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Affirmative Action Issues Face Texas

Debate over state affirmative action programs to assist women and minorities flared in the 74th Texas Legislature's 1995 session, and the issue continues to generate controversy in the courts, in Congress and in other state legislatures. Renewed debate is possible during the Texas Legislature's 1997 regular session in light of these developments:

☐ Gov. George W. Bush has said he would prefer that the state's affirmative action program for historically underutilized businesses (HUBs) emphasize helping small start-up businesses, without regard to race or gender. In 1995 the governor appointed two new members to the six-person General Services Commission, which oversees the HUB program. Gov. Bush has said he opposes quotas.

☐ In 1995 at least 10 states, including Texas and California, considered legislation that would abolish affirmative action. The National Conference of State Legislatures predicts that over half of the state legislatures will consider the issue in 1996.

☐ Californians will vote in November 1996 on a proposed constitutional amendment to eliminate that state's affirmative action programs. The University of California Board of Regents already has voted to end affirmative action in the state university system.

☐ Louisiana Gov. Mike Foster announced that he is considering including affirmative action repeal in a 1996 special legislative session. On his fourth day in office in January 1996, Gov. Foster issued an executive order abolishing Louisiana's affirmative action programs not required by state or federal law.

☐ In a case likely to go to the U.S. Supreme Court, the University of Texas School of Law is defending its admissions process before the 5th U.S. Circuit Court of Appeals. A ruling in the UT case would be the Supreme Court's first major review of affirmative action admissions policies since *Regents of the University of California v. Bakke* in 1978, which declared admissions quotas unconstitutional.

☐ A June 1995 U.S. Supreme Court ruling raising the legal standard for *federal* affirmative action programs led the Pentagon in October 1995 to suspend its program for awarding contracts to minority-owned businesses.

☐ U.S. Supreme Court decisions over the last decade have generally raised the level of evidence necessary to justify affirmative action programs by applying strict constitutional scrutiny, while not prohibiting the programs.

☐ Census projections indicate that about 51 percent of Texans will be members of a minority group in the year 2015, compared to 42 percent in 1995.

Members of Congress, including Sens. Phil Gramm of Texas and Bob Dole of Kansas, have proposed legislation to eliminate federal affirmative action programs, and hearings on a House bill are under way. President Clinton has stated that federal programs may need refining, but remain necessary to offset persistent discrimination.

The affirmative action debate, revolving around issues of race, gender and economic security, often arouses intense emotions, as when State Sen. David Sibley proposed in 1995 that Texas end state affirmative action programs, prompting an African-American House member, Rep. Ron Wilson, to don a Ku Klux Klan-style robe and hood at a press conference and say the costume came from Sen. Sibley's closet.

Public opinion on affirmative action appears mixed, as shown by a Harte-Hanks Texas Poll conducted in April 1995 in which 44 percent of 492 respondents said affirmative action programs for minorities have had a positive effect on the United States, but 52 percent favored ending the programs. Those polled were more likely to support affirmative action to assist women than to assist minorities.

This report examines these affirmative action issues:

What is affirmative action?

History

Modern affirmative action in the United States dates from President John F. Kennedy's 1961 executive order creating the President's Committee on Equal Employment Opportunity. The President directed the committee to recommend "affirmative steps" for integrating the federal government's work force to assure equality of opportunity.

The order — Executive Order No. 10,925 — also required all federal contractors to agree to "take affirmative action" to ensure that their employees were hired and treated without regard to their race, creed, color or national origin.

The order was based on the idea that merely removing legal barriers to equal opportunity for African-Americans and other minority groups was insufficient to meet civil rights goals and that affirmative steps to promote work place opportunity were necessary.

Power to enforce nondiscrimination requirements on federal contractors was given to the Department of Labor in 1965 by President Lyndon B. Johnson's Executive Order No. 11,246. The department created the Office of Federal Contract Compliance Programs (OFCCP). OFCCP rules require federal contractors with 50 or more employees to develop written affirmative action hiring programs, with goals and timetables. The president ordered all federal agencies and departments to develop equal employment opportunity programs. Additional programs were adopted under President Nixon.

Federal affirmative action programs for racial and ethnic minority groups and women were followed by state and private-sector programs adopted voluntarily or mandated by courts or legislative action. A series of court decisions defined how far government and businesses could go in affirmative action, as courts judged complaints of constitutional violations by those who felt they were negatively affected by the programs.

General definition

Affirmative action can be defined generally as an effort to make the racial, ethnic and gender mix of a particular sector similar to that in the appropriate larger population. For example, if 20 percent of a state's college-bound high school graduates are black, a university in that state might take action to assure that of the students admitted about 20 percent are black. The term affirmative action is usually applied in relation to access to economic benefits — jobs, business contracts and higher education — and is often considered as distinct from, although related to, other civil rights issues

Population Classifications

The U.S. Bureau of the Census has used the following population classifications for nearly two decades. The Texas General Services Commission uses essentially the same definitions in classifying business ownership under the state's program to assist historically underutilized businesses, or HUBs.

White. Origins in any of the original peoples of Europe, North Africa or the Middle East.

Black. Origins in any of the black racial groups of Africa.

Hispanic. Origins are Mexican, Puerto Rican, Cuban, Central or South American, or any other Spanish culture, regardless of race.

American Indian, Eskimo and Aleut. Origins in the original peoples of North America and maintains cultural identity through tribal affiliation or community recognition.

Asian. Origins in any of the peoples of the Far East, Southeast Asia, the Indian Subcontinent or the Pacific Islands.

Individuals generally choose the category in which they are placed. Many individuals in the United States have origins in more than one category. The Census Bureau is studying possible changes in the categories for the census in 2000, and has said it would decide in 1996 whether to respond to demands for a "multiracial" category. This change would raise questions for those administering affirmative action and other civil rights programs, but the change has been demanded by some student groups and others.

The terms black and African-American generally are interchangeable in common usage. A 1995 U.S. Labor Department survey of black households showed 44 percent wanted to be called black, 28 percent preferred African-American, and 12 percent preferred Afro-American. About 3 percent of whites in the survey of 60,000 households preferred the term European-American. A majority of Hispanic households surveyed preferred the term Hispanic to Latino or other terms.

such as public school desegregation and voting rights. Like these other measures, affirmative action is designed to counter the effects of current and past discrimination against affected groups.

Affirmative action programs vary widely. They may be ordered by courts, mandated by legislation or adopted voluntarily. "Quotas" or "set-asides" require that a certain number of persons of a particular group be granted a privilege and that other groups be absolutely ineligible for the reserved privileges. Some employers, schools and contractors establish "goals" or "targets" for minority participation. Others use race or sex as a "plus factor" in granting a privilege, considering it along with other factors such as test scores, experiences and recommendations. Another approach is providing additional education, outreach and access to groups that have been subjected to discrimination.

What the courts say

Courts generally have viewed as unconstitutional "quotas" or "set-asides" that require that a certain number of persons of a particular group be granted a privilege and that other groups be absolutely ineligible for the same privilege. However, quotas and set asides may be allowed in certain circumstances for limited periods of time to remedy

egregious instances of discrimination, courts have held. Use of "goals" or "targets" for minority participation has been held constitutional if non-minorities are not absolutely excluded from consideration.

Court decisions, discussed in more detail later in this report, in general state:

- quotas based solely on race are unconstitutional;
- affirmative action programs must pass a "strict scrutiny" test that shows they serve a "compelling governmental interest" and are "narrowly tailored" to address that interest;
- programs are allowed only to offset existing or past discrimination in the particular area addressed by the program; general discrimination in all of society is insufficient justification;
- public employers may institute affirmative action plans that are temporary and do not unnecessarily trammel the interests of non-minorities or males.

Debate terminology

In the debate over affirmative action the words used to describe the programs have themselves taken on subjective weight. For instance, the National Association of Black Journalists (NABJ) has cited polls showing that the public generally supports "affirmative action" but opposes "preferential treatment." The group criticized as misleading the use of terms such as "quotas," "preferences," "preferential treatment" and "set-asides," which a 1995 study found in frequent use. The NABJ suggested use of the terms "race-based remedy" and "race-conscious remedy" to describe affirmative action programs that address racial discrimination. A November 1995 *Houston Chronicle* article warned employers not to call their voluntary efforts to hire a diverse work force "affirmative action," as the mere use of such terminology might trigger unwanted legal requirements. The *Wall Street Journal* in a January 1995 column on business trends said "affirmative action" denotes legal requirements while "strategic diversity" denotes a vital employment strategy that businesses need to remain competitive.

Affected groups

The 1964 Civil Rights Act prohibits discrimination by employers on the basis of race, sex, color, national origin or religion (Title VII), by recipients of federal funds on the basis of race, color or national origin (Title VI) and by federally assisted educational programs on the basis of sex (Title IX).

Hispanics make up the largest ethnic minority in Texas, at about 28 percent of the population. About 12 percent of the Texas population is African-American. Racial and ethnic minorities, about 42 percent of the population in 1995, will make up about 51 percent of the state's total by 2015, the census bureau and state officials project, with the growth primarily among Hispanics. Women, historically underrepresented in some educational and occupational groups, often are included in affirmative action programs.

State government programs

Texas began implementing affirmative action programs in the early 1970s when civil lawsuits and federal mandates based on the 1964 Civil Rights Act and other federal laws compelled the state to act to remedy the effects of *de jure* discrimination — discrimination required or allowed by law — and *de facto* discrimination — discrimination in fact.

The need for affirmative action was articulated in a February 1970 report by the Texas State Advisory Committee to the U.S. Commission on Civil Rights, which stated:

> Just as many of the discriminatory practices against minorities were established through conscious, deliberate design, new behavior and results will now have to be achieved the same way. Time and self-education will not of themselves attain our goal of justice and

equality. It takes affirmative and positive action on the part of key individuals in our institutions and commitment and support on the part of the total society.

A 1980 study by the same group concluded that Texas had made only minimal improvement in civil rights since 1968 and found that Texas at all levels of government "consistently underemploys, underrepresents, underutilizes, and underestimates minorities and women." The committee concluded that "[t]he pervasiveness of this pattern . . . belies any argument that acceptable progress is being made in the direction of equal opportunity for all Texans." In the face of such findings and under pressure from federal agencies and state minority and civil rights advocates, Texas took action designed to end disparate treatment and increase the participation of minorities in at least three areas: state contracting, public higher education and state employment.

State contracts

In 1972 the Texas Industrial Commission received a grant from the U.S. Department of Commerce to establish the Texas Office of Minority Business Enterprise ("TexOMBE"). The grant proposal cited statistics showing that while Mexican-Americans, African-Americans and other minorities composed about 30 percent of the state's population, they owned only 5.4 percent of the state's businesses. The purpose of TexOMBE was to develop, formulate and encourage programs and projects to stimulate increased minority business ownership in the state. The commission concluded that minority businesses were held back by limited access to equity capital and debt financing, underdeveloped managerial skills and limited markets due to restrictive locations.

The commission said the TexOMBE program was designed to make minority businesses competitive and not to "subsidize them with special programs that create a false sense of prosperity." (*See* Texas Industrial Commission, Office of Minority Business Enterprise, *This is TexOMBE* (1974).) One function of the commission, however, was to increase the opportunities for minorities to contract with state and federal agencies and to assist them with procurement procedures.

The first law establishing percentage goals for state contracting was a race-neutral law enacted to benefit small businesses. The Small Business Assistance Act of 1975 expressed legislative intent that each state agency attempt to award 10 percent of all purchases or service contracts to small businesses. (*See* Acts 1975, 64th Leg., R.S., ch. 718.) State agencies were instructed to take "positive steps" to include small businesses on master bid lists, inform small businesses of state procurement opportunities, rules and procedures, waive bond requirements when feasible and establish annual procurement and assistance goals. Agencies reported their progress to the Industrial Commission.

In the late 1970s and throughout the 1980s legislative proposals were unsuccessfully offered to extend the small business contracting goals to minorities. In 1983 Gov. Mark White ordered state agencies to establish annual small and minority business participation goals of 10 percent, with 30 percent of the amount going to minority businesses. Gov. White directed the Industrial Commission to "redouble its efforts" to encourage development of minority businesses and assist agencies with meeting the procurement goals. (*See* Executive Order MW-8, May 19, 1983.)

Another order created the state Minority Business Enterprises Advisory Committee. Also in 1983 the name of the Industrial Commission was changed to the Texas Economic Development Commission, which continued to monitor compliance with the small business act and Gov. White's order.

In 1987 the commission was abolished and all its powers and duties transferred to the newly created Texas Department of Commerce. The Commerce Department's Office of Minority Business Development continued to offer assistance to minority businesses.

In 1989 the 71st Legislature created the Texas Certified Disadvantaged Business Program through the General Appropriations Act. The Department of Commerce certified small and minority businesses and developed a directory for use by state agencies in their bidding processes. Without setting a specific goal, the Legislature expressed its intent that agencies award contracts to minority and disadvantaged businesses in amounts proportional to the numbers of these businesses offering the services.

A 1993 provision making it easier for women and minorities to get state trucking certificates was struck down by the U.S. District Court in Victoria based on the Supreme Court's 1989 decision in *City of Richmond v. J.A. Croson Co.*, in which the court articulated the need for strict scrutiny and proof of specific disparity to justify affirmative action programs for government contracting. The provision was contained in SB 1313 by Bivins. A state appeal was dismissed as moot after the Legislature deregulated trucking in 1995 (SB 3 by Bivins).

Helping underutilized businesses

Since 1991 the state has operated a program to encourage state agencies to do business with minority- and women-owned firms that are defined as historically underutilized businesses, or HUBs. The goal for HUB contracts was set at 10 percent or more in 1991 and raised to 30 percent in 1993. The General Services Commission effectively reduced the overall goal to 26 percent in 1995. A study by the General Services Commission showed that the actual percent of state contracts awarded to HUBs was 1.4 percent in 1991, 8.3 percent in 1993 and 15.9 percent in 1995.

The HUB program was initiated in 1991 when the Legislature enacted HB 799 by Dutton, now in Government Code Chapter 2161 and 1 Texas Administrative Code secs. 111.11-111.70. State agencies were instructed to attempt to award at least 10 percent of the value of all agency contracts to HUBs. HUBs must have ownership that is at least 51 percent African-American, Hispanic-American, Asian-American, Native-American or female. The minority or woman owner must have a "proportionate interest" and demonstrate "active participation in the control, operation, and management" of the business.

Initially HUBs were certified by the Department of Commerce and the purchasing program was administered by the General Services Commission ("GSC"). In 1993 full operation of the program was put in the hands of the GSC.

Gov. Ann Richards issued an executive order (AWR 93-7) in March 1993 intended to strengthen the state's commitment to contracting with women-owned and minority-owned businesses. The order directed the GSC to make a good-faith effort to ensure that state agencies award at least 10 percent of the value of their contracts to HUBs, including awards made with local (non-state treasury) funds. The governor directed agencies to improve their procurement practices and created a task force to study discrimination in contracting. Also in 1993 the Legislature raised the state HUB contracting goal to 30 percent (HB 2626 by Black).

Voters rejected a constitutional amendment proposed in 1993 that would have authorized $50 million in bonds to provide assistance with start-up costs for new historically underutilized businesses.

Disparity study

In 1994 the state performed a disparity study prompted by the U.S. Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, which held that minority contracting goals unsupported by evidence of discrimination are unconstitutional. HB 2626 by Black, the GSC revisions, mandated the study. The $1 million study was conducted by National Economic Research Associates, Inc. in cooperation with a number of state agencies, officials and employees. Its mission was to examine whether race and sex discrimination limits the ability of companies owned by women and minorities to do business with the state.

The study found a pattern of discrimination against women and minority-owned businesses from both statistical and direct evidence. African-American and Hispanic businesses were found to be the most disadvantaged, while businesses owned by white women were the least disadvantaged. Asian- and Native-American-owned businesses fell in between.

The study also found that the HUB program was not significantly increasing the numbers of minority contractors hired by the state. In fact, in several industries African-American businesses were found to be receiving a *lower* share of state business than they were before the HUB program was instituted. Meanwhile, the U.S. Census Bureau reported that the number of black businesses in Texas *increased* by 40 percent between 1987 and 1992.

Rules revision

In 1995 the GSC proposed revisions to the HUB program rules based on the results of the disparity study. The revision process involved intense public debate before the GSC on how to revise the program rules to make them effective, fair and legally defensible. Opponents of the HUB program characterized the program as "reverse discrimination" against white male-owned businesses in the state and called for its elimination. Others asserted that the new rules proposed by the GSC created a system of quotas or set-asides and allowed businesses to be selected based on grounds of race, ethnicity or gender regardless of the businesses' ability to provide the product or service at a competitive price.

Some groups advocated setting goals by gender and race for each service category. They argued, for example, that goals for women should be excluded in the heavy construction category because women-owned businesses are not found in sufficient numbers for that type of work. Others argued that the rules would allow agencies to reach HUB goals using only one group, such as women, leaving racial minority groups out of the program. Opponents of the race- and gender-specific goals asserted that it would be difficult for many agencies to meet those goals and preferred the flexibility of non-specific goals. For example, a prime contractor in the Rio Grande Valley might have difficulty finding African-American subcontractors. Similarly, an East Texas construction project might not be able to meet the goal for Hispanic participation. The commission ultimately did not adopt proposed rules that would have included separate goals for women and racial minorities within each service group.

Final rules were adopted by the GSC and published in the *Texas Register* on September 19, 1995. Many of the changes were made in an effort to create a program that could withstand a challenge on *Croson* grounds. To attempt to avoid a quota system, the rules do not absolutely require any specific amount of state contracting with underutilized businesses. Instead, the rules direct state agencies to make a "good faith effort" to meet or exceed the HUB goals, either with direct contracts or indirectly through subcontracts. Good faith is presumed if the agency implements measures such as informing HUBs about procurement procedures, providing general contractors with lists of certified HUBs for subcontracting, adjusting bond and insurance requirements and dividing contracts into smaller lots to make them more available to small businesses.

The rules also allow some flexibility, recognizing that it may not be practicable to apply the goals to every contract. Agencies may set higher or lower goals for each contract after considering factors such as HUB availability, HUB utilization, geographical location of the project and the contractual scope of the work.

The overall state contracting goal dropped from 30 percent to 26 percent under the revised rules. The goals are based on the actual availability of HUBs and are broken down as follows, using U.S. Census Bureau standard industrial codes.

CONTRACTING GOALS

Heavy construction	11.9%
Building construction	26.1%
Special trade construction	57.2%
Professional services	20.0%
Other services	33.0%
Commodities	12.6%

The GSC's new rules also provide that a HUB "graduates" out of the program when its revenues or employment levels rise above a certain ceiling for four consecutive years, based on guidelines established by the U.S. Small Business Administration.

A rider in the General Appropriations Act (HB 1) of the 74th Legislature, sponsored by Sen. Rodney Ellis, added an enforcement mechanism to the HUB program. The provision requires state agencies, colleges and universities to adopt purchasing and contracting rules in accordance with GSC's HUB goals. State entities will be audited by the Office of the State Auditor, and noncompliance could result in budget cuts and a GSC takeover of purchasing authority.

Evaluating the HUB program

The HUB program came under scrutiny following an investigative report by the *Austin American-Statesman* in December 1994. The report found that less than 1 percent of the certified HUBs got most of the HUB contracts. Many of the biggest beneficiaries of the program are multimillion-dollar corporations, not the small businesses that the program was designed to benefit.

Some businesses were wrongly classified as HUBs, the report said. For example, Browning-Ferris Industries, a $4.3 billion company, was inaccurately classified as a woman-owned HUB. Following the report, the Attorney General's Office, the GSC and the Travis County District Attorney reviewed the issue of fraud in the certification process. In 1995 they began working on changes to the program designed to prevent fraud and make it easier to prosecute businesses that wrongfully gain HUB certification.

The GSC's 1994 disparity study reported that while overall minority contracting with the state increased substantially since the program's inception in 1991, the state consistently fell short of the contracting goals, as shown in the accompanying chart.

STATE CONTRACTS TO HUBS

	FY1991	1992	1993	1994	1995
Contract value (in millions)	$22.9	$69.0	$371.0	$604.0	$888.9
Percent of all contracts	1.4%	2.2%	8.3%	11.9%	15.9%
State goal	10%	10%	10%	30%	30%

Source: *General Services Commission*

Women-owned businesses are the major participants in and beneficiaries of the HUB program. In fiscal 1995, women-owned businesses composed the largest group of HUBs (45.23 percent) and received the largest percentage of HUB contracts (43.89 percent). Hispanic-owned businesses were the second-largest HUB group (28.30 percent) and received 35.30 percent of the HUB contracts. Asian Pacific Americans and Native Americans received a percentage of HUB contracts that exceeded their percentage representation of all HUBs. African-American businesses, however, constituted 17.66 percent of all HUBs but received only 7.86 percent of the HUB contracts. The disparity study reported that African-American business with the state has declined in some areas since the program began.

AGENCIES WITH LARGEST AND SMALLEST PERCENTAGE OF HUB EXPENDITURES (OF AGENCIES SPENDING MORE THAN $5 MILLION)

Agency	Total Expenditures	Total HUB Expenditures	% of Total Spending
Department of Information Resources	$27,460,073	$20,186,524	73.51%
Department of Protective & Regulatory Services	$47,107,394	$20,585,779	43.69%
Comptroller of Public Accounts	$41,876,766	$17,617,195	42.06%
University of Texas Health Center at Tyler	$27,147,829	$8,638,011	31.81%
General Land Office & Veterans Land Board	$7,162,801	$1,979,886	27.64%
Texas Department of Insurance	$5,754,358	$1,444,264	25.09%
Adjutant General's Department	$5,568,775	$1,360,497	24.43%
Texas A&M University System	$99,664,303	$24,326,852	24.40%
General Services Commission	$38,161,617	$8,709,961	22.82%
Texas Department of Health	$130,207,241	$29,360,528	22.54%
UT M.D. Anderson Cancer Center	$218,199,139	$15,678,641	7.19%
Tarleton State University	$8,709,607	$573,938	6.59%
Prairie View A&M University	$16,312,206	$1,034,115	6.34%
Texas Tech University Health Science Center	$26,332,594	$1,565,295	5.94%
Texas Agricultural Experiment Station	$16,750,103	$867,879	5.18%
Railroad Commission	$10,981,249	$523,856	4.77%
West Texas A&M University	$9,190,818	$416,474	4.53%
Stephen F. Austin State University	$11,225,567	$502,507	4.48%
Texas Engineering Experiment Station	$7,941,260	$337,235	4.25%
UNT Health Science Center	$13,786,991	$439,950	3.19%

Source: General Services Commission, *State of Texas Annual Historically Underutilized Business (HUB) Report for Fiscal Year 1995.*

Agencies vary widely in the amount they spend with minority and women contractors. In fiscal 1995 the Texas Department of Transportation spent the largest dollar amount with HUBs of any agency: $373,335,052, which was 19.67 percent of its total expenditures. Among all agencies with total expenditures of $5 million or more, the Department of Information Resources was the agency that spent the largest *percentage* of its procurement dollars with HUBs: $27,460,073, or 73.51 percent of its total expenditures. The table on Page 9 shows the top and bottom 10 agencies, among agencies with total expenditures of over $5 million, in terms of HUB spending percentages.

Agencies with low HUB percentages argue that HUB program performance can be affected by factors beyond their control, such as the location of the work and the type of work needed. Fewer minority contractors may be found in non-urban areas than in cities, and urban contractors may be unwilling to travel to solicit business, school and agency officials say. While colleges and universities may select among contractors statewide when spending funds from the state Treasury, for books and other educational-program items, they may focus on local contractors when spending *local* funds from student fees, grants and other non-Treasury sources on such operational expenses as construction projects and maintenance. For instance, Prairie View A&M, a predominantly black university, in fiscal 1995 spent 9 percent of its state funds with HUBs, but only 5 percent of its local funds with HUBs.

Another factor that may affect an agency's *reported* percentage of HUB spending is use of minority- and women-owned businesses that do not pay the fee to become state certified and therefore do not appear on the state bidders list, school and agency officials say.

State requirements for local jurisdictions

Most major Texas cities and other large governmental entities – counties, school boards and the like – use minority business contracting goals similar to the state's HUB program. The City of Houston has one of the largest programs in the state, certifying 1,725 minority and women businesses in seven counties. Since the program began 1984, Houston has spent almost $1 billion with certified businesses. Unsuccessful Houston mayoral candidate David Wilson – who campaigned in 1995 on an anti-affirmative action platform – is seeking supporters to force a referendum on repealing the city's minority contracting program.

The Legislature has compelled local affirmative action programs in certain instances. For example, Local Government Code sec. 252.0215 requires cities making an expenditure between $3,000 and $15,000 to notify at least two disadvantaged businesses of the contract opportunity.

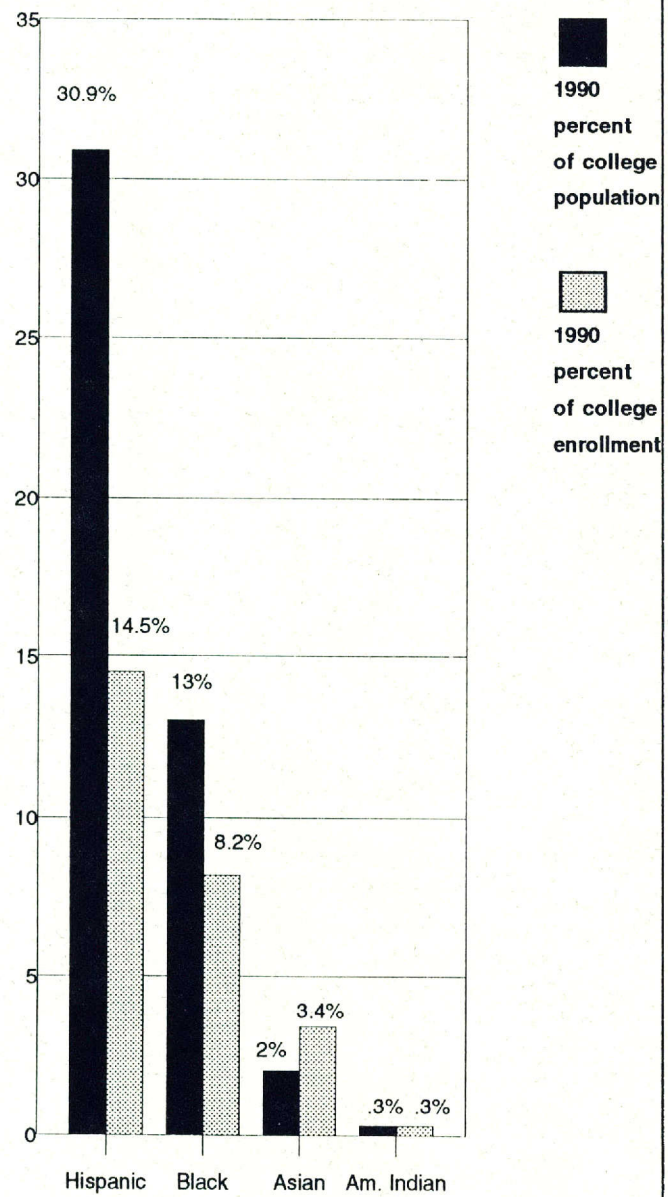
Access to higher education

The Texas Constitution at one time required "separate schools . . . for white and colored children," and Mexican-American children were segregated in many school districts. The constitutional provision was rendered unconstitutional by *Brown v. Board of Education* in 1954 and was repealed by the Legislature in 1969. Segregation in public institutions of higher education had been attacked before the *Brown* decision, when the United States Supreme Court ruled in *Sweat v. Painter*, 339 U.S. 629 (1950), that the University of Texas's establishment of a separate law school for blacks — with inferior facilities, faculty and reputation — was unconstitutional and Texas was forced to admit blacks into the university. Official discrimination against Mexican-Americans also has been found in Texas colleges and universities in various studies.

In 1978 an investigation by the U.S. Department of Health, Education and Welfare's Office of Civil Rights (OCR) found that Texas was not in compliance with Title VI of the 1964 Civil Rights Act, prohibiting discrimination by entities that

receive federal funds. The state was in danger of losing more than $300 million in federal funds. Blacks were found still to be segregated — the majority of them attending mostly black institutions — and Hispanics were found to be severely underrepresented at all schools. Texas was cited for failing to eradicate vestiges of its former statutorily segregated system and ordered to develop a plan to integrate its schools.

Minority College-Age Population Compared to Minority Enrollment At State Colleges and Universities



Source: U.S. Census Bureau and Texas Higher Education Coordinating Board

The Texas Plans

The state began negotiations with OCR on a desegregation plan to bring the state in compliance with federal law. Several attempts to devise a plan were rejected by OCR as ineffective. A plan was provisionally approved in 1981, and in 1983 OCR finally approved a five-year plan created by the Texas Higher Education Coordinating Board. The "Texas Plan" included minority enrollment goals, but did not recommend any specific actions for accomplishing those goals. The plan was criticized by black and Hispanic groups for its alleged failure to outline concrete steps for change. A second five-year plan — "Texas Plan II" — was adopted in 1989 without a federal mandate. The coordinating board reported in July 1995 that while minority enrollment in state colleges and universities had increased under the plan, the targeted groups were still underrepresented in higher education.

A voluntary six-year plan, called *Access and Equity 2000*, was adopted by the coordinating board in 1994. The plan emphasizes the need to prepare all Texans for employment in emerging high-tech industries. Minorities are the fastest growing segment of the population in Texas, and for the benefit of the state they must be at least proportionately included in the state's institutions of higher learning, according to the plan. The plan lists four goals for Texas colleges and universities:

- ☐ Increase the undergraduate graduation rates of black and Hispanic students to at least reach parity with the graduation rate of white students;
- ☐ Increase the number of black and Hispanic graduate and professional school graduates;
- ☐ Increase continually the number and proportion of black and Hispanic faculty, administrators and professional staff toward parity with their proportional representation in the population; and

☐ Increase the number of minorities and women on the governing boards of Texas public institutions of higher education.

The coordinating board recommends such remedies as collaborating with elementary and high schools to encourage black and Hispanic students to attend college and to prepare them for college; simplifying financial aid processes; promoting diversity and cultural tolerance on campuses; recruiting graduate students from predominantly minority institutions; expanding recruitment of black and Hispanic instructors and encouraging minority students to go into teaching. The plan also calls on the Legislature to encourage and support diversity on college and university governing boards, fund programs to support the goals of the plan, continue to support state financial aid and loan programs including the Hinson-Hazlewood loan program, and maintain the viability of historically minority institutions, such as Prairie View A&M and Texas Southern University.

The board itself lacks authority to implement the recommendations of *Access and Equity 2000*. Each of the colleges and universities is responsible for its own programs. Race-conscious admissions procedures are one method that universities may use to increase minority enrollment. The board reported in 1995 that while minority enrollment in Texas colleges and universities had been increasing, blacks and Hispanics remain significantly underrepresented, particularly at the master's and doctoral levels.

Hispanics make up about 31 percent of the college-age population in Texas; African-Americans, 13 percent, Asian-Americans, 2 percent, and Native Americans, 0.3 percent. While Asian-Americans and Native Americans are generally represented in universities in numbers at least roughly equal to their proportionate representation in the eligible age group, Hispanics and African-Americans continue to be underrepresented, and the numbers have not changed significantly since the U.S. Department of Health, Education and Welfare cited Texas for having a segregated higher education system in the late 1970s.

Challenge to UT program

The University of Texas is defending its law school admissions procedure in *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), a case pending before the 5th U.S. Circuit Court of Appeals. Four candidates — one white woman and three white men — sued the law school after they were denied admittance in 1992, claiming that they would have been admitted if the affirmative action program had not admitted less-qualified African-American and Mexican-American students.

Under UT's admissions procedure in 1992 the principal basis for acceptance or denial was an applicant's Texas Index ("TI") score, a composite number reflecting the applicant's grade point average and score on the Law School Admission Test, or LSAT. Nonminority applicants whose TI score was above a certain point were presumptively admitted, while those whose score was below a certain point were presumptively rejected, subject to review by the admissions committee. The files of applicants in the middle range were reviewed by each member of a three-person subcommittee of the admissions committee and voted upon. A limited number of middle-range applicants were admitted if they received two or three votes.

The cutoff score for presumptive admission of black and Hispanic students was lower than the one used for admitting non-minority applicants, and the cutoff for presumptive denial was higher. The middle-range minority applicants were reviewed by a separate minority subcommittee that recommended applicants to the full committee for admission.

U.S. District Judge Sam Sparks ruled that the admissions procedure under which the plaintiffs were denied admission was unconstitutional because white applicants and minority applicants were reviewed by separate committees, and thus did not compete against each other. An admissions quota program had been declared unconstitutional in the U.S. Supreme Court's 1978 *Bakke* decision on the same grounds. The judge also found that the educational benefits of having a diverse student

body and the need to offset past discrimination were sufficient "compelling governmental interests" to justify the race-based admissions policy.

The law school viewed the judge's opinion on the mechanics of its admission process as a moot issue since the procedure had been changed after the lawsuit was filed, eliminating the separate minority subcommittee review. Despite his ruling against the admissions procedure, Judge Sparks awarded the plaintiffs only $1 apiece in damages and the opportunity to reapply. One plaintiff reapplied, and was rejected again. Judge Sparks said the students did not prove that they would have been admitted even without the affirmative action program in place, since criteria other than grades and test scores weighed against them. Judge Sparks's decision was appealed to the 5th U.S. Circuit Court of Appeals, where oral arguments were heard in August 1995. The case will likely go on to the Supreme Court.

Another challenge to affirmative action was raised when in early 1995 a Native American Texas A&M University student questioned a university financial aid program for minorities that excludes Native Americans and Asian Americans. A university representative stated that the school has special scholarship programs only for blacks and Hispanics because only these two groups were found by the Texas Higher Education Coordinating Board to be underrepresented in higher education. Many schools are reviewing their scholarship programs and other affirmative action programs in light of the 4th U.S. Circuit Court of Appeals decision in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), which declared unconstitutional a scholarship program available only to African-American students at the University of Maryland.

The Colorado attorney general in January 1996 advised all the state's colleges and universities that race-based scholarships using public funds are unconstitutional. California has already eliminated affirmative action in the state university system. After intense public lobbying by Gov. Pete Wilson, the University of California Board of Regents voted in July 1995 to end affirmative action programs in admissions, hiring and contracting. Despite protests by student and faculty groups, the majority of the board of regents voted to continue the ban. However, the university administration agreed to a one-year delay in implementation of the admissions ban while they study its potential effects and alternatives to affirmative action for achieving diversity.

Any university system in Texas has the authority to take action similar to California's board of regents, but such action is considered unlikely considering Texas's history of segregated education and the continuing underrepresentation of minorities in Texas colleges and universities. Gov. Bush has stated that he would not support a similar end to affirmative action in Texas. Kenneth Ashworth, the Texas commissioner of higher education, views affirmative action as necessary to ensure minority participation in the prosperity and stability of the state as a whole.

State employment

A study by the Texas Legislative Council in 1969 concluded that blacks and persons with Spanish surnames were severely underrepresented in state employment. The few minorities employed by the state were concentrated in low-level, low-skilled positions. The senior positions were occupied almost exclusively by white males. When changes in federal civil rights laws extended antidiscrimination proscriptions to state governments in 1972, several Texas agencies were found by the federal Equal Employment Opportunity Commission to be in violation of Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination. The state was warned to take action to increase the numbers of minorities in state government. Texas had enacted a law in 1967 prohibiting discrimination in state hiring, but the law's enforcement powers were vested in local district attorneys' offices, and the antidiscrimination law was rarely invoked. (*See* Texas Civil Practices and Remedies Code sec. 106.001 et seq.).

Calls for changes in state hiring, led particularly by then-Rep. Paul Ragsdale (D-Dallas), continued throughout the 1970s. In 1973 a state Equal

Employment Opportunity Office was established to monitor state agency minority hiring efforts, review affirmative action policies and recommend changes. But it had no enforcement power and was widely viewed as ineffective. A provision of the 1973 general appropriations bill that would have required all state agencies to adopt an affirmative action plan was later found by then-Attorney General John Hill to be invalid on a technical ground. Agencies were nevertheless encouraged by then-Gov. Dolph Briscoe to put programs in place voluntarily.

In 1978 a federal EEOC investigation led to the filing of a discrimination lawsuit by the U.S. Department of Justice against nine Texas agencies: the Merit System Council, the Texas Employment Commission, the Department of Health, the Department of Human Resources, the Alcoholic Beverage Commission, the Texas Rehabilitation Commission, the Parks and Wildlife Department, the Department of Highways and Public Transportation, and the Department of Agriculture. Most of the agencies worked out consent agreements with the Justice Department, agreeing to end discriminatory practices, set hiring goals and implement programs designed to increase the hiring and promotion of minorities.

Legislative initiatives to create a state agency to enforce the 1964 Civil Rights Act began in 1967 but failed to pass until 1983, when the Texas Commission on Human Rights Act was enacted, authorizing the new commission to enforce Title VII in the state. The act now prohibits employment discrimination on the basis of race, color, disability, religion, sex, national origin or age. (*See* Texas Labor Code sec. 21.051.) The Texas Commission on Human Rights is responsible for investigating discrimination complaints and resolving disputes, and in some cases may file suit in civil court to enforce Title VII against an employer.

While the percentage of minorities and women in the state workforce overall now nearly equals that of the state population as a whole, complaints about particular agencies and situations continue to surface. Employment discrimination complaints may allege disparate treatment, in which discrimination is intentional, or *disparate impact*, in which a policy or action has a discriminatory *effect* even though it is race neutral on its face and there is no apparent intent to discriminate.

For example:

☐ The Sunset Advisory Commission recommended in 1990 that the Highway Department (now the Texas Department of Transportation) increase minority hiring and promotion and cited the lack of minority representatives on the department's advisory panel. In 1991 the U.S. Department of Transportation found that women and minorities were severely underrepresented in hiring and promotions at the Highway Department. The USDOT threatened to cut off $900 million of federal highway funds. The Highway Department was ordered to adopt an affirmative action plan.

☐ Gov. Ann Richards ordered the Texas Alcoholic Beverage Commission (TABC) to implement an equal opportunity employment plan in 1991 after an investigation of the agency showed that minority employment had failed to improve since the commission had agreed to end discriminatory practices in 1978.

☐ In 1993 Hispanic port of entry inspectors filed a class action lawsuit against the TABC, arguing that their job classification had a disparate impact on them, resulting in low pay. The job classification was not race or ethnicity specific, but 95 percent of the inspectors were Hispanic. The case was settled in August 1995 after the Legislature reclassified the position and $200,000 was distributed to the class of plaintiffs.

☐ The Texas National Guard implemented a new affirmative action plan in 1993 after the EEOC investigated discrimination complaints by minorities.

☐ The EEOC found in 1994 that the Texas Department of Public Safety (DPS) had used an oral interview process that effectively discriminated against blacks and Hispanics considered for promotion in the late 1980s.

PERCENTAGE OF BLACK, HISPANIC AND FEMALE EMPLOYEES IN TEXAS' 10 LARGEST STATE AGENCIES
Fiscal 1994

Agency	Employees	Black	Hispanic	Female
Texas Dept. of Criminal Justice	38,055	19.25%	10.81%	37.36%
Mental Health-Mental Retardation	33,756	26.71%	17.74%	67.12%
Department of Human Services	19,529	20.15%	32.55%	77.58%
Texas Department of Transportation	16,625	8.01%	17.54%	20.63%
Protective and Regulatory Services	7,231	19.98%	21.78%	82.02%
Department of Public Safety	6,595	9.27%	16.96%	40.42%
Texas Department of Health	6,441	9.12%	26.42%	68.39%
Texas Employment Commission	5,131	17.96%	24.06%	58.68%
Office of the Attorney General	4,010	15.23%	26.90%	66.75%
Comptroller of Public Accounts	3,286	14.91%	22.64%	53.86%

Source: Texas Commission on Human Rights, *Minority Hiring Practices Report*, SB 5, Article V, Section 99, 1994-95 Biennium.

☐ Also in 1994 a jury cleared the DPS of allegations that a black officer had been denied promotion to Texas Ranger because of his race, but the jury also found that the officer's criticism of discrimination in the department had played a role in his failure to be promoted. In 1996 female Texas Rangers filed a sexual harassment and discrimination lawsuit against DPS. One of the complainants was one of the first two women to be inducted into the Rangers in 1993.

Since 1989 the Legislature has included in the general appropriations bill a requirement that all state agencies develop and implement a plan to recruit and select qualified minorities, women and disabled persons. The Legislature has stated that all state agencies and institutions of higher learning should employ blacks, Hispanics and women in proportion to their availability in the statewide civilian labor force for each job category. The Legislature determines the available work force for each category on a statewide basis. The figures for the 1994-1995 fiscal biennium are shown in the chart at right.

Workforce in Texas: Goals for Agencies

Job Category	Black	Hispanic	Female
Officials/Administrative	5%	8%	26%
Professional	7	7	44
Technical	13	14	41
Protective Services	13	18	15
Para-Professionals	25	30	55
Admin. Support	16	17	84
Skilled Craft	11	20	8
Service/Maintenance	19	32	27

(*See* SB 5, the General Appropriations Act of 1993. The Legislature set the same goals for fiscal 1996-1997 in HB 1, the General Appropriations Act of 1995.)

Each agency and institution is left to devise its own affirmative action plan if an analysis of the work force shows that these groups are underrepresented at the agency. The chart at the top of this page shows minority and female employment figures at the 10 state agencies that employ the most state workers.

Some agencies use a plan developed by the Texas Commission on Human Rights – the "Bi-Modal Plus Factor Work Force Diversity Plan." The plan was designed to address the fact that a number of state agencies probably cannot justify affirmative action programs by demonstrating past or current discrimination, as Supreme Court rulings require. The plan relies on the court's position that race may

be used as a "plus" factor in hiring and admissions decisions, as long as the qualifications of the applicants are determined on the basis of additional objective factors uniformly applied to all applicants.

Under the plan all applicants are rated on factors such as education, experience and references. Each applicant is also given "work force diversity points" based on gender, race and national origin. The number of points assigned to each characteristic is determined by a formula based on the numbers already represented in the work force. Nonminorities, including white males, are also given "plus" points. Implementation of this type of plan by state agencies is voluntary.

Several agencies, including the Texas Alcoholic Beverage Commission, use the work force diversity methodology recommended by the Human Rights Commission. Drafters of the plan contend that it is defensible under the 14th Amendment and Title VII, but it has not yet been tested in court. A white male who was denied a promotion at TABC filed a complaint, pending at the EEOC in early 1996, alleging that the affirmative action plan violated his civil rights.

Amending affirmative action laws

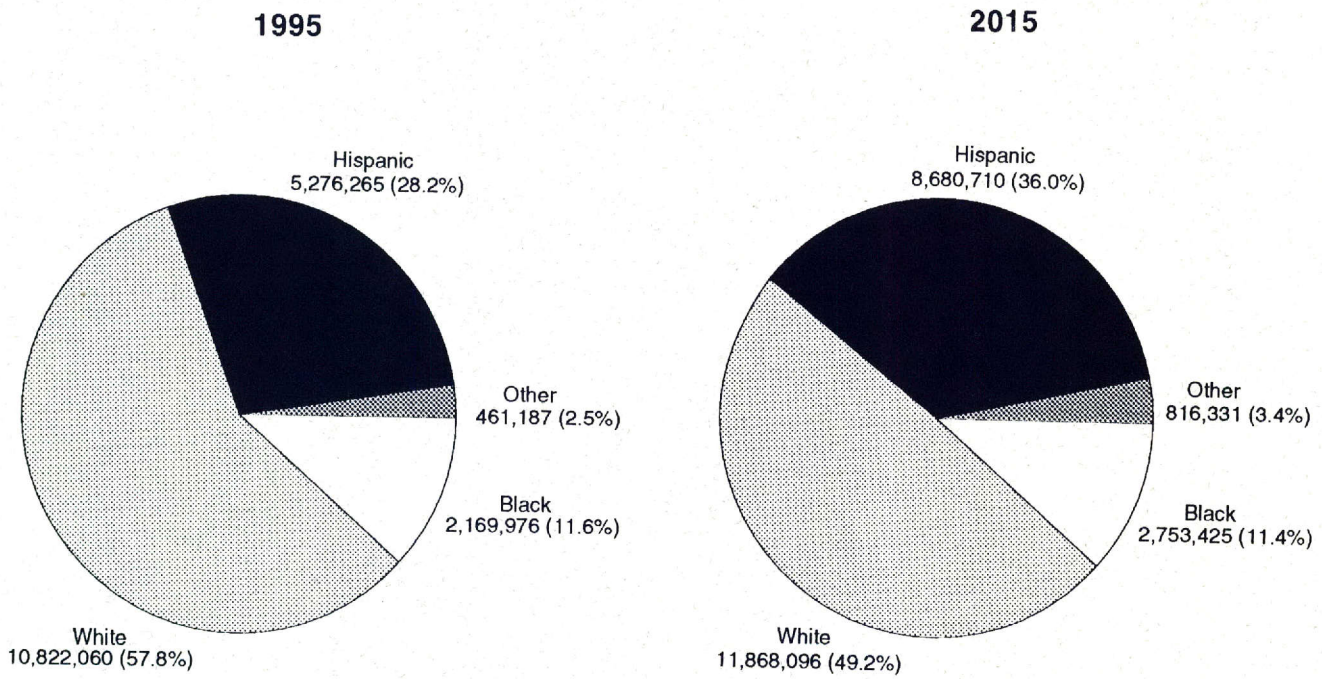
Modification or elimination of affirmative action programs is the aim of numerous legislative proposals and pending court cases. Both state legislatures and Congress are debating the issue.

Texas

The 74th Texas Legislature considered dozens of proposals related to affirmative action during its session in 1995. The most widely discussed was SJR 45 by Sen. David Sibley (R-Waco), proposing a constitutional amendment stating:

"The state, an agent of the state, or a political subdivision of the state may not discriminate against or grant preferential treatment to a person because of the person's race, sex, sexual orientation, color, ethnicity, or national origin in

Texas Population Forecasts



Sources: U.S. Census Bureau and Texas Comptroller of Public Accounts

the operation of the state's system of public employment, public education, or public contracting."

Rep. Nancy Moffat (R-Southlake) introduced a similar resolution (HJR 120) in the House. HJR 120 lacked the proposed protection from discrimination based on sexual orientation that Sen. Sibley had included in his resolution. The senator said the inclusion of the provision in the Senate legislation had been inadvertent on his part.

Both resolutions died in committee after drawing strong opposition from minority lawmakers who said such an amendment would effectively end affirmative action by the state.

Proposals to *expand* affirmative action programs also stalled in the 74th Legislature, as did almost all proposals relating to HUBs. HUB supporters did, however, add a rider to the appropriations bill (HB 1) that requires state agencies, colleges and universities to adopt purchasing and contracting rules in accordance with GSC's HUB goals. State entities will be audited by the state auditor, and those entities not in compliance may have their purchasing power taken over by the GSC.

Proposals that died included:

☐ The Senate passed a proposal by Sen. Barrientos (SB 879) to allow big-city fire departments to implement programs to bring the numbers of women and minority firefighters more in line with their numbers in the cities' general populations, adding flexibility to the state law requiring hiring and promotion of firefighters with the highest test scores. The bill was not reported by the House Urban Affairs Committee.

☐ Sen. Ken Armbrister offered a floor amendment to the public utilities bill (SB 373) that would have extended the state government HUB contracting goals to public utilities. The amendment passed on the second reading, but opponents held up the final vote on the bill for two weeks until a compromise was reached, added as a provision in the telecommunications bill (HB 2128), allowing the Public Utility Commission to encourage, but not mandate, utility company contracts with HUBs.

☐ Bills by Sen. Rodney Ellis to restrict eligibility for the HUB program died in committee. Certification and goal credit would have been denied for HUBs that exceeded a certain size (SB 749) or were not primarily responsible for performance of the contract (SB 1202).

☐ Sen. Royce West introduced a proposal to revive the $50 million bond program for start-up HUBs that was rejected by voters in 1993. The proposal died on the Senate calendar.

California

The California Legislature recently considered at least 10 proposals to repeal affirmative action programs. One was a proposed constitutional amendment similar to the Sibley proposal in Texas prohibiting discrimination or preferential treatment. Its supporters could not garner the two-thirds vote necessary to get a proposed constitutional amendment on the ballot. Instead they used the petition process (not authorized in Texas) to get an initiative on the November 1996 ballot. Two white conservatives, Tom Wood and Glynn Custred, formed the California Civil Rights Initiative ("CCRI") to conduct the petition drive.

The core of the proposed California amendment reads: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." The definition of "state" in the proposed amendment includes cities, counties, school districts and any other political subdivision or governmental entity.

Other states

The National Conference of State Legislatures reported that 37 states considered legislation relating to affirmative action programs in 1995. Repeal of affirmative action in contracting, employment and education was proposed, but not enacted, in Colorado, Florida, Georgia, New Mexico, Oregon, Pennsylvania, South Carolina and Washington, as well as Texas and California.

Laws implementing or expanding affirmative action programs were enacted in Hawaii, Illinois, Louisiana, Michigan, Nebraska, Nevada, New York, Rhode Island and South Dakota. New Jersey Gov. Christine Todd Whitman signed a law giving minority- and women-owned businesses greater access to state contracts. Gov. Whitman stated in December 1995 that she supports affirmative action, but hopes it eventually is based on economic status rather than race or sex.

Federal government

Following a review of federal affirmative action programs, President Clinton in July 1995 said the programs remain necessary because of persistent racial discrimination and disparity. The president nevertheless instructed federal agencies to comply with the 1995 *Adarand* decision, in which the Supreme Court ruled that federal affirmative action programs, like state programs, are subject to the strict scrutiny standard of review.

He also asked agencies to exercise four principles in formulating affirmative action plans: (1) no quotas in theory or practice; (2) no illegal discrimination, including reverse discrimination; (3) no preferences for people who are not qualified for the job or other opportunity; and (4) retirement of affirmative action programs when they are no longer needed. "Mend it, but don't end it," the president said.

Congressional Republicans led efforts in 1995 to eliminate federal affirmative action in contracting, hiring and other programs. Congress eliminated a federal program that gave a tax break to companies that sell television and cable stations to minority-owned businesses.

In July 1995 U.S. Sen. Phil Gramm of Texas unsuccessfully offered an amendment to the legislative branch appropriations bill that would have prohibited the government from awarding any contract on the basis of race, color, national origin or gender. Sen. Robert Dole (R-Kan.) and Rep. Charles Canady (R-Fla.) introduced legislation to end federal affirmative action. A subcommittee of the House Judiciary Committee began hearings on Rep. Canady's bill in December 1995.

Some federal laws require that Texas implement affirmative action plans. For example, state recipients of federal highway funds must spend at least 10 percent of the appropriated funds with disadvantaged business entities, or DBEs. TxDOT established a 15 percent DBE goal for use of federal highway funds in fiscal 1996.

The U.S Supreme Court

Supreme Court decisions on affirmative action have revolved around the question of whether affirmative action laws violate the equal protection clause of the U.S. Constitution's 14th Amendment and provisions of the Civil Rights Act of 1964.

Constitutional challenges to affirmative action *per se* have been rejected by the court, but the court has spelled out the standard by which race-based and gender-based laws and programs, including affirmative action, must be judged.

Strict scrutiny: the *Croson* decision

Key requirements of race-based affirmative action programs, as established by court decisions, include "strict scrutiny" of the programs to assure that they are "narrowly tailored" to serve a compelling "governmental interest." Remedies must target discrimination and disparity in a particular area, not general societal discrimination.

The Supreme Court articulated the need for strict scrutiny and proof of specific disparity in laws governing affirmative action in government contracting in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989). The decision changed the way that states and cities formulate contracting goals. In *Croson*, the court considered a challenge to the City of Richmond's plan requiring prime construction contractors to subcontract at least 30 percent of the dollar amount of each city contract to one or more "Minority Business Enterprises."

Applying the "strict scrutiny" standard, the court held that Richmond's plan was unconstitutional because the city had not shown any past discrimination against minorities in the Richmond construction industry. The fact that minorities had been victims of general societal discrimination was

not enough to justify the program, the court held. The court also found that the 30 percent set-aside program was not "narrowly tailored" to remedy that discrimination. For example, the minority-business plan included Spanish speakers, Asian Americans, American Indians, Eskimos and Aleuts, despite a lack of any evidence of past discrimination against these groups in the city's construction industry. Also, the city had not considered using alternative, race-neutral means to increase minority participation in city contracting.

The court concluded that to justify the program, the city would have had to identify past discrimination in the construction industry against the groups it sought to include in the program. This could be accomplished, for example, by ascertaining how many minority enterprises were available in the Richmond construction market versus how many participated in city construction projects. In response to the *Croson* decision many governmental entities, including the State of Texas, undertook "disparity studies" to determine whether there was evidence of discrimination against women and minorities to support contracting goals.

Racial and ethnic classifications call for strict scrutiny because they are "inherently suspect," the court has said. Justice O'Connor wrote in *Croson* that "the purpose of strict scrutiny is to `smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."

Strict scrutiny at federal level: *Adarand*

The strict scrutiny approach applied to the City of Richmond's plan in *Croson* was extended to federal programs by the court in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). In that case, a majority-owned construction company challenged the U.S. Department of Transportation's practice of giving financial incentives to prime contractors on highway construction projects if they hired subcontractors owned by "socially and economically disadvantaged individuals."

The 4th U.S Circuit Court of Appeals upheld the legality of the program, but the Supreme Court remanded the case because the Court of Appeals had not applied the "strict scrutiny" standard to the federal program. In doing so the court overturned its decision in *Metro Broadcasting Inc. v. FCC*, 110 S. Ct. 2997 (1990), which had held that *federal* affirmative action programs need only satisfy the lower "intermediate" scrutiny standard.

The *Adarand* decision may have limited impact on the State of Texas, because the state has already examined its affirmative action contracting program against the strict scrutiny standard. However, some experts say the decision indicates the court's increasing willingness to strike down affirmative action programs in whatever context they are found.

Changes have already begun on the federal level. In July 1995 President Clinton instructed all federal agencies to comply with the *Adarand* decision. In October 1995 the Pentagon announced that it would end its program that sets goals for contracting with minority-owned businesses.

Intermediate scrutiny in gender-based programs

Gender-based affirmative action programs, like race-based programs, are considered inherently suspect and subject to a high level of scrutiny by the courts. However, courts judge them using the less strict standard of *intermediate* scrutiny. Under the intermediate scrutiny test, gender-based plans must be "substantially related" to an "important governmental interest."

A variety of interest groups, scholars, judges and others have advocated applying the strict scrutiny test to gender-based affirmative action. The U.S. Supreme Court has an opportunity to change the standard in a case pending before the court, *United States v. The Commonwealth of Virginia*, in which the Justice Department is challenging the Virginia Military Institute's policy of excluding women from the all-male state-funded college. The solicitor general, who argues cases to the Supreme Court on behalf of the federal government, has urged the court to apply the strict scrutiny standard.

Quotas: The *Bakke* Decision

Use of strict scrutiny in affirmative action decisions dates from 1978 when the Supreme Court ruled against use of admission quotas in state universities in *Regents of the University of California v. Bakke*, 98 S. Ct. 2733 (1978). In *Bakke* a white male was denied admission to the University of California at Davis Medical School. The school had set aside 16 places in a class of 100 for "disadvantaged" and minority applicants. A majority of the justices agreed on the results of the case but not the reasoning; thus, there is no majority opinion in the case. However, Justice Lewis Powell's opinion is considered by many to be the opinion of the court. He wrote:

☐ Preferring members of one group for no other reason than race is discrimination and is absolutely forbidden by the Constitution.

☐ Racial preferences may be used only to counteract the effects of identified discrimination in the area to which the preference applies. It is not enough that members of the targeted group were victims of general societal discrimination;

☐ The attainment of a diverse student body is a constitutionally permissible goal for an institution of higher learning.

The court objected to the university's means, not its goal. Quotas did not give white applicants the opportunity to compete for those spaces in the class reserved for minorities, the court said. White applicants were absolutely excluded from being considered for those slots on account of their race. The court found the procedure to be a violation of the equal protection clause of the 14th Amendment. But the court also said that universities are allowed to make race a "plus" factor in admissions decisions, just as factors such as grades, test scores and recommendations are considered. Such a system allows non-minority applicants to compete fairly with minority applicants, the court felt.

Strict scrutiny: Scholarships

The strict scrutiny approach has also been applied to programs establishing scholarships for minority students only. The 4th U.S. Circuit Court of Appeals upheld a challenge by a Hispanic student to a scholarship program at the University of Maryland for which only African-Americans were eligible. (*Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).) The court held that the university did not prove that current problems — such as low African-American enrollment, retention and graduation rates, the school's poor reputation among blacks and the hostile campus environment — were caused by past discrimination. General societal discrimination was not enough to show a "compelling need" for race-exclusive privileges. The court also held that the scholarship program was not "narrowly tailored" to remedy past discrimination. The Supreme Court let the Court of Appeals decision stand by declining to review it.

Public employment

State affirmative action hiring plans also must be narrowly tailored to serve a compelling governmental interest. Public and private employers may voluntarily institute affirmative action hiring plans to remedy past discrimination by the employer or to eliminate racial imbalance in traditionally segregated job categories. The plan must be temporary and must not impose too intrusive a burden on nonminorities.

In *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979), the Supreme Court considered the legality of a collective bargaining agreement that reserved 50 percent of the spaces in a training program for black employees until the percentage of blacks in the plant reached the percentage of blacks in the available work force. The court held that voluntary affirmative action plans are not prohibited by Title VII as long as they are temporary and do not absolutely preclude opportunities for nonminorities.

The same criteria were applied to public employers in *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S. Ct. 1442 (1987). In *Johnson*, the court upheld an affirmative

action policy that resulted in a woman being promoted over a white male with higher test scores. The court held that the plan was legally acceptable because it was flexible, temporary and did not set quotas.

However, in *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986), the court ruled that a collective bargaining agreement providing minority school teachers with protection against layoffs did not pass the strict scrutiny test. The agreement provided that in the event of layoffs, the percentage of minority teachers laid off could not exceed the percentage of minorities employed at the time. As a result, nonminority teachers with more seniority were laid off while minorities with less seniority were retained. The court felt that layoffs, as opposed to hiring, imposed too intrusive a burden on nonminority teachers and that the board of education did not have a compelling governmental interest in retaining less senior minority teachers.

Hiring quotas have been upheld in some circumstances. In *United States v. Paradise*, 107 S. Ct. 1053 (1987), the Supreme Court considered whether a district court's temporary plan for increasing the numbers of blacks being promoted in the Alabama Department of Public Safety violated the constitution. The plan required one black trooper to be promoted for every white trooper promoted until the department devised an equitable promotion scheme. "The Government unquestionably has a compelling interest in remedying past discrimination by a state actor," the court said, pointing out that the Alabama DPS had excluded blacks from employment as state troopers for almost 40 years in "pervasive, systematic, and obstinate" violation of the 14th Amendment. In 1972 there had *never* been a black trooper employed by the Alabama DPS, and in 1978 there were *no* black troopers at the rank of corporal or above. The plan was "narrowly tailored," the court found, because it was necessary to eliminate the effects of long-term discrimination, it was flexible and temporary, and the numerical relief ordered bore a proper relation to the percentage of non-whites in the relevant work force.

The affirmative action debate

The government's role in affirmative action is also being debated outside the courtroom. Summaries of the views of the supporters and the opponents of affirmative action follow.

Supporters say

Affirmative action programs are needed to remedy years of race and sex discrimination. Laws once limited the rights and privileges of minorities, and racist and sexist attitudes persist even though discrimination is now against the law. Denial of equal rights and equal protection left minority groups underrepresented, and now remedies are required.

Minorities are the fastest growing segment of the country's population, and society should ensure, for the sake of the state and the nation, that they have education and employment opportunities. Societies become unstable when large economic disparities divide races and ethnic groups. Minorities must be included in the mainstream to assure a society that is economically prosperous, socially tranquil and politically stable.

It is a misconception that minorities and women are getting more than their fair share of jobs and other opportunities. Inequities have not yet been erased. A study by the federal Glass Ceiling Commission in 1995 found that 97 percent of the senior managers of Fortune 500 companies are white and 95 to 97 percent are male. The American Association of University Women reports that 72 percent of school teachers are women, but only 28 percent of principals and only 5 percent of superintendents are women.

Even when women and minorities hold high positions they generally are paid less than white men. For example, African-American men with professional degrees earn 79 percent of the amount earned by white males who hold the same degrees and are in the same job categories. In Texas in fiscal 1995 the state gave 84 percent of all contracts to businesses owned by white males.

Without affirmative action, minorities will be hired much less often or not at all. Simply enacting anti-discrimination laws does not result in equal treatment. The senior and decision-making positions lack minorities and women to act as role models and recruiters. Furthermore, racism is so pervasive that even purportedly objective factors used in hiring and admissions decisions may be discriminatory. For example, studies have concluded that many standardized tests are biased against certain minorities.

Few minorities are chosen for jobs or school admission solely because of their race. Even those who may not meet traditional requirements — which themselves may have elements of discrimination — usually are sufficiently competent to succeed. Many of society's greatest minority and female leaders benefitted from affirmative action, and they are no less capable than their white male counterparts. Affirmative action creates an opportunity for success, but it is up to the individual to succeed.

"Reverse discrimination" is rare. Persons who claim to be the victims of reverse discrimination often were actually not qualified for the position or contract that was awarded to a minority. For example, in the Hopwood case against the University of Texas law school the judge found that the white plaintiffs did not prove that they would have been admitted even in the absence of an affirmative action program.

The burdens of being black or Hispanic in this country far outweigh the benefits of affirmative action. Racial minorities face discrimination in lending, insurance, housing, public accommodations and treatment by law enforcement authorities, to name only a few. Affirmative action does not create a preference for minorities; it offsets preferences in favor of nonminorities.

Diversity itself is a worthy goal and creates a beneficial mixture of cultures, customs and different approaches to problems. This is increasingly important as all countries of the world are brought closer together. The costs of affirmative action are exaggerated by opponents and are more than offset by the benefits to society of a diverse work force that offers opportunities to all groups.

Privileges rarely are granted on merit alone. People often get jobs because of family relationships or as political favors. Legacy admissions programs in universities give priority to applicants who are children of alumni. Remedying discrimination is a compelling goal that justifies using race as a "plus" factor along with other measures of merit.

Increased minority graduation rates create a corps of workers inclined to assist the poor and the disadvantaged. For example, the black student who was admitted to the University of California Medical School at Davis in place of Allan Bakke in 1973 went on to become a doctor whose practice is dedicated solely to poor people whose care is funded by the Medicaid program.

Even proponents of affirmative action hope that some day affirmative action will not be needed. But that day has not yet come. Minorities and women have been denied equal opportunities for centuries, while affirmative action is only a few decades old. Its full benefits need more time to be realized.

Opponents say

Affirmative action is a euphemism for unfair, unconstitutional reverse discrimination against whites and men. Qualified persons are being denied opportunities because of their race and gender. Granting rights and privileges on the basis of race violates the most important principles of the U.S. Constitution. Even this country's most honored civil rights leader – Dr. Martin Luther King, Jr. – advocated being judged on the content of one's character, not the color of one's skin.

Individuals who did nothing to perpetrate the wrongs that affirmative action addresses should not be penalized by the remedies. Whites competing for jobs today never owned slaves, and most entered the work force after

segregation laws fell. They may not harbor any racist views, and they may never have discriminated against anyone on the basis of race.

Likewise, those who have never suffered from discrimination should not benefit from its remedies. Individual acts of discrimination should be dealt with when they occur, instead of granting a privilege to a whole class of people regardless of whether they have ever been discriminated against.

Affirmative action emphasizes differences, divides the citizenry and creates resentment. Instead of integrating society, it impedes progress toward the goal of a color-blind society.

Affirmative action can give minorities more than their fair share of jobs, promotions and other privileges. Privileges should be granted on the basis of merit alone. It is unfair to give a job or a place in college to a person who does not meet the qualifications that bind the majority of people.

Affirmative action can lower the self esteem of minorities, who may feel degraded for receiving a privilege solely because of their race. It also stigmatizes its beneficiaries, who may be viewed as incompetent and may fail to succeed. Minorities are disproportionately represented in the lower half of the class in schools where they were admitted under affirmative action programs. Many might fare better in institutions where they could succeed.

Affirmative action is expensive. California's Joint Legislative Budget Committee estimated that ending affirmative action could save tens of millions of dollars annually in the cost of public employment, contracts and education.

The lack of minority representation in certain fields is not necessarily the result of discrimination. Sometimes, too few qualified minorities apply. Or women choose family over jobs.

Affirmative action has been little help to minority groups. The primary beneficiaries are white females. Abuses may occur when, for instance, a culturally white male uses a distant Native American ancestor to qualify for preferences or a huge business manages to qualify as "historically disadvantaged."

Hardly a racial or ethnic group in this country has escaped discrimination or unfair treatment. It is not fair that only some of the groups benefit from affirmative action, and it would be impossible to give every group a privilege. The answer to overcoming disadvantages is not special treatment; it is hard work and determination.

Some argue that all preferences, such as legacy preferences for children of alumni in college admissions, are unfair and should be ended and replaced with pure merit selection. Using affirmative action to counter special preferences only compounds the unfairness.

At the least affirmative action should be restricted to assisting the poor, regardless of race or gender. Large businesses owned by minorities and women are not "disadvantaged" and should not be entitled to a windfall merely because of the race, ethnicity or gender of their owners. Similarly, college-bound minority students from financially secure families have the educational background and money resources to compete without special admissions programs or financial aid.

The state should focus its resources on helping women and minorities to compete without affirmative action. For example, primary and secondary education can be improved so that minorities are better able to compete in higher education and in job markets.

— By Barbara Griffin

A list of Texas race-based affirmative action laws in the areas of minority business contracting, education, governing boards employment has been compiled by the House Research Organization and is available from the HRO, Room E2.180, Capitol Extension.

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House Research Organization
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910
(512) 463-0752
FAX (512) 463-1962