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### **Author**

Kamp, Allen R.

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# ANTI-PREFERENCE IN EMPLOYMENT LAW: A PRELIMINARY ANALYSIS

ALLEN R. KAMP†

## I. INTRODUCTION

There recently have been proposals to ban preferences for an individual group based on factors such as race, sex, or color.<sup>1</sup> They would add a ban on preferences based on these categories to the already existing ban on discrimination. Characterized as being anti-affirmative action, these proposals have been debated in terms of their constitutionality and desirability. There has been no discussion, however, as to mundane legal questions such as who has standing and how to prove a case under anti-preference legislation.

This Article will analyze these proposals and basic legal questions. Making the assumption that the courts will use the present models of disparate treatment and disparate impact as they do now under anti-discrimination law, this Article will discuss ways to prove that an illegal preference has taken place. This Article finds that such statutes could radically change present law on employment and educational selection in unforeseen ways. Many now-current practices as diverse as favoring one's lover, hiring co-ethnics for a small ethnic firm, and admitting legacies into college could be illegal. It concludes that the proposals make an unstated and erroneous assumption that anti-preference rules are anti-affirmative action practices, which they often are not, and that anti-preference and anti-affirmative action equals a merit selection system, which it does not.

## II. THE PROPOSALS

The two main anti-affirmative action proposals have been the California Civil Rights Initiative (CCRI) and a federal bill proposed by Senator Bob Dole.

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† Professor of Law John Marshall Law School. J.D. University of Chicago, 1969; M.A. University of California at Irvine, 1967; A.B. University of California at Berkeley, 1964. I would like to thank Professor Yvette Barkdale for her assistance.

1. California Civil Rights Initiative (Proposition 209) passed. Carla Hall, *UCLA Students Feel the Tensions of Prop. 209*, L.A. TIMES, Nov. 10, 1996, at A1.

No one, however, has focused on the language of the referendum or the Dole Bill. In fact, it is very difficult to obtain the actual language of the CCRI. News stories just call it the "anti-affirmative action measure" without including its text. My research assistant had to make five phone calls to California's State Assembly to get a copy of the Referendum.<sup>2</sup> It is as follows:

§31. (a) Neither the State of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education, or public contracting.

(b) This section shall apply only to state action taken after the effective date of this section.

(c) Allowable remedies for violation of this section shall include normal and customary attorney's fees.

(d) Nothing in this section shall be interpreted as prohibiting classifications based on sex which are reasonably necessary to the normal operation of the State's system of public employment or public education.

(e) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(f) Nothing in this section shall be interpreted as prohibiting state action which is necessary to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.

(g) If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Senator Dole's Bill provides:

Notwithstanding any other provision of law, neither the Federal Government nor any officer, employee, or department or agency of the Federal Government

(1) may intentionally discriminate against, or may grant a preference to, any individual or group based in whole or in part on race, color, national origin, or sex, in connection with

(A) a Federal contract or subcontract;

(B) Federal employment; or

(C) any other federally conducted program or activity;

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2. California Civil Rights Initiative, Assembly Constitutional Amendment No. 2, 1995-96 Reg. Sess. (1994).

(2) may require or encourage any Federal contractor or subcontractor to intentionally discriminate against, or grant a preference to, any individual group based in whole or in part on race, color, national origin, or sex; or

(3) may enter into a consent decree that requires, authorizes, or permits any activity prohibited by paragraph (1) or (2).

“Grant a preference” is defined as “use of any preferential treatment and includes but is not limited to any use of a quota, set-aside, numerical goal, timetable, or other numerical objective.”<sup>3</sup>

The Dole Bill, however, does provide that the ban on preference will not prohibit recruiting to expand an applicant pool, nor does it extend to historically black colleges and universities.<sup>4</sup>

Inspired by CCRI, legislators have introduced similar state bills in California (as legislation), Delaware, Illinois, Kentucky, Michigan, Missouri, New York, Pennsylvania, South Carolina, and Texas.<sup>5</sup> The various bills mostly follow the language of the California model. The interesting variations include the California legislation’s personal liability on educational employee “for an injury caused by the failure of the officer or employee to enforce this chapter.”<sup>6</sup> The Kentucky and Michigan versions add religion to the prohibited categories; Michigan also adds “age, sex, height, weight, familial status, or marital status.”<sup>7</sup> Would this outlaw married student housing? Washington includes “status as a sexual minority.”<sup>8</sup> Evidently, it would be legal to prefer someone who belonged to a “sexual majority.” The Texas bill would ban preferences only after reparations have been awarded to “African Americans, Native Americans, Hispanic Americans, and women.”<sup>9</sup> Only the Washington proposal would mandate a merit system.<sup>10</sup>

3. S. 1085, 104th Cong., 1st Sess. § 8(2) (1995).

4. *Id.* at §§ 3-4.

5. Cal. A.B. 833, Reg. Sess. (1995-96); Del. H.B. 114, 138th Gen. Assembly, Reg. Sess. (1995-96); Ill. S.B. 1184, 89th Gen. Assembly, Reg. Sess. (1995-96); Ky. S.B. 275, Reg. Sess. (1996); Mich. H.B. 4972, 88th Leg., Reg. Sess. (1995); Mo. S.B. 873, 88th Gen. Assembly, Reg. Sess. (1996); N.Y. A.B. 6466, 219th Gen. Assembly, Reg. Sess. (1995); Penn. H.B. 360, 179th Gen. Assembly, Reg. Sess. (1995-96); S.C. H.B. 3812, S.C. (1995); Tex. H.J.R. 117, 74th Leg. (1995).

6. See Cal. A.B. 833, *supra* note 5, § 66132.

7. See Mich. H.B. 4972, *supra* note 5, §§ 102(1), 202(1)(a).

8. See Wash. H.B. 2244, 54th Reg. Sess. § 101(1) (1995-96).

9. See Tex. H.J.R. 117, *supra* note 5, § 3b.

10. See Wash. H.B. 2244, *supra* note 8, § 203. The department of personnel shall develop merit systems of employment for state agencies under the provisions of Section 201 of this act, that include altering a civil service system of employment to include such provisions and establishing new merit systems of employment for state agency employees who are not employed under a civil service system of employment. The department of personnel shall provide guidance to units of local gov-

### III. ANTI-PREFERENCE VERUS ANTI-DISCRIMINATION

Reading the texts of the California and Federal proposals shows that they do not ban affirmative action per se, rather, they ban preferences based on the suspect categories. What CCRI would do is to ban preferential treatment, which is not now illegal per se. On a constitutional level, the Supreme Court's latest case on affirmative action, *Adarand Constructors, Inc. v. Peña*,<sup>11</sup> only ruled that federal racial classification that favors a racial group "must serve a compelling governmental interest, and must be narrowly tailored to further that interest."<sup>12</sup> Such strict scrutiny does not always invalidate racial classifications:

Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' . . . The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.<sup>13</sup>

What is illegal now is discrimination against someone, not preferring someone.<sup>14</sup> The proposals would give a different and new cause of action; plaintiffs would be able to sue, not only because

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ernment in developing merit systems of employment described under Section 201 of this act.

11. 115 U.S. 2097 (1995).

12. *Id.* at 2117.

13. *Id.*

Justice Scalia, however, would apply an even more rigorous standard. He writes in concurrence:

I join the opinion of the Court, except Part III-C, and except insofar as it may be inconsistent with the following: In my view, government can never have a compelling interest: in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520, (1989) (Scalia, J. concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, see Amdt. 14, §1 ("[N]or shall any State . . . deny to *any person*" the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, see Amdt. 15, §1 (prohibiting abridgment of the right to vote "on account of race") or based on blood, see Art. III, §3 ("[N]o Attainder of Treason shall work Corruption of Blood"); Art. I, §9 ("No Title of Nobility shall be granted by the United States"). To pursue the concept of racial entitlement - even for the most, admirable and benign of purposes - is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand. *Id.* at 2118-2119.

14. See, e.g., § 703(a) of Title VII reads: It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

they suffered discrimination, but also because someone else was preferred.

The proposals reject any distinction between classifications burdening groups and those benefiting such groups. This distinction, however, has always been part of our law. The Fourteenth Amendment, for example, prohibits a deprivation of life, liberty, or property without due process or denial of equal protection—not granting someone else a benefit. *Regents of Univ. of California v. Bakke*, for example, distinguishes between discriminating against a racial group and granting a group a benefit.<sup>15</sup> In equating discrimination and preference, the proposals adopt the position of Justice Thomas in his *Adarand* concurrence who sees preference and discrimination as morally and constitutionally equivalent:

I agree with the majority's conclusion that strict scrutiny applies to *all* government classifications based on race. I write separately, however, to express my disagreement with the premise underlying Justice STEVENS' and Justice GINSBURG's dissents: that there is a racial paternalism exception to the principle of equal protection. I believe that there is a "moral [and] constitutional equivalence," between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.<sup>16</sup>

One example illustrates the difference in treatment between preference and discrimination under present law. Today, some law suits arise out of the "paramour" situation in the employment discrimination field. The boss favors his lover with promotions and raises and the other employees sue. However, these plaintiffs rarely win under Title VII because most courts hold that Title VII does not prohibit sexual favoritism, just sexual discrimination. Michael J. Phillips, in *The Dubious Title VII Cause of Action for Sexual Favoritism*,<sup>17</sup> explains the courts' reasoning:

In *De Cintio*, seven male respiratory therapists complained that they had been unfairly disqualified from promotion to a higher position so that the administrator making the promotion could elevate a woman with whom he was having a consensual romantic relationship. In rejecting their Title VII claim, the court began by noting that Title VII forbids discrim-

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conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Note that neither the California proposal nor the Dole bill bans preferences based on religion. *Supra* notes 2-3.

15. 438 U.S. 265, (1978); see *Adarand*, 115 U.S. at 2108-14.

16. *Adarand*, 115 U.S. at 2119 (Thomas, J., concurring).

17. 51 WASH. & LEE L.REV. 547 (1994).

ination based on gender, but not discrimination based on sexual activity irrespective of gender. In all the cases in which Title VII sex discrimination liability has been found, it continued, 'there existed a causal connection between the gender of the individual or class [claiming relief] and the resultant preference or disparity.' Here, however, the plaintiffs 'were not prejudiced because of their status as males; rather, they were discriminated against because [the administrator] preferred his paramour. [The plaintiffs] faced exactly the same predicament as that faced by any woman applicant for the promotion.

[A]lmost all courts considering the sexual favoritism issue have followed *De Cintio* by rejecting the idea that Title VII forbids sexual favoritism as such.<sup>18</sup>

In situations involving two groups, where discrimination against one is necessarily preference for another, the result would be the same whether the cause of action is for discrimination or preference. Discrimination against one group automatically becomes a preference in another. In *E.E.O.C. v. Consolidated Service Systems*,<sup>19</sup> for example, the E.E.O.C. brought an action against a company which hired Koreans 81% of the time, where the available work force was at most 3% Korean.<sup>20</sup> There, where Korean hires were compared to all non-Korean hires, a hire of one Korean would mean one less non-Korean hired.<sup>21</sup>

In other cases, focusing on preference for one group of employees may give a result different from that obtained by focusing on discrimination against a group. In *Allen v. City of Chicago*,<sup>22</sup> laid-off employees claimed that a city reorganization had laid-off African Americans, Latinos, those over 40, and opponents of Mayor Daley in disproportionate percentages. The court denied class action status, stating "plaintiffs have not set forth facts alleging that they have suffered as a result of a single employment policy practice of general application."<sup>23</sup> The plaintiffs were then faced with the difficult prospect of proving up individual cases of discrimination. However, viewed in the light of preference, the plaintiffs' case is that non-Latino whites, who are under forty and who support Mayor Daley, are being favored. If this were illegal, there can be a plaintiff class of all non-favored employees and the case becomes much easier to prove.<sup>24</sup>

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18. *Id.* at 559.

19. 989 F.2d 233 (7th Cir. 1993).

20. *Id.* at 235.

21. *Id.*

22. 828 F.Supp. 543 (N.D. Ill. 1993).

23. *Id.* at 553.

24. *See generally id.*

## IV. BRINGING AN ACTION FOR PREFERENCE

A. *Who Has Standing to Sue?*

Both proposals provide for private rights of action. Unlike an action for discrimination, I assume that those directly affected by the prohibited acts could not sue as they are the ones preferred. My conclusion, however, assumes that Justice Thomas' views are not adopted. If they were, members of minority groups harmed by paternalistic government programs in being victims of attitudes of superiority or of resentment, or who have developed dependencies or attitudes of entitlement, perhaps would have standing to sue. To him, programs that benefit one race constitute pernicious paternalism:

But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.<sup>25</sup>

I, however, assume those arguably harmed, that is, those not preferred by the preferential action, have a cause of action. How much harm caused by the preferences need be shown? Various cases have discussed whether the burden on those harmed by affirmative action programs is necessary or sufficient to invalidate those programs. In general, the cases differentiate between situations where the burdens felt are general and spread out over a large population as opposed to those where the burdens fall on particular individuals or unsettle "legitimate expectations." A Justice Department Memorandum on *Adarand* summarizes the cases:

In some situations, however, the burden imposed by an affirmative action program may be too high. As a general principle, a racial or ethnic classification crosses that threshold when it 'unsettle[s] . . . legitimate firmly rooted expectation[s],' or imposes the 'entire burden . . . on particular individuals.' Applying that principle in an employment case where seniority difference between minority and nonminority employees were involved, a plurality of the Court in *Wygant* stated that race-based layoffs may impose a more substantial burden than

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25. *Adarand*, 115 U.S. at 2119 (Thomas, J., concurring).



race-based hiring and promotion goals because "denial of a future employment opportunity is not as intrusive as loss of an existing job." In a subsequent case, however, Justice Powell warned that "it is too simplistic to conclude that hiring [or other employment] goals withstand constitutional muster whereas layoffs do not . . . The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on innocent nonminorities, not the label applied to the particular employment plan at issue."

In the contracting area, a racial or ethnic classification would upset settled expectations if it impaired an existing contract that had been awarded to a person who is not included in the classification. This apparently occurs rarely, if at all, in the federal government. A more salient inquiry therefore focuses on the scale of the exclusionary effect of a contracting program . . . . Similarly, an affirmative action program that effectively shut nonminority firms out of certain markets or particular industries might establish an impermissible burden.<sup>26</sup>

The question then becomes: How definite a harm must be experienced before one can sue on the basis of preference? For example, let us take a pool of one hundred employees composed of ten equally divided ethnic groups. Ten are promoted to middle management of which eight of those promoted are Wisians. I assume that now all non-Wisians have a cause of action for non-promotions due to illegal preference. My conclusion, of course, is debatable. Would a plaintiff have to show that he or she definitely would have been promoted if the Wisians were not?<sup>27</sup> Was that finding necessary?

## B. *Procedural Issues*

### 1. *Exhaustion of Administrative Remedies*

At present, a plaintiff seeking to sue under Title VII, the Americans with Disabilities Act,<sup>28</sup> or the Age Discrimination Employment Act,<sup>29</sup> must exhaust complicated state and federal pre-suit administrative requirements. A party must first file a charge with the E.E.O.C. or with a state fair employment practice agency.<sup>30</sup> Suits against the Federal government differ from those against private employees, but a complicated procedure

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26. Walter Dellinger, *Memorandum to General Counsels*, Daily Labor Report, June 28, 1995, at E-1, E-9 (citation omitted).

27. *Adarand*, 115 U.S. at 2102.

28. 42 U.S.C. § 12101, *et. seq.* (1990).

29. 29 U.S.C. § 621, *et. seq.* (1967).

30. 42 U.S.C. §§ 706-07 (1991).

must be followed.<sup>31</sup> States frequently have established administrative procedures to adjudicate claims of discrimination.<sup>32</sup>

Both the California and Dole Bill proposals provide for lawsuits that are not subject to the administrative filing requirements. Thus, they act as mechanisms for circumventing these procedures. A plaintiff who wishes to bypass the present procedures could just recast his or her action from "discrimination" into "preference" and obviate any necessity of administrative filing or consideration.

## 2. *Jury Trial*

Another procedural issue is the right to a jury trial. The Dole Bill attempts to limit federal preference actions to equitable relief only, thus depriving the plaintiff of a jury. The Supreme Court, however, has never decided whether or not a claim for back pay under Title VII gives a party the Seventh Amendment right to a trial by jury. The question was made moot by the Civil Rights Act of 1991, which provided for compensatory damages.<sup>33</sup> The Dole Bill would again raise this issue.

## 3. *Class Actions*

Under current class action doctrine in equal employment law, members of a class have to suffer the same injury. The Supreme Court has stated:

If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision making processes. In this regard it is noteworthy that Title VII prohibits discriminatory employment practices, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.<sup>34</sup>

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31. *E.g.*, under Title VII, a federal employee must file with his or her agency's E.E.O.C. counselors. 29 C.F.R. § 1612 (1995).

32. *E.g.*, *University of Tennessee v. Elliot*, 478 U.S. 788 (1986).

33. 42 U.S.C. § 1977(A) (1991).

34. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982).

If the standard is "discrimination," then each group has to prove a discriminatory practice directed at it; if it is "preference," everyone not in the preferred group can join together to attack the practices that produced the preference.

### C. *Proving a Case for Preference in Hiring*

I assume here that the law of proof of preference actions will parallel that of discrimination and that the cases will divide into two groups, those involving disparate treatment and those involving disparate impact. Of course, future cases may not follow the models used in anti-discrimination statutes, but I am making a working assumption that they will.

The difference between "treatment" and "impact" is explained in *Int. Brotherhood of Teamsters v. U.S.*:<sup>35</sup>

'Disparate treatment' such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. Either theory may, of course, be applied to a particular set of facts.<sup>36</sup>

#### 1. *Disparate Treatment*

##### (a) *Admissions of Preferences*

Employers may just state that they prefer a certain group, in the same way that they now can make explicitly discriminatory remarks. In *Price Warehouse v. Hopkins*<sup>37</sup> for example, partners of an accounting firm had evaluated the plaintiff, a woman, in terms of sexual stereotypes. One told her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>38</sup> The Court ruled that "[t]he plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing,

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35. 431 U.S. 324 (1977).

36. *Id.* at 335 n.15 (citation omitted).

37. 490 U.S. 228 (1989).

38. *Id.* at 235.

stereotypical remarks can certainly be evidence that gender played a part.”<sup>39</sup>

Under the current law, explicit statements of preference may not necessarily constitute discrimination. In *Consolidated*, Judge Posner even stated that there was a preference for Koreans, but that it did not constitute illegal discrimination:

No inference of intentional discrimination can be drawn from the pattern we have described, even if the employer would prefer to employ people drawn predominantly or even entirely from his own ethnic or, here, national-origin community. Discrimination is not preference or aversion; it is acting on the preference or aversion. If the most efficient method of hiring, adopted because it is the most efficient (not defended because it is efficient—the statute does not allow an employer to justify intentional discrimination by reference to efficiency, just happens to produce a work force whose racial or religious or ethnic or national-origin or gender composition pleases the employer, this is not intentional discrimination. The motive is not a discriminatory one.<sup>40</sup>

Judge Posner concludes with a lyrical description of the small ethnic firm. It is at least arguable that such firms would be guilty of “preferential” hiring under the language of the California and federal proposals:

In a nation of immigrants, this must be reckoned an ominous case despite its outcome. The United States has many recent immigrants, and today as historically they tend to cluster in their own communities, united by ties of language, culture, and background. Often they form small businesses composed largely of relatives, friends, and other members of their community, and they obtain new employees by word of mouth. These small businesses — grocery stores, furniture stores, clothing stores, cleaning services, restaurants, gas stations— have been for many immigrant groups, and continue to be, the first rung on the ladder of American success. Derided as clan-nish, resented for their ambition and hard work, hated or despised for their otherness, recent immigrants are frequent targets of discrimination, some of it violent. It would be a bitter irony if the federal agency dedicated to enforcing the anti-discrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring. There is equal danger to small black-run businesses in our central cities. Must such businesses undertake in the name of nondiscrimination costly measures to recruit nonblack employees?<sup>41</sup>

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39. *Id.* at 251.

40. *Consolidated*, 989 F.2d at 236.

41. *Id.* at 237-38.

What would have happened if the E.E.O.C. had put Mr. Hwang, the owner of Consolidated Service Systems, on the stand and asked him the following: if he liked Koreans; if he thought they were hard-working; if he thought they made good employees; and whether he was more comfortable with a four-fifths Korean work force? Under an anti-preference regime, a "yes" answer may win the case. Compare *E.E.O.C. v. O & G Spring and Wire Forms Specialty Company*,<sup>42</sup> in which the district judge found discrimination in a case involving an ethnic (Polish) employer. Reaching the opposite conclusion from *Chicago Miniature and Consolidated*, the district court judge found that the word-of-mouth recruitment practice had a disparate impact on African Americans. With a "preference" based statute, many more cases would come out the same way as *O & G*.

(b) *Statistical Proof*

In employment discrimination cases, a plaintiff can use statistics to prove disparate treatment. In *Int. Brotherhood of Teamsters*, for example, the plaintiff proved its case by showing that the defendant had employed few African Americans and Hispanics, even though the company's terminals were located in areas of substantial African American populations.<sup>43</sup> Under a preference-based equal employment law, statistical evidence could be a powerful tool in the hands of a plaintiff. Common experience tells us that certain jobs contain disproportionate percentages of one race, religion, sex, ethnic group, or nationality. In the words of Justice O'Connor, "it is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination."<sup>44</sup>

During my twenties, I worked on construction crews that consisted primarily of African Americans, Chicanos, and Appalachian Whites; more of my fellow law professors are Jewish than statistics would predict. Such disproportions in employment may be due to both legitimate and illegitimate causes. The disparity may be based on such legitimate factors as a group's cultural preference for certain types of jobs (e.g., my Scandinavian relations' preference for craft work). On the other hand, people prefer, often unconsciously, to promote people who are similar to

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42. 38 F.3d 872 (7th Cir. 1994).

43. *Int. Brotherhood of Teamsters*, 38 F.3d at 336-41. See, e.g., *O & G*, 431 U.S. at 876.

44. *Local 28 of the Sheet Metal Worker's International Association v. E.E.O.C.*, 478 U.S. 421, 494 (1986).

themselves.<sup>45</sup> Racial, gender, religious, and ethnic stereotypes thus can cause one group to be discriminated against or to be preferred over another.

In any case, plaintiffs under a preference regime could sue and use any group's disproportionate rate of success as part of its case. Frequently, it is white males who are more successful than others. In universities "[w]hite men continue to be the only beneficiaries of 'affirmative action,' the only group who are hired at rates significantly higher than their proportion in the available pool of qualified candidates."<sup>46</sup> The preference initiatives could be used to attack the success of that group.

In one situation of statistical proof, the substitution of a preference model would make the plaintiff's case much easier to prove. An employer may not discriminate against any one group but obviously prefer a single group. Imagine an employee pool that is eligible for promotion, made up of Roman Catholics, Baptists, Methodists, Episcopalians, African Americans, Whites, Hispanics, and Asians, of various ethnicities and national origins, including Northern, Southern and Eastern Europeans, who are male and female, and of all ages between thirty and fifty. An employer could promote in such a way as to pick a few percentage points less than chance would indicate from the non-preferred groups.

A member of such a group, say a Roman Catholic of Italian origin who is a fifty-year old male, may have an impossible time of proving discrimination. There may well be no overt evidence of discrimination (e.g., no ethnic slurs) and courts generally require a gross statistical disparity to prove discrimination. Generally, courts require a showing that the plaintiff's group is at least two standard deviations away from that produced by chance.<sup>47</sup>

If the focus is on preference, however, the plaintiff's case may be transformed from a loser to a winner. Let us say that although no group is discriminated against, it turns out that out of ten white male Episcopalians or Presbyterians of Northern European descent, eight were promoted, where chance would yield one. The nation's top CEOs are disproportionately Presbyterian and Episcopalian. One study showed that where the two denominations make up two percent of the population, a combined percentage of thirty three percent of CEOs are Presbyte-

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45. See Tracy Baron, *Keeping Women out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny To Upper-Level Jobs*, 143 U. PA. L. REV. 267, 271 (1994).

46. Martha West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L.Q. 67, 70 (1994).

47. *Id.* at 149. The requirement derives from *Hazelwood School District v. U.S.* 433 U.S. 299 (1978).

rian or Episcopalian. Although it is hard to prove a case of discrimination in CEO employment against any particular group, it is easy to prove preference; *e.g.*, Presbyterian and Episcopalian white males of Northern European ancestry are promoted at a statistically significant level.<sup>48</sup> Now the employer has to explain this preference. Furthermore, the Italian Roman Catholic male can be joined by all the other non-preferred groups in a class action to attack the preference.

(c) *Circumstantial Evidence*

A plaintiff can also prove discrimination by circumstantial evidence. *McDonnell Douglas Corp. v. Green*<sup>49</sup> laid down the sequence of proof:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>50</sup>

The plaintiff then must "be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact a pretext."<sup>51</sup> The fact-finder can consider such facts and circumstances as:

petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.<sup>52</sup>

In a preference action, the focus would be on the person preferred. Translating *Green*, in terms of anti-preference law, may lead to something like the following as constituting plaintiff's prima facie case:

(i) the preferred person (*e.g.*, the person who was promoted over plaintiff) belongs to a preferred group;

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48. DAVID L. KURTZ ET AL., *CEO: WHO GETS TO THE TOP IN AMERICA* 81, 83 (1989).

49. 411 U.S. 792 (1973).

50. *Id.* at 802.

51. *Id.* at 804.

52. *Id.* at 804-05.

(ii) that plaintiff and the person who was promoted were both qualified; and

(iii) that despite the equal qualifications, the preferred person was promoted.

Circumstantial evidence could include the employer's past treatment of the preferred person and the employer's general policy and practice with respect to the preferred group. Furthermore, statistics could be used to establish a general pattern of preference.

## 2. *Disparate Impact*

Another way of proving an equal employment opportunity case is through the "disparate impact" model, in which an employer's practice, neutral on its face, has a disparate impact on a particular group. Requiring a high school diploma, for example, may have a disparate impact against African Americans and thus be an act of illegal discrimination.<sup>53</sup> The employer then has the burden of proof "that the challenged practice is job related for the position in question and consistent with business necessity."<sup>54</sup>

Do the anti-preference proposals adopt a disparate impact theory? The Supreme Court has avoided ruling on disparate impact in the field of affirmative action. *Adarand* explicitly did not decide anything relating to disparate impact.<sup>55</sup> Further, Justice Scalia has stated that a preference for small businesses would be constitutional even if it would have a racially disproportionate impact.<sup>56</sup> If one did not use a disparate impact model, however, one could easily circumvent the intent of the anti-preference proposals. The University of California, for example, could just prefer certain geographical locations such as East Los Angeles.

Admissions made by employers could lead to proving a prohibited preference due to disparate impact. In *O&G's* dissent, for example, Judge Manion argues that the lack of an English fluency requirement may well have explained the death of African American employees because they would have been uncomfortable in an environment where Polish and Spanish were spoken.<sup>57</sup> But why allow employees to speak Polish on the job? The plaintiff could use the non-requirement of English as evidence of a preference towards Polish and Latino workers. The opposite, requiring fluency in standard English, may also be used to prove a preference. Such a provision could have the disparate

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53. See, e.g. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

54. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1991).

55. *Adarand*, 115 U.S. at 2105.

56. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring).

57. *O&G*, 38 F.3d at 888 (Manion, J., dissenting).



impact of preferring white, native-born English speakers. This puts the employer in a bind, as pointed out by Justice Blackmun in his Concurring opinion upholding affirmative action in *United Steelworkers of America, AFL-CIO-CLC v. Weber*,<sup>58</sup> where he states that banning affirmative action would put the employer on a "tightrope." The employer could not discriminate, but it would also have "to eschew all forms of voluntary affirmative action. Even a whisper of emphasis on minority recruiting would be forbidden."<sup>59</sup> Putting together a ban on preferential hiring with disparate impact theory would indeed put employers on such a tightrope.

Statistics could be used to prove a disparate impact; *Wards Cove Packing Co., Inc. v. Atonio*<sup>60</sup> sets out a statistical disparate-impact case:

[P]roper comparison [is] between the racial composition of [the jobs at-issue] and the racial composition of the qualified . . . population in the relevant labor market.' It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms the proper basis for the initial inquiry in a disparate-impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics—such as measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs—are equally probative for this purpose.<sup>61</sup>

Putting the concepts of disparate impact theory, statistics, and preference together might make illegal many common practices. Take that of preferring "legacies" in college admissions. Prestigious colleges frequently give preferential admissions to children of alumni.<sup>62</sup> The policies were developed in reaction to Jewish applicants; and resulted in preferences for the white and affluent.<sup>63</sup> Would such practices now be banned as preferring certain races and ethnic groups?

58. 443 U.S. 193 (1979).

59. *Id.* at 210-11.

60. 490 U.S. 642 (1989).

61. *Id.* at 650-51 (citation omitted).

62. West, *supra* note 46, at 142., n.302.

"For more than forty years, 20% of Harvard students have been admitted as 'legacies,' children of Harvard alumni."

Professor West cites John Larew's findings: "[a]ccording to Larew, at Yale University, alumni's children are two and a half times more likely to be admitted. In 1991, Dartmouth admitted 57% of its legacies and 27% of other applicants. In 1990, University of Pennsylvania admitted 66% of applicants who had an alumni parent. Stanford's rate of admissions for legacies is twice the rate for the 'general population' of applicants."*Id.* at 178 n.303 (citation omitted).

63. *Id.* at 142 n.302.

## V. PREFERENCES, AFFIRMATIVE ACTION, AND MERIT

Banning preferences has been equated with ending affirmative action. The American Bar Association Journal, for example, under the heading "*Affirmative Action: Have Race - And Gender - Conscious Remedies Outlived Their Usefulness?*" states: "Next year, California voters may be considering an initiative that would bar preferential treatment on the basis of race or sex in public education, government employment and the awarding of public contracts."<sup>64</sup> Another ABA article terms the referendum as "an initiative to eliminate affirmative action in California."<sup>65</sup>

However, the California and federal proposals actually do not affect many affirmative action practices. For example, take the practice of broadening the applicant pool. Is a law school that contacts its African American and Asian alumni for names of qualified applicants indulging a preference or is it just broadening its applicant pool? The Justice Department's statement on *Adarand* concludes that *Adarand* does not apply to such "outreach" programs:

Mere outreach and recruitment efforts, however, typically should not be subject to the *Adarand* standards. Indeed, post-*Croson* cases indicate that such efforts are considered race-neutral means of increasing minority opportunity. In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision. If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, *Adarand* ordinarily would be inapplicable.<sup>66</sup>

Affirmative action can also be viewed as a correction for prior discrimination. In *United Steelworkers*, the Court approved an affirmative action plan where it was adopted "to break down old patterns of racial segregation and hierarchy."<sup>67</sup> *United States v. Paradise* approved a decree that ordered that at least fifty percent of the state troopers promoted be African American. The decree was justified on the ground that "[t]he Government un-

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64. Lino A. Graglia, *Affirmative Action: Have race - and gender - conscious remedies outlived their usefulness?*, 81 A.B.A. J. 40 (May 1995).

65. Arleen Jacibus, *Affirmative Action on Way Out in Calif.*, 81 A.B.A.J. 22 (Sept. 1995).

Ellen Ladowsky, writing in the *Wall Street Journal*, also describes the initiative: "In California, where voters will be asked to cast a ballot on an anti-affirmative-action measure in 1996, early polling suggests that women's support for the 'Civil Rights Initiative,' as it is called, is almost as strong as that of white males . . ." *That's No White Male. . .*, WALL ST. J., Mar. 27, 1995, at A20.

66. Dellinger, *supra* note 26.

67. *United Steelworkers*, 1443 U.S. at 208.

questionably has a compelling interest in remedying past and present discrimination by a state actor."<sup>68</sup> *Adarand* cites *Paradise* with approval.<sup>69</sup>

Could it be argued that certain preferences are not prohibited but rather just cures for past discrimination? A similar question: if preferences now can cure past discrimination, could discrimination cure past preferences? Could an employer, for example, put a limit on the number of promoted Presbyterians? Professor West has proposed a limit on university granting tenure upon hiring to white, heterosexual males in order to cure the historical preference for such individuals.<sup>70</sup> Questions such as these will take years of litigation to answer.

The proposals, thus, may not ban affirmative action. They would also not mandate a meritocracy with employment decisions based on quality. Some people have assumed that a ban on preferences equals a ban on affirmative action, which equals selection on merit. For example, in June of 1995, *The New York Times* reported that at the University of California at Berkeley, forty two percent of the freshman class is Asian-American, while next year, given the state's new ban on affirmative action, that number is expected to be approximately fifty five percent.<sup>71</sup> This assumes that anti-affirmative action means admitting only on numerical criteria.

Anti-discrimination, anti-preference, merit selection, and admission by the numbers are actually four different concepts. Professor Michael Selmi points out that the affirmative action debate assumes that "affirmative action means that unqualified, or lesser qualified, individuals will be selected over more qualified, individuals."<sup>72</sup> Selmi gives the example of *Johnson v. Transportation Agency*:<sup>73</sup>

[A]fter being passed over in the selection process, the plaintiff in the case, Paul Johnson, alleged that his constitutional rights were violated because he had scored a 75 on the dispatcher examination, two points higher than Ms. Joyce's score of 73. Based on that test score difference, the case reached the Supreme Court under the apparent assumption that Mr. Johnson was better qualified than Ms. Joyce. Indeed, it appears that no one ever questioned, or even mentioned that assumption, but it was simply accepted throughout the litigation with-

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68. 480 U.S. 149, 167 (1987).

69. *Adarand*, 115 U.S. at 2117.

70. West, *supra* note 46, at 157-58.

71. Peter Applebome, *The Debate on Diversity in California Shifts*, N.Y. TIMES, June 4, 1995, at A1.

72. Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251 (1995).

73. 480 U.S. 616 (1987).

out debate. . . . Yet, it is a rather remarkable conclusion, as discussed below, that the two-point test score differential demonstrated Mr. Johnson was better qualified than Ms. Joyce.<sup>74</sup>

There are two reasons why numerical scores do not indicate merit: the standard error of measurement and the low correlation between test scores and performance. Professor Selmi explains the concept of standard error of measurement:

One way would be to test a particular individual an infinite number of times with comparable examinations and then to compute the average of the observed scores. Other than as a theoretical proposition, this procedure is obviously impossible. Indeed, it is rare that an individual will be tested more than once for a particular measurement. There is, however, a statistical method that simulates the procedure described above which allows one to estimate the parameters, or limits, of an individual's true score. The statistic is known as the standard error of measurement, which can be used to identify the range of scores an individual would likely obtain over repeat administrations of an examination. This range of scores can then serve as an indicator of where an individual's true abilities lie, as those abilities are measured by the test, and may be used to avoid placing undue emphasis on a single numerical score.<sup>75</sup>

Thus, because any one test score indicates a range of probable test scores, one cannot say that a test score higher than another, but within the standard measurement of error, is "better" than the other.<sup>76</sup>

Furthermore, there is only a weak correlation between test scores and job and school performance:

Correlation coefficients are defined on a scale that ranges from +1.0 to -1.0, with a 1.0 correlation, in absolute value, indicating a perfect relationship inasmuch as by knowing score Y one can correctly predict criterion X. In other words, if a perfect relationship existed, employers would also be able to predict employees' performance ratings by knowing their test scores. Based on what has been said so far, it should come as little surprise that correlation coefficients show test score/job performance relationships that are far from perfect. What may come as a surprise, however, is how weak the relationships can be. Correlation coefficients for employment tests tend to be quite low, with the best tests having correlations of approximately 0.3. In practical terms, such a low correlation means that the examination provides only limited predictive information regarding an applicant's potential.<sup>77</sup>

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74. Selmi, *supra* note 72, at 1252-53.

75. *Id.* at 1272.

76. *Id.* at 1274-75.

77. *Id.* at 1263.

In order to determine how much of the predicted performance is explained by the test, one squares the correlation coefficient:

We can illustrate the meaning of the correlation by using an example based on the LSAT. If there is a 0.3 correlation between LSAT scores and first year law school grades, then only 9% of the variance in grade point averages will be explained by the LSAT scores. This does not mean that there is no explanation for the remaining variance, only that the test does not provide the explanation. Instead, other factors, such as study habits, interest in the subject matter, or effort may be better, or stronger, predictors of first-year grades than the test itself, and the test may not be capable of measuring these qualities or may not be structured with an intent to measure them. If such factors determine success in law school, and the test fails to measure them, then that test will a fortiori be an incomplete, and in some instances a poor, predictor of success.<sup>78</sup>

Thus, the assumption that admitting by rank order of scores on a test and grades equals merit selection is false. Indeed, rank order selection could be attacked under a disparate impact rationale, if such tests are shown to prefer any one group. Then the defendant may, if the current law on discrimination would apply to preferences, have to show that "the challenged practice is job related for the position in question and consistent with business necessity."<sup>79</sup> Is it necessary to use the SATs and the LSATs? The University of California did not use them until 1960.<sup>80</sup> An educational institution could use other criteria for admission.

Underlying the entire debate is an unstated assumption that merit or objective selection is somehow mandated once affirmative action is ended. However, merit or objective selection is not required by any law today. What is now prohibited is discrimination; a ban on preferences would not force decision-makers to affirmatively choose on merit but just add another set of prohibited acts.<sup>81</sup> It would be possible, for example, for an employer to choose randomly from a pool of qualified applicants. Such a

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78. *Id.* at 1264.

Correlation coefficients for the LSAT, which is intended to predict first-year law school grades, tend to hover around .35. The correlations may not necessarily improve when college grade point averages are included in the predictive calculus, largely because there is often little commonality to grades across schools, or across professors within schools, all of which can reduce the reliability of college grades as a measure of potential law school performance. *Id.* at n.39.

79. *Supra* note 54.

80. *Id.*

81. "It is difficult to imagine, after all, that the Constitution requires an employer to make rank order selections." Selmi, *supra* note 72, at 1314.

practice would be a quota, but not a preference. If hires were made randomly from a pool of qualified employees who were twenty percent Wisian and eighty percent Wusian, then hired employees should be roughly twenty percent/eighty percent Wisian/Wusian. Although, this is a quota, the employer has not preferred any group. If done federally, would this be a "quota" or an "other numerical objective" barred by the Dole Bill?<sup>82</sup>

Moreover, many present selection processes based on supposed "merit" may indeed be illegal as preferences under a disparate impact model. A university, for example, may require a Ph.D. of persons hired to teach freshman English. It may be that a particular group, say Wisians, constitute 10% of all college graduates but forty percent of the Ph.D.s in English. The requirement of the doctorate results in a preference for Wisians. Nevertheless, is a Ph.D. "consistent with business necessity?" Do you need a Ph.D. to teach freshman English?

The proposals put decision-makers in a quandary; they cannot discriminate nor prefer. Can they just take those who score highest on some test? Persons who have low scores may argue that such practices have an unjustified disparate impact. For example, should the University of California admit students on the basis of SAT scores? Such a practice may result in a high percentage of Asian students. Is such a practice justifiable? Can one argue that a student with an LSAT score of 750 will do significantly better or will benefit more from a college education than a student that scores 650? Allocating admissions to the highest scoring may also constitute an illegal preference on a disparate impact analysis. In order to avoid litigation, an employer or admissions director, could just lower the score to a comfortable level and then just choose randomly among the applicants.

## V. CONCLUSION

When there is no history of discrimination, however, the proposals would definitely end explicit hiring quotas. They may well abolish the ethnic employer's preference for his countrymen and thus reverse *Consolidated*.

Anti-preference legislation would not give the employers much room to maneuver. Employers would probably move from subjective decision-making to a system of decisions based either on objective, validated job-related criteria or on random selection. Plaintiff's lawyers should love it. Luckily, both the California proposal and the Dole Bill provide for attorney's fees.

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82. *Supra* note 3.