. I further believe that many of the laws that have been passed in the last 31 years may have been necessary–including the Civil Rights Act of 1964–to reassert the constitutional guarantees expressed in the Thirteenth, Fourteenth, and Fifteenth Amendments.

But I see this insistence on group preference as a role reversal; and those who marched and struggled and died for equality now find us wanting separation. And we have been joined by other government-designated minority groups. Eighty-five percent of the American population today is covered by some government designation of protection. The latest group are Euro-ethnics–Russians, Latvians, Lithuanians, Serbians, Croatians, Poles, Turks, Hungarians, Italians, and others. By enforcing the Civil Rights Acts of 1964–or because of the way they enforce it–I think government has perpetuated and worsened the situation with myriad artificial allotments that I have discussed before–artificial allotments the government says are necessary to propel Americans into the mainstream.

Predictably, this race-conscious approach to the allocation of social benefits has too often led to bitterness and disharmony rather than acceptance and harmony. And to quote from Tom Sowell again, he says this: "There is much reason to fear the harm that racial preference is doing to its supposed beneficiaries, and still more reason to fear the long run consequences of polarizing the nation. Resentments do not accumulate indefinitely without consequences." And from a black history perspective, it must be noted that black Americans have always expressed a willingness to seek out objectives within the legal framework of the Constitution and judicial codes. We have never asked for special laws. Affirmative action quotas–or other color-oriented procedures–were never part of the *Brown vs. Board* strategy or the strategy for the Civil Rights Acts of 1964. The basic premise has always been that we are American citizens too and must be treated accordingly, but these attempts to legislate fairness over the last 25 years can only be considered alien to the basic premise and the basic strategy.

Let's go back even further–the black pioneering abolitionists emphatically stated that special laws do not a full citizen make. Special laws based upon color or race make weak and inferior citizens, and special protections were definitely not a part of the objectives of the forefathers of black America or any other ethnic group. A letter written by a black man to Frederick Douglass in 1871 proposing that blacks

receive government appointments based upon their proportion of the population led Douglass to denounce the idea as absurd. He replied: "The mulattoes on a solid census basis ought to have so many offices; for blacks so many; the whites so many; the Germans so many; the Irish so many; and other classes and nationalities should have offices according to their respective numbers. Upon your statistical principles, sir, colored people ought therefore not only hold one-eighth of all the offices in this country, but they should own one-eighth of all the property and pay one-eighth of all the taxes. Equal in numbers, they should of course be equal in everything else. They should constitute one-eighth of the poets, statesmen, scholars, authors, and philosophers of the country."

Now, I think we must stop thinking about things that have happened and think about things that can happen. Affirmative action is not about remedying discrimination; it is about statistically measured race and gender balancing, a kind of minority/majority blending technique in employment and education. Affirmative action is not about equal opportunity; it is about statistically measured equal results. In my opinion, affirmative action means quotas; or, it means absolutely nothing when quotas offend every principle of individual liberty, individual accountability, and fair play. I believe it is a bankrupt public policy, a zero-sum game that has done its supposed beneficiaries more harm than good. And I think Congress and the courts must take the constitutional highground and reject any notion that discrimination can be eliminated or minimized by race balancing in the form of proportional representation. Nor should Congress continue to condone equality of results in the form of preferential treatment, again, such as quotas, timetables, goals, and set-asides. The main objective of the federal, state, and local governments must be to provide equal opportunity based upon individual merit.

Hopefully, this session of the Supreme Court will decide the issue of numerical hiring and promotion goals for minorities and women. They, perhaps, will decide the constitutionality of these remedies. There are three cases now pending before the Supreme Court. One is the *Wygant v. Jackson Board of Education* case. It involves an involuntary affirmative action plan adopted by the Jackson, Michigan, school board. The case, which has been brought before the Court and argued before the Court, was brought by a white teacher who charged that her constitutional guarantee of equal protection under the law had been violated by a collective bargaining agreement limiting lay-offs of minority group teachers. No court has found the school district guilty of discrimination. The second case is *Local 93, International Association of Fire-Fighters v. The City of Cleveland.* This case involves a promotion

plan for minority group fire-fighters that is a part of a consent decree charging that the fire department practiced, if you will, racial bias. However, there was no finding of racial bias against any of the individuals in the case. The final case is *Local 28, Sheet Metal Workers v. Equal Employment Opportunity Commission*. This case involves a court order for an affirmative action plan that includes numerical goals. The plan was imposed after the union was found by the lower courts to have engaged in racially discriminatory membership–not hiring–but membership practices.

With these three decisions, it is my belief that the Court can put an end to the long journey that we have let our liberal, well-intentioned politicians take us on. I think also President Reagan has an excellent chance to help shorten that journey by amending and reissuing Executive Order 11246 so that goals and timetables are not mandatory and do not trigger a finding of discrimination. If I had my way, we would wipe out that order altogether and rely instead on Title IV and Title VII of the Civil Rights Acts of 1964.

Now, I know many civil rights activists claim that gains made by designated minorities will be rolled back. I think that's nonsense. I think that we will know when people have made it on their own; and the selection of employees and students and faculty persons will be based upon merit and standards and there will be no questions raised about whether a person made it on their own or not. Progress will no longer be demeaned by a real or imagined dependency upon preferential treatment. No quota will make any one of us successful, and no program of quotas will make the last of us or prevent the last of us from failing. Each of us must demand again that we learn to make risk-taking the engine that propels us to success. We have the moral responsibility to remove the barriers that prevent people from having equal access to equal opportunity.

Many people ask: With what will you replace affirmative action? I can only say to you that we replace it with absolutely nothing–because I think it's unnecessary. There is a recent study put out by the Rand Institute–by researchers James Welch and Jim Smith–that I would suggest many of you might want to take a look at. The study very clearly points out, using data from the period 1940 to 1980, that primary credit for improving the economic condition of blacks must go to better education. This means that not only must much more be done to improve the quality of education, but that individual black parents and students must also grasp educational opportunities with vigor and seriousness. Our high dropout rate and our high pushout rate must be reduced. The report goes on to say that most of the improvement in education for blacks occurred before 1960–before the Civil Rights

Movement and before massive integration efforts. When you go back to 1850, 50,000 free persons of color in this country were not subject to compulsory attendance laws for schools. They were not even permitted to attend school, and they were expressly forbidden from conducting any kind of education process under penalty of law. Yet more than one-half of the black population in 1850 were literate. Underground schools were in full flourish. The 1850 census found that 90 percent of all the free blacks in Savannah were literate even though not a single black child was officially enrolled in school. And even in my hometown, in Washington, D.C., a black man was publicly whipped for operating an unauthorized school. On affirmative action, the report concludes that the wage gap between black and white male college and high school graduates narrowed more rapidly in the 20 years before 1960 than during the 20 years after. This progress occurred long before the beginning of affirmative action or any kind of program to eliminate discrimination. The data shows that affirmative action has helped give blacks access to positions with businesses whose hiring is covered by civil rights regulations. But the net long-term effect has been a radical reshuffling of black jobs and labor forces as blacks have left businesses whose hiring was not federally regulated. The report concludes that affirmative action apparently had no significant long-term impact–either positive or negative–on the male racial wage gap. In fact, wage gains by blacks evaporated in 1972 when firms reached their affirmative action targets.

One must ask this question from the *Wygant* brief: Would Hank Aaron be considered the all-time home run king in baseball today if each time he want to bat the grounds-keepers were required to move the fence in ten feet?

I want to close now and take some questions from you. And I must say to you: Do not be timid with your questions, because I am not in the habit of being timid with my answers. I think that is the best way to get to the dialogue in a hurry.

I want to close with the words of Alain Leroy Locke, a hero of mine, and one of the first black Rhodes scholars in this country. Locke was a philosophy professor at Howard University from whom I had a chance to take a class, and I also had the privilege of being on the faculty with him. These words were written in 1925: "The intelligent Negro of today is resolved not to make discrimination an extension for his shortcomings and performance, individual or collective. He is trying to hold himself at par, neither inflated by sentimental allowances nor depreciated by current social discounts. For this he must know himself." Thank you.