



**Legacies  
of the  
Civil  
Rights  
Act 1964**

Edited by Bernard Grofman

## Civil Rights, the Constitution, Common Decency, and Common Sense

Bernard Grofman

When judged in terms of the idealistic hopes of many of their supporters, the Civil Rights Act of 1964 and other early civil rights legislation must be regarded as great disappointments. The 1960s optimism that an end to legally sanctioned discrimination would lead to a society of equals, where persons were no longer viewed through the lens of skin color, proved misguided. The United States still has powerful remnants of a "caste" system in which the color of one's skin may be as important in affecting chances for success in life as the content of one's character.<sup>1</sup> While the black middle class has expanded considerably, on a variety of indices the gap between black America and white America has grown larger, not smaller, since 1964. The ratio of black employment to white employment is worse now than it was in 1964, and a far higher proportion of blacks than whites live in poverty or on welfare. While blacks and whites graduate high school in almost equal proportions, the reading and math skills of black high school graduates lag dramatically behind those of their white counterparts. Perhaps worst of all, black infant mortality rates are far higher than those of whites. There is what seems to be a permanent black underclass—geographically segregated, beset by limited education, broken families, and omnipresent violent crime (Farley and Allen 1987; Jaynes and Williams 1989; Massey and Denton 1993). In sum, we are still a very long way from achieving Martin Luther King's dream. The issue of race refuses to go away.

Yet, despite continuing stark inequalities and continuing discrimination

against African Americans, contemporary debates about civil rights no longer address the question of how to end discrimination or achieve real equality between the races; instead they center on the supposed inequities of affirmative action. Civil rights issues are once again at center stage in American politics, but what are being protested are not the inequities caused by discrimination against blacks but the actions that have been taken to end that discrimination. Today the reforms brought about by the Civil Rights Act of 1964 in employment, housing, and education are under attack.<sup>2</sup> Virtually all forms of affirmative action are being labeled "reverse discrimination" against whites. Defenders of the civil rights legacy of the past are on the defensive, as seen in President's Clinton's less than ringing endorsement of affirmative action, "Mend it, don't end it," and in the 1996 passage of Proposition 209 in California calling for "color-blind" practices, which has been interpreted by its leading supporters as requiring an end to all (or virtually all) affirmative action practices.<sup>3</sup>

While the principal attack on current civil rights policies comes from the conservative camp, an increasing number of liberals have also come to reject many of the directions in which civil rights enforcement has gone since the passage of the 1964 Civil Rights Act. Even among those sympathetic to civil rights goals, affirmative action is sometimes seen as like Frankenstein's monster in the 1930s movie version of Mary Shelley's masterpiece: massive, lumbering, and lacking clear direction. Policies are not very well articulated—indeed, they are stitched together out of incompatible parts. Affirmative action in particular is apparently out of control and has taken on a life of its own.

The chief complaint about civil rights policy is, of course, that it has lost sight of its original and completely praiseworthy goal of ending discrimination and requiring race-neutral treatment and hared off instead after norms of proportionality in result. The real consequences of the past thirty-five years of government policies, it is claimed, have been very different from and very much less desirable than those that were intended. Just as economists and others have argued that welfare policies designed to provide a safety cushion for the "deserving" poor have reduced incentives to work and led to an increase in illegitimacy and welfare dependency, contemporary civil rights policies are alleged to create a variety of perverse incentives and highly undesirable unintended consequences. The litany of complaints is a long one. Civil rights policies, it is alleged,

(a) have replaced the idea of equality of opportunity with a system that requires

race-based preferences so as to create what is little more than a racial and ethnic spoils system;

(b) implicitly assume that our primary identity is defined by the color of our skin or the language spoken by our ancestors rather than by our shared U.S. citizenship and the common commitments of a constitutional covenant;

(c) create race-norming of standards through affirmative action practices that implicitly reinforce the idea that differences in achievements across racial and ethnic lines are inevitable;<sup>4</sup>

(d) harm U.S. competitiveness in multiple ways, e.g., by removing personal incentives for investment in human capital (supposedly, minorities won't see the need to invest in skills since they will get hired/promoted anyway, while whites will see the benefits of such investment reduced by affirmative hiring and promotion policies); by creating a vast bureaucracy and a complex set of regulations to enforce affirmative action policies that greatly increase the cost of doing business in the United States; and by making it very difficult to hire on the basis of merit or fire on the basis of non-performance if race might be implicated;<sup>5</sup>

(e) have generally been a failure in terms of raising the living standards of blacks and other minorities, except possibly for minority groups (such as white women) who already had middle-class skills/values;

(f) are simply not cost-effective and/or have largely achieved their goals of ending discrimination by now, with remaining inequities the result of differences in human capital and motivation;<sup>6</sup>

(g) have, through affirmative action policies, fostered white resentment of minorities who have advanced in spite of lower seniority and lesser skills than whites or who have, on account of race, gotten jobs for which they are unqualified;

(h) have, through affirmative action policies, created a "culture of victimhood" in which minorities view differential treatment based on actual differences in behavior or performance as discriminatory; and

(i) have created a "rights-based" society in which an ever increasing number of groups claim an ever increasing number of rights<sup>7</sup> and entitlements to "special" protection.<sup>8</sup>

While I believe that many of these allegations are either mistaken or overstated,<sup>9</sup> I do not wish to defend current policies in this essay.

I aim instead to carve out a middle ground between those who think that race should never be taken into account in decisions about jobs or education and those



who believe that proportional representation by race in universities and the workforce is tantamount to a constitutional commandment. I believe that civil rights policies for the United States can be constitutionally grounded and formulated on the basis of common decency and applied with common sense.<sup>10</sup>

My analysis has seven postulates: (1) discrimination against blacks still exists and requires legal remedy; (2) civil rights policies must be based on moral principles that command wide assent; (3) the crafting of race-conscious remedies is inevitable in the presence of race-conscious discriminatory practices; (4) the notion of hiring on the basis of "merit" must be rethought, in that "merit" cannot be judged solely by the results of paper-and-pencil tests; (5) the term "affirmative action" has outgrown its usefulness because it has come to mean everything from efforts to publicize job openings to rigid quota rules; (6) actions to remedy past discrimination have a stronger moral force and a far different constitutional authority than diversity preference, *per se*; and (7) as long as socioeconomic and educational disparities persist, antidiscrimination legislation and litigation can have only a limited impact in changing the fundamental racial inequalities in our society.

#### Race Still Matters

My first presupposition is that we are still very far from a world where race does not matter. Discrimination against African Americans continues to take place, even if in ways that are less overt than "colored only" water fountains. Controlled experiments demonstrate continuing elements of discrimination against black Americans in housing and employment (Bergmann 1996, chapter 5).<sup>11</sup> Similarly, *ceteris paribus*, blacks are more likely to be stopped by the police or followed by store detectives and less likely to be picked up by cruising taxicabs or given entrance to posh stores that require admittance by the buzzer. Lynchings may be largely a thing of the past, but skinheads and other white supremacist thugs are still killing African Americans solely because they are black. Perceptions that "blacks are different"—less intelligent, less hardworking, and more prone to criminal behavior than whites (or than other minorities such as Asian Americans)—persist, even though most white Americans are generally unwilling to acknowledge publicly that they hold such views.<sup>12</sup> In a revealing recent social-psychological experiment, for example, we learn that it would take vast sums of money to persuade a typical white American to change his skin color to black.

### Widely Shared Moral Principles

My second presupposition is that civil rights legislation must rest on the bedrock of widely shared moral principles. Critical, in my view, to civil rights policies that can gain widespread public assent are the twin principles of *nondiscrimination* and *non-stigmatization*. Whatever else 1960s supporters of civil rights may have wanted, it is clear that they endorsed the "nondiscrimination principle" for state action, namely that discriminatory state action is constitutionally repugnant.<sup>13</sup> By discrimination I mean what that term has traditionally meant: invidious intentional discrimination against a disliked minority solely on the basis of race or some other suspect criterion. It is also clear that 1960s supporters of civil rights would have endorsed what I call the "non-stigmatization principle," namely that under most (if not all) circumstances, given the history of the United States, when it comes to race, "separate is not equal" even if the separate (public) facilities being compared are equal down to the thirteenth decimal place.<sup>14</sup> I think that today we could obtain wide (though not, of course, unanimous) agreement on these principles.<sup>15</sup> Unfortunately, however, such principles don't get us very far with respect to the "hard cases" that now command public attention,<sup>16</sup> but it is still useful to remember just how far we have come in thirty-five years to be able to say that those two principles would now command near-universal assent!<sup>17</sup>

### Race-Conscious Remedies Are Needed for Race-Conscious Discrimination

My third presupposition is that in some circumstances, because of the existence of discrimination tied to race, race-conscious remedies for that discrimination are simply unavoidable. My own approach to affirmative action is based on the notion of the realistic politics of a second-best world (Grofman and Davidson 1992). If race were not such a pervasive factor in social judgments, if the United States had no history of enslaving blacks, exterminating Native Americans, and discriminating against virtually everyone with darker skin tones (except of course surfers and sunbathers), color-blind government policies would not be just an ideal but a workable alternative. Justice Clarence Thomas's recent call to be totally "color-blind" is, unfortunately, "history-blind." If we were to accept his views, we would find ourselves unable to craft sensible policies that address both continuing discrimination and the lingering effects of past discrimination.<sup>18</sup>

### Merit Is Not Identical to Skills Shown on Paper-and-Pencil Tests

My fourth presupposition, and one that I believe most Americans would find uncontroversial, is the notion that merit is not identical with skills shown on paper-and-pencil tests. In particular, elements of character and promise such as demonstrated willingness to work hard, previous job performance, or persistence in the face of adversity are also very much indicators of "merit."<sup>19</sup> Similarly, most Americans would accept the commonsense view that small differences in test scores may not mean very much. Thus, rather than race-norming scores to determine admissions or job selection, it would be more reasonable to establish *minimum* standards to screen out those who should not qualify and then use other criteria to make the final selection—or simply use a lottery to choose between those who fall above the threshold (Guinier 1996). If a lottery were used, or if the additional screening criteria were applied in an evenhanded fashion, this would be likely to increase the number of minorities without violating our basic notions of fairness. Thus, in my view, much of the debate over the supposed conflict between affirmative action and "merit-based" hiring is misguided, because it posits that the sole appropriate measures of merit are the results of paper-and-pencil tests.

### "Affirmative Action" Has Outgrown Its Usefulness

The term "affirmative action" has come to cover a multitude of processes, some widely supported, others deeply unpopular. In my view, the term has ceased to be useful in policy debates because it now encompasses everything from outreach efforts to minority communities to rigid quotas even in settings where no discrimination has been legally demonstrated.<sup>20</sup>

When policies and statutes are couched in antidiscrimination terms, they can often command wide assent; when they are couched in terms of affirmative action, public support plummets. Yet most Americans would have no trouble agreeing that, say, special efforts should be made to publicize job openings so that all potential applicants have an equal chance to compete. Even the "token" job interview, perhaps all too often only a token, can still be defended on the grounds that what I will call expectational racism (i.e., stereotypes grounded in realistic expectations about the odds that a minority will in fact be qualified), can still be refuted by evidence about a particular individual—but only if there is an opportunity to present that evidence. Even more broadly, few Americans would object to special efforts to

improve the quality of schools in neighborhoods where poor resources at home make it harder for kids to learn. There is likewise wide support for creating genuine equal opportunity, so long as this is not seen as a predetermined way to create special training programs available only to minorities. Opponents of current civil rights policies are disingenuous when they claim, for example, that affirmative action is "nothing but quotas," just as defenders of those same policies are disingenuous when they refuse to admit that some affirmative action policies (as they have been implemented) are, in fact, quotas.

### Civil Rights vs. Diversity

Too much of the debate over civil rights has been marred by lumping together needed remedies for real discrimination and the goal of promoting "diversity." Debates about affirmative action today almost always confuse two very different situations: (1) those dealing with legally imposed remedies for past discriminatory practices, and (2) those dealing with voluntary attempts to promote diversity in schools or the workplace.<sup>21</sup> What is appropriate in the context of legally required remedies for past discrimination ("remedial action") and what is appropriate in terms of a general concern for diversity (what I would characterize as "diversity preference") are, in my view, quite different.<sup>22</sup>

For companies whose racially discriminatory practices have been demonstrated, I believe that most Americans would accept the need for an accelerated pace of minority entry-level hiring and accelerated promotions to qualified minorities to compensate for past exclusionary and unjust practices, even though they would still reject double standards (race norming) for retention and promotion.<sup>23</sup> I believe that remedies for past discrimination can legitimately include steps to force the employer to create, with all deliberate speed, the pattern of employment by race or gender that we can realistically expect would have occurred had there never been discrimination in the first place.<sup>24</sup> Even where previous discrimination has not been proved, I believe that many Americans would accept the need for race-conscious and gender-conscious programs to recruit minorities, even while they would reject different standards for retention and promotion for members of different races.

The preference for diversity per se, by contrast, is not mandated by the constitutional principle of equal protection, nor is it a principle that could command widespread assent in all contexts.<sup>25</sup> In many ways, moreover, the debate about di-



iversity preferences is a sideshow, diverting us from the main event, which is how best to eliminate the continuing manifestations of actual discrimination against minorities.<sup>26</sup> However, claims for something like diversity preference seem to me to be especially strong in two domains, education and community service.

In higher education there is a long history of preference for diversity (e.g., a geographic mix of students, athletes, tuba players for the marching band), and the strong argument, at least in the humanities and the social sciences, that the classroom experience is enhanced when a wide range of perspectives are represented.<sup>27</sup> Thus, the *Bakke* compromise (race may be used as an admissions criterion as long as it is not weighted too highly), does make sense in the context of college admissions.<sup>28</sup> Of course we must be careful to set realistic thresholds for admittance. Setting people up to fail is no favor, especially if failure ends up discouraging someone from trying again in a context where he or she is more likely to succeed. College-level classes require a minimum level of verbal and mathematical skill, and the minimum requirements are greater still at the more elite universities.<sup>29</sup>

In the case of police, the argument is again not really about diversity but about job performance. In particular, given our legacy of past discrimination, it seems reasonable on commonsense grounds to believe that black police may be more effective than white police in winning trust and enforcing law and order in black neighborhoods.<sup>30</sup> Of course it also seems plausible, given our country's past history, to believe that a virtual absence of black police would have severe consequences for the perceived and actual fairness of the social order.

### The Equal Protection Clause Is Not a Universal Panacea

My final presupposition is that the constitution's equal protection clause is not a universal panacea. There are many pernicious racial inequalities that lack a direct constitutional remedy because they do not fit into the framework of discrimination on the basis of race. Equality cannot always be commanded with a lawsuit.<sup>31</sup> As long as there is a legacy of past discrimination and continuing socioeconomic disparities, equal treatment alone will not afford equality of result. Realistically speaking, were completely neutral performance standards to be used for most high-level jobs (as well as for college and graduate school admissions), a much lower proportion of African Americans would be found with the necessary training and skills, for all kinds of historical reasons. Minorities suffer from the lingering effects of past and present discrimination and from continuing socioeconomic and cultural

disparities (such as the presence or absence of books in the home), that cannot be wished away. These disparities will have consequences for language and skill acquisition, for work habits, and even—in terms of fetal nutrition and verbal stimulation during infancy—for intelligence, and they can result in differences that are immensely difficult to overcome.<sup>32</sup>

Education is increasingly the key to success in our society and it is there that much of the effort to change the unequal status of blacks must focus. Racial disparities will continue to be especially great in the best-paying and most prestigious jobs until we raise the level of black educational attainment. In addressing the situation of black America it is necessary to begin at the bottom if we are to have success at the top.<sup>33</sup>

## Notes

1. Despite my recognition of our increasingly multiracial society (see Fraga and Ruiz-de-Velasco, chapter 10 of this volume) and the problem of gender-based discrimination, in this essay I deal primarily with civil rights issues as they apply to African Americans because I regard the problem of race, the need to cope with the legacy of slavery and Jim Crow, as a bone lodged in the throat of American society. Just as it has been for the previous two centuries, the problem of race will be the most important domestic issue of the twenty-first century.

2. Similarly, the changes brought about under the Voting Rights Act of 1965—race-conscious congressional and legislative districting—are also under attack (Grofman 1995; Reeves 1997; Grofman 1998), as is the legacy of the Immigration Reform Act of 1965. While the main focus of recent immigration reform efforts has been closing U.S. borders to illegal immigration and denying government services to those who are already here illegally, a backlash against legal immigration is also underway. This backlash is symbolized by the proposed denial of welfare benefits to legal immigrants who are not (yet) citizens, proposals to scale back total numbers of legal immigrants, and proposals to change the character of legal immigration by limiting its use in uniting families and by giving strong advantages to better-educated, more affluent would-be immigrants.

3. Public attitudes toward affirmative action are complex and depend on exactly how questions are framed (see, e.g., Kinder and Sanders 1996; Tate and Hampton, chapter 9 of this volume; and Sniderman, Tetlock, and Carmines 1993). For example, although Proposition 209, the language of which rejected preferential treatment, passed in California, a comparable initiative in Houston, which specifically called for an “end to the use of Affirmative Action for women and minorities,” failed.

4. Similarly, contemporary civil rights policies are attacked on the ground that they cast doubt on the actual achievements of minority members, which become attributed by others (especially whites) not to the actual abilities and hard work of these minority members but to the supposed preferential treatment they received through affirmative action policies.

5. In particular, it is alleged that employers will settle discrimination claims out of court even when they are unfounded, merely because the costs of litigating such claims are so high, and that the anticipation of lawsuits discourages employers from applying the same performance standards to minorities and non-minorities, thus forcing them to use proportionality of results as their standard lest they be sued successfully. However, there is little empirical evidence to support this argument (see Leonard 1989; Burstein, chapter 7 of this volume). On the other hand, some economists argue that the threat of Civil Rights Act enforcement and related legal threats actually decrease minority hiring. Because em-

employers know that once hired, minorities will be hard to fire, employers are reluctant to hire minorities in the first place (see, e.g., Bloch 1994, 104). To the extent that this argument can be proven, the claim that affirmative action policies harm whites must be unfounded.

6. Indeed, the even stronger claim has been made by one libertarian scholar that had it not been for artificial government support for discriminatory behavior, discrimination in the United States would have died out long ago though the natural operation of market forces. By the logic of the market, employers seek the best workforce for the least money; discriminating in favor of white workers would introduce unnecessary expense and therefore inefficiency into the labor market (Epstein 1992).

7. The claim is also frequently made that the term "discrimination" has been redefined in inappropriate ways so as to affect domains of social conduct that are far beyond the scope of what was, in 1964, thought of as discrimination—often in ways that substantially affect free speech interests, e.g., gender harassment suits based on *Playboy* photos in the locker room or job suspensions based on use of language that might be interpreted as implying racial prejudice.

8. Indeed, especially (but certainly not exclusively) among African Americans, there has been some concern that current civil rights policies no longer focus on efforts to redress the lingering effects of historical discrimination on African Americans but now erroneously emphasize generic claims to "victimhood." Even more specifically, it is claimed that some groups, including groups the majority of whose members are recent immigrants with no real claim to having suffered from the lingering effects of past discrimination in the United States, are often treated better by government policies than the former slaves to whose plight the Civil War amendments were primarily directed.

9. Attacks on so-called affirmative action are especially overblown when they wrongly lump together as targets those practices used as legally required remedies for proven discrimination and those whose principal justification is simply a claimed need for diversity (see below).

10. For an attempt to appeal to honesty, common sense, and common decency in the context of race and the criminal justice system, see Kennedy 1997.

11. Implicit or explicit racial appeals are also important in many political campaigns involving a black candidate, especially in the South (Reeves 1997, chapter 5).

12. As former federal judge A. Leon Higginbotham put it, "The precept of black inferiority is the hate that raged in the American soul through over 240 years of slavery and nearly 90 years of segregation. . . . The ashes of that hate have, over the course of so many generations, accumulated at the bottom of our memory. There they lie uneasily like a heavy secret that whites can never quite confess, and blacks can never quite forgive" (1997, 11).

13. In the 1960s as now, there was no consensus about how to deal with purely "private" discrimination or where to draw the line between the public and private spheres.

14. See chapter 11 of this volume by Barbara Phillips Sullivan.

15. For a discussion of standards of proof for discrimination, see appendix 1 by Kadane and Mitchell and appendix 2 by Lempert in this volume.

16. In the aftermath of the passage of the Civil Rights Act of 1964, it became apparent that color-blind law, like the idealistic vision of children of different races growing up in an atmosphere free of prejudice, was not adequate to deal with the complexities caused by the interaction of race and class, continuing racism in the private sphere, the lingering effects of past discrimination, and growing cultural diversity. As Hugh Graham argues in chapter 3 of this volume, the focus of civil rights policies in the 1970s and thereafter became far more complex than simple enforcement of the twin principles of nondiscrimination and non-stigmatization. Skrentny (1996) offers an intriguing discussion of the evolution of civil rights policies that suggest a combination of political manipulation (in which Richard Nixon helped create a "wedge issue" for the Republicans to use against their Democratic opponents), and an administrative preference for numerical—and thus manageable—standards.

17. On the other hand, I am skeptical of the attempts by liberal legal scholars and political philosophers to articulate a philosophical justification for the most extreme forms of preferential treatment, since many of these justifications are anchored in a cloud cuckoo-land. For Ronald Fiscus (1992, 13,

63-64), for example, concern for merit takes a back seat to the idea that fairness requires that all races be equally represented in all professions, since that is what supposedly would occur in an ideal world devoid of racism (Fiscus 1992, 91-92).

18. It is sometimes argued (most commonly by white defenders of color-blind practices) that race-conscious policies create uncertainties among minority members themselves as to their own abilities. I have never found this a compelling argument; those African Americans who succeed "against the odds" have many reasons to be proud. That they may have been given a helping hand does not demean their achievements. We all have, in one way or another, been given helping hands.

19. Of course, even when paper-and-pencil tests do not test items that are directly relevant to job performance, they may be used because their results are seen as a signal of a willingness to invest in human capital that bodes well for future job performance (Spence 1974).

20. For example, Rosenfeld deliberately uses the term affirmative action to include modes of preferential treatment (1991, 47). Certainly that is not how the term was first used.

21. Of course, some of these "voluntary" forms of affirmative action will come in situations where legal discrimination might have been proven but where settlement out of court was thought preferable, or where jurisdictions or companies chose to engage in affirmative action in part to ward off potential lawsuits.

22. I prefer the phrase *remedial action* to refer to plans put into place as a result of litigation or out-of-court settlements that have specifically been crafted as remedies for a pattern and practice of what is (or at least appears to be) actual discrimination. In contrast, I use the term *affirmative action* only to refer to action that is prospective, designed to assure future fairness of treatment in the absence of any specific legal finding of discriminatory practices whose consequences are to be remedied. I use *diversity preference* to refer to giving preference (at the margin) to members of a given racial or other minority over equally qualified others.

23. Policies designed to eliminate illegal discrimination unavoidably impose costs of compliance even on the innocent, but we must balance such costs against the evil of failing to remedy discrimination. Of course, attempts to eradicate discrimination down to the last decimal place are, as a practical matter, simply impossible because of the problem of enforcement costs and diminishing marginal payoffs to enforcement efforts.

24. Consider the following example, in which we posit that a southern state has failed to hire blacks on its state police force and that a federal district court has found a history of past discrimination and needs to craft a remedy. Assume that black candidates make up 20% of all those who are qualified to serve but that no blacks currently serve. Assume a steady force of 3,000 state troopers, with 100 hired yearly to replace the 100 who retire. If we hire 20 blacks per year out of 100 job openings, it will be thirty years before blacks make up 20% of the force. In fact, for the next fifteen years, blacks will remain less than 10% of the force, and for the first five years, blacks will be less than 4% of the force. Given the history of past discrimination and the slowness with which "natural replacement" will remedy it, for a court to order that more than 20 black troopers be hired per year does not seem unfair, on balance, despite its consequences for new white job applicants.

25. The school board of Piscataway High School (New Jersey) faced budget cuts in 1989 that led to staff cuts. There were two teachers at the school doing similar jobs, of equal seniority and, apparently, equal performance, one white, one black. The school board chose, for no announced reason other than a preference for diversity, to fire the white teacher (Gutmann 1996, 118). That teacher sued and, not surprisingly, won at the district and appellate levels. As James Turner, former assistant attorney general for civil rights in the U.S. Department of Justice, notes, "From the time Title VII was passed, no court had ever held that it was proper to fire incumbents to maintain or create diversity." Turner also observes that "A coalition of civil rights organizations recently paid off the white teacher to end the case to avoid an adverse Supreme Court ruling" (Turner 1997, 23). While eliminating racial stereotypes and providing role models for minority members are important, these goals do not rise to the level of constitutional commands, and their implementation raises difficult constitutional questions (Gutmann 1996, 131).

26. In most contexts, I would still advocate some diversity-oriented hiring at the entry level as long as there is not a subsequent double standard as to the criteria for success and as long as it is clear that minimum criteria will still need to be satisfied for acceptance (see discussion of college admissions below). I do not think it necessary to promote diversity, per se, but I do believe in giving people a chance. Because tests are of limited value in predicting the future success rates of all applicants, a period of probation can be useful to separate those who can and will succeed from those who can't or won't. But realism dictates that the likely success rates of minorities and nonminorities during the probation period (and with respect to subsequent retention/promotions) are unlikely to be equal.

27. There is also a long history of de facto discrimination in higher education that benefits whites, e.g., "legacies" or preferences given to children of alumni and special treatment for friends of trustees and relatives of the rich (see, e.g., Frammolino, Gladstone, and Weinstein 1996).

28. The *Bakke* rationale for diversity preference does not, however, apply with the same relevance outside the classroom context.

29. At the college level, minority dropout rates tend to be high at prestigious institutions, except for those very elite schools (like Harvard) that can attract the best minority students. See Thernstrom and Thernstrom 1997, chapter 14.

30. Similarly, women police may be more effective than male officers in handling domestic disputes, in part because they appear less threatening because of their gender. Here, too, the argument for adding women to the force becomes one not about diversity but about recognizing domains of superior performance that may not be acknowledged in, say, height, weight, and strength standards for police officers.

31. For an elaboration of this point (although not one with whose views I always agree), see Halpern 1995.

32. As I hope is apparent, this comment should not be misinterpreted as support for genetic theories of racial differences in intelligence. To the contrary, such theories tend to deny or downplay the importance of social, nutritional, and environmental context on cognitive development.

33. As my colleague A Wuffle metaphorically phrases the point, "No amount of manipulating the toothpaste tube at the top end will produce much toothpaste if almost all of the toothpaste has been left down at the bottom."