

James Robb is senior analyst for THE SOCIAL CONTRACT. This paper is based on his monograph *Affirmative Action for Immigrants: The Entitlement Nobody Wanted* which is available from The Social Contract Press. See the ordering instructions at the end of this article.

# Affirmative Action for Immigrants

## The Entitlement Nobody Wanted

By James S. Robb

### Summary of Findings

Over the past 30 years, affirmative action (racial preference) policies have been extended to more and more racial and ethnic groups, despite the fact that they were originally created to address a rather narrow set of injustices against American blacks.

Now, through a combination of poorly written legislation, murky executive orders, and general inattention, *millions of immigrants are eligible for affirmative action benefits upon arrival.* This startling phenomenon is caused by several things.

First, affirmative action policy makes no distinctions concerning country of origin. To meet affirmative action goals mandated by the government, a firm need only hire a certain number of employees from various racial/ethnic groups, *regardless of whether or not they are citizens.*

Second, the massive immigration influx of the past three decades has brought in immigrants who are mostly Hispanic, Asian, or black. Thus, *most new immigrants automatically become protected minority group members.* In 1993, for example, 74.9 percent of legal immigrants came from countries whose citizens are generally considered members of the protected racial/ethnic groups.

Completing this disturbing picture is that *Congress*, apparently by accident, wrote language into its Immigration Reform and Control Act of 1986 which effectively *made it illegal to bar immigrants from affirmative action programs.* In the 1986 bill, Congress required immigrants to be treated exactly like native-born citizens for purposes of employment. Thus, when affirmative action is practiced by employers, the legislation effectively *entitles* immigrants to those benefits.

So, employers not only *can* include non-native born persons in their affirmative action programs, *they must.* Immigrants gain these benefits despite the fact that affirmative action was designed to redress grievances of America's historic minorities, primarily blacks.

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An abundance of evidence demonstrates that immigrants profit heavily from these programs:

- In faculty hiring, universities typically do not even inquire about the citizenship of prospective teachers. Stanford University, for example, investigated the matter and found that more than half of its ethnic faculty members were actually foreign-born.
- The hard sciences in American universities are increasingly dominated by foreign students. For example, 10 foreign Asians now receive Ph.D.s in the hard sciences to every one earned by an American-born Asian. And 46 percent of all Ph.D.s awarded here in the sciences now go to non-citizens, most of whom are ethnic minorities. As a result, industry and academia are increasingly turning to foreign-born scientists to meet affirmative action hiring goals.
- Immigrants have also begun to make great inroads into minority contractor setasides (government contracts reserved for minority-owned firms). In Washington, D.C., for example, 60 percent of minority setaside contracts awarded by the city during the late 1980s went to firms owned by a family of Portuguese immigrants.
- Affirmative action for immigrants has become an issue in the parceling out of municipal jobs. In Los Angeles, a tremendous struggle has begun between black Americans, who now hold 30 percent of LA County's 80,000 public jobs, and Hispanics, many of whom immigrated from Mexico.

During *The Social Contract's* five-month investigation into affirmative action being awarded to immigrants, we worked out four steps which we believe would eliminate the granting of affirmative action benefits to immigrants (if affirmative action is retained):

1. The government should start keeping statistics by nationality to determine which groups are now benefiting from affirmative action;
2. The government should clarify who counts as an authentic protected minority;
3. A legislative and administrative consensus should be reached to keep immigrants out of affirmative action programs;

4. The president should sign an executive order stating that immigrants do not count toward the fulfillment of affirmative action goals. Further, Congress should adopt legislation allowing employers to exclude immigrants from affirmative action.

## Why Nobody Seems To Know

Well before this investigation began, strategically located advocates of affirmative action began to grow alarmed that newly arrived immigrants were slipping into racial preference programs even though the immigrants had never experienced the conditions which caused the programs to be developed.

According to Ricky Gaull Silverman, vice-chairman of the Equal Employment Opportunity Commission (EEOC), immigrant participation is "the ultimate nightmare of affirmative action. It is its Achilles' heel."<sup>1</sup>

Her concern that immigrant participation will undermine affirmative action has not, however, resulted in EEOC's gathering much data on the subject. In fact, none of the government agencies and offices charged with administering and enforcing affirmative action policy has done a formal study or seems to possess any hard data on the subject. Likewise, the General Accounting Office, which has studied numerous aspects of affirmative action policy and programs, has skipped this angle.

Johnathan Tilove, a writer for Newhouse News Service, spent several months investigating whether immigrants enjoy affirmative action benefits. Concluding that they often do, Tilove wondered why apparently no one had written on the subject before. "[Immigrant participation] is a wholly unintended, largely undebated, and virtually unreported phenomenon that goes to the guts of American race and immigration policy," he wrote.<sup>2</sup>

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It is almost as though the question poses an embarrassment to the affirmative action establishment. Perhaps the reluctance to look too closely at immigrant involvement in affirmative action is just part of a general hesitation among more liberal social scientists to undertake research which might tend to undermine support for the policy. That is the view, at least, of Frederick R. Lynch, of the Claremont Institute, who has studied and criticized racial and ethnic preference programs for several years. [See the interview with Professor Lynch in this issue beginning on page 98.]

"Affirmative action is the Bermuda Triangle of

sociology," he said. "You fly into it, and you may never be heard from again." Recently, he said, he had attended a convention for sociologists in which 600 papers were presented. Not a single paper dealt with affirmative action, which is surprising in light of the developing national debate over the issue. He said his research into the subject has taken a toll. "I've lost job opportunities, promotion opportunities," Lynch stated. "I've damn near had to leave the field."<sup>3</sup>

On the other hand, libertarian-type conservatives, who are usually critical of anything connected with affirmative action, shy away from scrutinizing this particular topic because of their support for a wide-open immigration policy. If some immigrants are shown to be involved in what are to them unacceptable programs (i.e., affirmative action), that might tend to weaken support for the historically high levels of immigration in place today.

The lack of data on immigrant participation may also be, in part, the result of mere benign neglect. Administrators throughout the government and private sectors, when contacted by the author for their knowledge of immigrant participation, confessed to near-total ignorance of the subject. Perhaps no one has thought the topic important enough to merit much research. As will become clear, however, many people involved in affirmative action programs are very much concerned.

Perhaps a deeper reason for the lack of research is that the topic is potentially so painful. For if immigrants are indeed found to be displacing, to whatever degree, American minorities in affirmative action programs, some hard choices will have to be made. Giving immigrants an immediate advantage over U.S.-born historic minorities is the kind of social engineering few Americans are likely to condone. It may be that immigrants have to be explicitly barred from some privileges native-born American citizens enjoy. Or perhaps the web of myriad affirmative action programs will have to be scaled back. Or both.

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In either case, the prospect of immigrants moving into affirmative action programs poses a serious threat to not one, but two proverbial cows sacred to established interest groups—wide-open immigration and unrestricted affirmative action.

## The Origins of Affirmative Action

In 1964, Congress passed the most far-reaching racial justice legislation in U.S. history, the Civil Rights

Act. This legislation made discrimination illegal in everything from drinking fountains to public accommodations. In Title VII, section 703(a) of the act, employers were forbidden to discriminate in the hiring or treatment of personnel "because of a person's race, color, religion, sex, or national origin."<sup>4</sup>

Significantly, although Congress' biggest concern was to remedy discrimination against blacks, the act's broad language had sweeping implications for many other groups. The Civil Rights Act effectively forbade discrimination against Asians, Hispanics, Jews, and women, to name just a few affected groups.

The term "national origin" appeared ambiguous, however, leaving unclear just what Congress meant by it. Were employers required to hire immigrants even when U.S. citizens were available? Or did it only mean that employers could not turn people away based on where their *ancestors* came from? In what circumstances — if any — could American companies, schools, and governmental bodies prefer citizens over non-citizens?

Even though a later Supreme Court decision and several important clauses in subsequent relevant legislation attempted to straighten matters out, confusion over these questions has continued to this day. In fact, misunderstandings of the term "national origin," as used in the Civil Rights Act of 1964 and in the Immigration Reform and Control Act of 1986, have contributed heavily to the controversy over immigrants participating in affirmative action programs.

## **Tentative First Steps Toward Affirmative Action**

To enforce the tenets of the Civil Rights Act, Congress instructed the executive branch to implement appropriate regulations. The term "affirmative action" first cropped up in the pivotal Executive Order 11246, issued by the Johnson Administration in September, 1965. This rule required federal contractors to take a color-blind approach in their hiring practices. "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin," the order states.<sup>5</sup>

This first use of the affirmative action concept was a straight-forward attempt to apply Title VII to government-controlled economic sectors. The emphasis was on equality of treatment rather than the achievement of a specific result. In fact, Congress, in debating the Civil Rights Act, had taken pains to prevent the legislation from sanctioning preferential treatment of any minority group. In Section 703(j), Title VII states,

*Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any group because of the race, color, religion, sex, or national origin of such individual or group on*

*account of an imbalance which may exist...*<sup>6</sup>

Backers had repeatedly stressed this point on the floor of the Senate during the debate. Indeed, Sen. Humphrey declared that he would literally eat the bill if it were used to mandate race-preference hiring practices.<sup>7</sup>

## **Affirmative Action Grows Ambitious**

During the Nixon Administration, affirmative action metamorphosed into the collection of social policies we recognize today. In the waning days of LBJ's term, regulations issued by the Department of Labor's Office of Federal Contract Compliance first compelled all federal contractors to establish "goals and timetables" for hiring more minorities and women, rather than expecting them merely to avoid discrimination against individual persons.

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Forcing this change on federal contractors carries more of a punch than is immediately obvious. Since most large corporations and virtually all universities and hospitals vie for federal contracts, Labor Department mandates, including affirmative action rules, directly affect some 90,000 organizations employing 25 million people.<sup>8</sup>

In 1969, President Nixon's Labor Department put considerably more teeth into "goals and timetables." A dispute had been brewing for some time over the low number of African-Americans in Philadelphia's construction industry. Investigating, the department had found that many skilled black workers were available, but few were used. The culprits turned out to be the local union hiring halls, which refused to add blacks to the roster. The Labor Department lacked the rule-making authority to order the labor unions to alter their policies.

Concerned about recent black rioting in the inner cities, the department took a drastic step. It told the Philadelphia contractors they must develop and meet, or make every effort to meet, specific numerical hiring goals to be considered for contracts, this even though it was determined that the contractors were not responsible for the problem.<sup>9</sup>

As the 1970s progressed, various governmental agencies continued to broaden and deepen the impact of affirmative action. One of the largest, and most controversial, affirmative action policies is minority contractor set-asides. It reserves a certain percentage of government contracts for firms at least 51 percent

minority owned. Programs using this approach awarded minority-owned firms \$6 billion in defense contracts in 1994, \$4 billion in contracts administered by the Small Business Administration, and several billion more dollars for transportation contracts.

## Color Makes a Comeback

To enforce the new quasi-quotas, the government found it necessary to introduce a system of racial and ethnic typing. In order to be certain employers were not discriminating by race or ethnicity, the administration decided to tag virtually everybody by race or ethnic group. Since the protective language of Title VII was so broad, Americans were to be divided into five racial and ethnic categories: White, Asian/Pacific Islander, Hispanic, Black, and American Indian.<sup>10</sup>

The new system was a radical departure from previous policy. Not only did the notion of "color-blindness" become passé, the Labor Department in effect created several new minority groups out of whole cloth. People who formerly might have thought of themselves as Mexican-American, Cuban-American, or Brazilian-American, now discovered they belonged to a single minority, "Hispanics."

Chris Norby, a history teacher in Brea, California, scorns such broad-brush labels. "In my own [school] district," he declared, "our 'Hispanics' include both recent immigrants and fourth generation Mexican-Americans who speak no Spanish at all, both children of Cuban-American doctors and descendants of Basque shepherds from northern Spain."<sup>11</sup>

## New Mission for Affirmative Action

The inclusion of virtually every conceivable minority group into affirmative action plans eventually forced a sharp shift in the rationale used to justify the policy. As long as the primary purpose of the policy remained to correct old wrongs done to blacks and to a few other long-suffering minorities, such as American Indians, then affirmative action maintained some philosophic coherence.

When the government turned its attention to groups encompassing virtually the entire population, however, the old explanations no longer satisfied. As noted above, many people now considered members of a protected minority were far from needing help. More troubling was the inclusion of the immigrant population along with U.S.-born minorities.

*What possible harm has the United States done to an immigrant just arriving from, say, Jamaica? And yet, immediately upon arrival the Jamaican would be classified as "non-Hispanic black," along with the descendants of America slaves. Further, the Jamaican's income is likely to be higher than that of U.S. blacks.*

"It is a historical accident," claims Peter Skerry, a fellow of the Woodrow Wilson International Center for Scholars in Washington, "that the groups that received distinctive protection under civil-rights legislation and judicial rulings were shortly to expand greatly through

immigration — legal and illegal."<sup>12</sup>

For example, at the turn of this century there were more Americans claiming to be of Swiss ancestry than Spanish. The latter numbered fewer than a quarter million people.<sup>13</sup> The Census Bureau now records more than 22 million Hispanics in the U.S., an approximate 100-fold increase.

Granting special rights to people just arriving "has led to confusion in area after area of public policy," Skerry suggests. Every place made at the affirmative action table for a new group must necessarily result in less room for all the others.

This problem extends well beyond the Hispanic community, however. A survey of data supplied by the Immigration and Naturalization Service revealed that *74.9 percent of incoming and legalized immigrants in 1993 came from nations whose inhabitants, once in the U.S., generally qualify as members of the protected racial/ethnic minorities.* In other words, about three out of four immigrants in 1993 became eligible for affirmative action benefits as soon as they received their "green cards."<sup>14</sup>

## A New Rationale

To solve the dilemma of offering special treatment to people not necessarily in need of it or (using traditional reasoning) especially deserving of the help, a new motive for affirmative action was required.

Multicultural diversity provided the answer. Redressing legitimate grievances began to be replaced by the new goal of making work forces and student bodies as representative of the surrounding populations as possible. That way, affirmative action planners could justify including immigrants in their calculations merely because they were there.

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"To make the connection that affirmative action should only be for native-born Americans seems kind of ludicrous to me," commented Larry Hardy, who is affirmative action officer for the Office of the President of the University of California system.

Hardy stressed that today's *raison d'être* for affirmative action has broadened from that of righting "past discrimination" to ameliorating "present effects." Getting the pool from which new University of California employees are chosen to match the ethnic and gender makeup of the surrounding area's market as closely as possible is his mission, Hardy said. "Whether [potential employees] come from Africa or were born here, it's irrelevant," he stated.<sup>15</sup>

## How Did This Happen?

This question is at the heart of the matter: is it legal to bar immigrants from affirmative action programs in order to favor U.S.-born minorities? Does it matter whether the immigrants are legal or illegal? Naturalized citizens or non-citizens?

If it is *legal* to choose U.S.-born minorities over immigrants — and it is found that aliens participate in affirmative action anyway — the question is, "Why is this happening?" How widespread is the phenomenon?

But if it is *not legal* to prefer American workers, then the task is to discover if and where historic minorities are losing out to newly arrived workers in the struggle for jobs, school placement, promotions, etc. The role affirmative action has in this displacement should be especially scrutinized. Finally, if it becomes clear that U.S. minorities are in some cases displaced by immigrants *through* affirmative action, Congress must decide if that situation is acceptable, and if not, how to remedy it.

## Evolution of an Entitlement

Nathan Glazer, professor emeritus of sociology at Harvard and author with Daniel Patrick Moynihan of *Beyond The Melting Pot*, recently wrote, "One thing that might be done immediately, however the affirmative action debate comes out, is to remove immigrants from affirmative action protection.

"They have, like all people in the United States, protection against discrimination through civil rights laws," he continued. "Affirmative action was intended for our own native racial problem, not for immigrants, who now make up a large share of those entitled to its benefits."<sup>16</sup>

Like Dr. Glazer's, many intelligent voices raised in the immigration debate have assumed that immigrants may be participating in affirmative action programs, but are fuzzy on whether the law actually entitles them to this benefit.

The answer lies in an obscure amendment to the Immigration Reform and Control Act of 1986, in which Congress mandated that employers could not refuse to hire immigrants just because they were not citizens. Unless the employer had another applicant who was a citizen *and* equally qualified, the immigrant had to be hired.

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To avoid discrimination in this hiring process, the immigrants would have to be treated just like American citizens. And if the citizens who belonged to racial minorities were placed in specially preferred hiring

pools, the immigrants had to be placed there too.

So, if most firms give no preference to Americans over non-citizens, and an immigrant's racial/ethnic background places him in a hiring pool highly sought after to meet affirmative action hiring goals, the immigrant may suddenly find himself at the front of the whole line for job placement. An advantage meant for American minorities goes instead to a non-citizen.

Under present law, therefore, foreign nationals are *equally entitled* to benefit from American affirmative action programs.

Congress probably did not intend this — almost certainly did not intend it — yet the convoluted legislation it enacted has managed to confer a major benefit upon unintended recipients. It's the entitlement nobody wanted.

So, how does this bizarre twist of social policy actually aid immigrants in practice? The area we will concentrate on in this summary of a much more in-depth study is the field of university teaching.

## Non-Citizens in University Faculty Hiring

Anyone who has spent time at American doctorate-granting universities in the last several years will have been struck by the large number of foreign-born people filling the ranks of teaching assistants, lecturers, and professors. Especially in the hard sciences, immigrants are now filling a significant proportion of all new faculty slots.

How many foreign-born people teach at U.S. colleges and universities? In the course of this study, no source could be identified which even attempted to develop comprehensive statistics. Further, many schools don't even know about their own faculty, nor do they want to know.

Larry Hardy, previously cited as affirmative action officer for the University of California system, stressed that UC's nine campuses do not separate out aliens for the purpose of compiling statistics, nor do they tag them in any special way. Thus, they literally have no idea how many foreign teachers they have.<sup>17</sup>

More surprising, of all the numerous federal offices which exist to gather statistics, only the National Science Foundation maintains a partial database of the nationality of some university personnel (i.e., very junior appointments in the sciences only). Numerous sources can cite the race/ethnicity of faculty members, but that's all. By studying the data supplied by NSF as well as some other suggestive information, however, some idea of the numbers can be derived.

*Chart 1* displays the number of post-doctoral appointments awarded in the sciences by selected prominent universities in 1992, including how many of them went to non-citizens. Post-doctoral appointments are fellowship/research positions offered to scholars who have already earned their Ph.D.s or other doctoral degrees, but who wish to pursue their studies further.<sup>18</sup>

The striking thing is the enormous number of postdoctoral appointments in the sciences given to non-citizens. Many of those who complete this prestigious postdoctoral training can be expected to find their way into American classrooms as professors. The National Science Foundation conducted a survey asking non-citizens who were receiving science and engineering doctorates from U.S. schools what they planned to do next after graduation. Of the 3,970 who had definite plans, fully 2,886, or 73 percent, planned to pursue either postdoctoral studies or employment in academia.<sup>19</sup>

Obviously, at least in the scientific fields, the supply of non-citizens is great. But what of the demand?

## Pressure to Move Beyond Government Requirements

As affirmative action gained ground during the 1970s and 1980s, universities scrambled to change their mostly white faculties into more racially diverse bodies. This proved a daunting task, due to the relative lack of U.S.-born minority persons with Ph.D. degrees. Although the government's affirmative action requirements for federal contractors (covering virtually all research universities) only required them to match their staffs to the number of *qualified* available people within each minority group, political pressure from the outside tended to make them want to go further.

## California Leads the Way

As the trend toward multiculturalism swept the academic world, California, laboring at the forefront of so many other movements, helped blaze this new trail as well. University faculties needed to reflect accurately the racial/ethnic makeup of their area, the movement decreed; all points of view needed to be heard. This new paradigm went well beyond what the federal government required the schools to do.

The California legislature wanted some of its schools, at least, to go a good deal further. In state law AB1725, the legislature laid out a master plan, directing the California Community College system to select 30 percent of all new faculty hires from minority groups. The plan was that, by the year 2005, a community college faculty would mirror the surrounding community.<sup>20</sup>

This could prove very difficult to accomplish in California, where a large segment of its minority population consists of recently arrived Hispanic and Asian immigrants.<sup>21</sup> The community colleges were able to successfully boost their minority numbers in lower level staff positions, but where would they find the minority professors, all of whom needed Ph.D.'s?

The California State University system and the illustrious University of California system were not the targets of state-imposed quotas, but they did feel the heat to pursue aggressive affirmative action for many years. This push may now stall, since Governor Wilson last year persuaded the UC Board of Regents to abolish

affirmative action in hiring and student enrollment. On the other hand, the schools' actual practice may not shift dramatically — every single campus chancellor in the UC system strongly opposed the Regents' action. School officials are likely to continue pressing for greater minority hiring even without official affirmative action. As a headline in the July 24, 1995 *Washington Post* put it, "California Regents Aren't the Last Word: Diversity Can Be Ensured Without Race-Based Admissions, Officials Say."<sup>22</sup>

"When we do our recruitment, we look at much more than the [surrounding] community," said Larry Hardy. He noted that for *national* schools like the University of California, *national* faculty recruitment was in order.<sup>23</sup> A report card for the UC system can be found by studying *Chart 2*.

After several years of concerted effort, the UC system schools have been able to get their combined minority faculty percentage up to 16.7 percent, a figure which outperforms the national average by a significant margin. *Chart 3* shows the racial/ethnic makeup of all university faculties during 1991 (three years prior to the UC data).

Though stronger than the national average overall, the University of California figures bear close inspection. If the UC system schools were to attempt to match their faculty ethnic makeup to that of the general population of California, their task would be difficult. California's population is about 9 percent black, a little below the national average. However, only 2.5 percent the UC schools' faculty members were African-American, significantly below the national average of 4.7 percent of faculty.

The numbers were more mixed concerning Hispanics. UC's 4.2 percent figure for Hispanic professors improves significantly on the national average of 2.2 percent, and yet the state's population has now become about 30 percent Hispanic!

If it were not for the presence of a large contingent of what the University of California describes as "Asian-Americans" — well above the national average — UC's percentage of ethnic faculty would seem much more modest. More than half of all minority persons teaching at UC schools are from that category. It is well known that Asian-Americans are heavily represented in every aspect of American academic life, and this is especially true in California. Their story of accomplishment is truly impressive.

Are they, however, really all Asian-Americans? The answer is: no, they are not. Part of the confusion is in the very terms the government has decreed be used for racial/ethnic typing. All people of Asian ancestry are termed "Asian-American/Pacific Islander," when, in fact, they might be *citizens* of Japan, Taiwan, or another Asian nation.

Since the University of California does not even keep separate statistics on the number of foreign-born professors, no official there can quantify the

phenomenon of foreign professors being labeled Asian-American. However, a glance at *Chart 1* illustrates the probable situation. If nearly half of post-doctoral appointments in these and similar universities have been going to non-citizens, faculty appointments themselves are likely to be heavily affected as well.

It's not that UC and other university systems try to mislead by the numbers they put out. The truth of the matter is that these and other large institutions have hesitated to treat foreign minority nationals as anything other than minority citizens of the U.S. The schools have something real to fear, since the law, as discussed above, seems to require this kind of alien mainstreaming. In addition, foreign minorities can potentially qualify for special affirmative action benefits — and help improve the compliance numbers of various institutions — as soon as they arrive in the United States.

Disturbing evidence of how widespread this situation has surfaced during a controversy at the University of Michigan over its affirmative action hiring program. The university had reported that it had made great progress in boosting minority faculty numbers. From 1987 to 1992, African-Americans in the faculty moved from 3 to 4.4 percent, Hispanics from 0.9 to 1.3, and Asians from 4.9 to 6.1 percent, the Michigan administration stated.

The faculty senate cried foul, however. Taking a multiculturalist stance, the senate charged that not nearly enough had been done to make the faculty mirror the racial balance of the surrounding community. University provost Gilbert Whitaker countered that the administration's goal was to match the available minority labor pool; that is, minorities with doctorates. In any case, in its zeal to move the school to increase minorities in the faculty, the faculty senate uncovered some fascinating information about non-citizens swimming with the affirmative action tide.

Of the minority faculty listed by the university, the senate found that 56.1 percent of the "Asian-Americans" were not American citizens at all. Nor were 23.3 percent of the Hispanics. And 18.8 percent of the blacks weren't citizens, either. Yet these people had apparently enjoyed every advantage of affirmative action — heavy recruitment, preferential hiring, top wages, etc.<sup>24</sup>

Larry Hardy stated that if the University of California were considering hiring a new faculty member who happened to be both foreign and an ethnic minority person, the candidate could not be denied affirmative action benefits. "It would be illegal to do so, to be quite frank," Hardy said.

## **Stanford Tries to Buck the System**

One university became quite concerned about affirmative action for non-U.S. citizens, especially since, in this case, large sums of money were involved. Stanford University is one of the wealthiest and most prestigious schools in America. Located in Palo Alto,

California, Stanford faced almost exactly the same situation as the University of California system, but with an added complication.

Stanford had established substantial financial rewards for departments which managed to recruit new minority faculty. The system worked by authorizing departments to hire half of an extra faculty member for every one minority teacher hired. Thus, if the humanities division hired two new minority persons, it would receive budget authority to add another professor of its choice. Stanford, being well-endowed, could afford this sort of incentive.

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***"...this system had the effect of inadvertently rewarding departments for hiring foreign-born professors."***

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What disturbed the administration and faculty was that this system had the effect of inadvertently rewarding departments for hiring foreign-born professors. In part this was because Stanford, like so many other schools, made no distinction between citizen and non-citizen. An internal study prepared for the administration, and obtained by the *San Jose Mercury News*, reported that slightly more than half of Stanford's ethnic minority faculty members were foreign-born. "Foreign-born and foreign-educated faculty members," the report stated, "may not be as effective as role models for minority undergraduates."

School officials wanted to re-target their financial incentives to help draw African-Americans, Mexican-Americans, Puerto Ricans, and American Indians to their faculty. So, in 1993, Stanford restricted its minority faculty hiring incentives to those four groups. All other groups were to be excluded, including Asian-Americans, who the university said were already adequately represented. Non-citizens would no longer be hired on an affirmative action basis.

When reports of the new policy hit the press, an outcry immediately went up from defenders of the status quo. "They would be leaving themselves open [to a lawsuit] in my opinion," stated Gazella Summitt, president of the American Association for Affirmative Action.

"The fact that somebody is left out doesn't give them a lawsuit," said Paul Brest, dean of Stanford's law school, in response. "The court has approved of educational institutions having affirmative action programs, and I think, by necessity, that means including some groups and not including other groups." He did suggest, however, that "the law in this area is amazingly unclear."<sup>25</sup>

Due to the criticism, the plug was quietly pulled on

the plan. "It has been dropped, never having been implemented," stated Robert Weisberg, vice-provost for faculty recruitment and development. Weisberg arrived after the policy's announcement in 1993, and he was told the plan would not be put in effect after all. "It was dropped as not sensible policy," he recalled.

"Even if there were some legitimate concerns which motivated [the policy]," he said, "It would be absurd to take a categorical position on foreign professors. In any event, it was too blunt an instrument." Stanford, he added with a touch of irony, had joined the ranks of the sensible universities which have "tried to avoid resolving these questions."<sup>26</sup>

In the meantime, Stanford continues the policy it wanted to halt — providing a large subsidy for every foreign minority professor hired.

## Adding It All Up

Because of a mix of governmental policy and ideological pressure, America's universities have felt great pressure to increase the number of ethnic minority persons on their faculties. At the same time, the universities' own degree programs have been turning out enormous numbers of foreign-born graduates, most of whom are counted as ethnic minority persons under U.S. guidelines, and most of whom wish to remain in America.

The present law discourages schools from treating these non-citizens separately when it comes to faculty hiring. Put that together with the pressure to hire more ethnic minorities, and it becomes understandable that some schools' contingent of minority faculty is becoming dominated by foreigners.

Are U.S.-born minorities losing out because of this? Maybe, maybe not. Black, Hispanic, and Native American Ph.D.s are in such short supply that qualified non-white citizens may well be able to find a position despite foreign competition.

However, there are those who see it otherwise. "It's the old zero-sum issue," commented Frederick R. Lynch. "If you count one person in, you count another person out. If you bring in an Asian, you of necessity exclude an American black." Certainly the practice reduces pressure on the educational system to recruit and train more U.S.-born minorities for Ph.D. programs.

Another sensitive issue concerns how immigrant hiring affects Asian-Americans, already fighting a perception that they are *over*-represented in many faculties. If Korean and Chinese and Indian nationals are included with Asian-Americans, it may indeed look as if there are too many Asian-Americans *vis-à-vis* the population.

Another group of losers is whites, who may find foreign minorities being recruited heavily while U.S. citizens who happen to be white are given less attention.

The clear winners, of course, are the non-citizens who came here looking for economic opportunity, only to find themselves winners in the affirmative action

lottery.

It's the American system working for them, albeit perversely. ■

[Mr. Robb's full 121-page monograph, *Affirmative Action: The Entitlement Nobody Wanted* is available from The Social Contract Press, 316½ E. Mitchell St., Suite 4, Petoskey, MI 49770; phone (616) 347-1171, FAX (616) 347-1185. The cost is \$12.50 including shipping and handling.]

## NOTES

<sup>1</sup> Johnathan Tilove, Newhouse News Service, *The Raleigh News And Observer*, January 9, 1994.

<sup>2</sup> Tilove, *op cit*.

<sup>3</sup> Interview of Frederick R. Lynch by the author, April 12, 1995.

<sup>4</sup> Title VII of the act can be found in the 7 U.S.C. § 2000(e)(2); for a point-by-point commentary on Title VII, see Business Law Editors, *Labor Law Reports: Employment Practices*, Volume 2 (Commerce Clearing House: Chicago, 1993). pp. 306-311.

<sup>5</sup> Executive Order 11246 was issued September 24 and appears in 30 *Federal Register* 12319, 12935; it also appears in 3 CFR, 1964-1965 Comp., p. 339.

<sup>6</sup> 7 U.S.C. § 2000(e)(2)(j).

<sup>7</sup> Taylor, Jared, *Paved With Good Intentions* (Carroll & Graf Publishers, Inc.: New York, 1992). p. 126.

<sup>8</sup> For a more in-depth look at the development and scope of affirmative action see: J. Edward Kellough, *Federal Equal Employment Opportunity Policy and Numerical Goals and Timetables: An Impact Assessment* (Praeger Publishers: New York, 1989), pp. 13-22; U.S. General Accounting Office, *Federal Affirmative Employment: Better Guidance Needed for Small Agencies* (GAO: Washington, 1994); Frederick R. Lynch, *Invisible Victims: White Males and the Crisis of Affirmative Action* (Greenwood Press: New York, 1989), pp. 11-20.

<sup>9</sup> Michael J. Flynn, "The Legality of the Philadelphia Plan," *University of San Francisco Law Review*, Volume 4, April 1970, pp. 373-396.

<sup>10</sup> The Uniform Guidelines on Employee Selection Procedures, the Equal Employment Opportunity Commission, and the Office of Federal Contract Compliance all use this classification scheme. See Joseph G. Allegretti, "National Origin Discrimination and the Ethnic Employee," *Employee Relations Law Journal*, Spring, 1981, p. 546.

<sup>11</sup> Chris Norby, "Ethnic Categories Become Meaningless," *The Orange County Register*, February 21, 1993.

<sup>12</sup> Peter Skerry, "Borders and Quotas: Immigration and the Affirmative-Action State," *The Public Interest*, Number 96, Summer 1989, pp. 88-89.

<sup>13</sup> L. H. Gann and Peter J. Duignan, *Hispanics in the United States* (Westview Press: Boulder, Colorado, 1986) p. 315.

<sup>14</sup> Table 8, Statistical Yearbook of INS, 1993.

<sup>15</sup> Interview of Larry Hardy by the author, April 26, 1995.

<sup>16</sup> Nathan Glazer, "Debate on Aliens Flares Beyond the Melting Pot," *The New York Times*, April 23, 1995.

<sup>17</sup> Interview of Hardy by the author, May 22, 1995.

<sup>18</sup> The charts in this article were prepared by the author from sources noted in each chart.

<sup>19</sup> Susan T. Hill, project director, *Selected Data on Science and Engineering Doctorate Awards: 1993*, NSF 94-318 (National Science Foundation, Arlington, Virginia, 1993), pp. 67-68.

<sup>20</sup> Frederick R. Lynch, "Tales from an Oppressed Class," *The Wall Street Journal*, November 11, 1991; Interview by the author with Ann Bergo, Equal Opportunity Employment Specialist, Los Angeles Community College System, May 24, 1995.

<sup>21</sup> It could also prove difficult in light of resistance to this sort of mandate within the schools themselves. One division chairman at a large California community college campus told me he had never heard of AB 1725. Moreover, if anyone ever told him to hire someone because of his race or gender, he would resign in protest.

<sup>22</sup> Rene Sanchez, "California Regents Aren't the Last Word," *The Washington Post*, July 24, 1995.

<sup>23</sup> Interview of Hardy by the author, May 22, 1995.

<sup>24</sup> Frederick R. Lynch, *The Diversity Crusades*, pre-publication manuscript to be published in 1996 by the Free Press.

<sup>25</sup> Steve Johnson, "Stanford Offers Born-in-U.S. Minority Bonus," *San Jose Mercury News*, October 24, 1993.

<sup>26</sup> Interview of Robert Weisberg by the author, May 22, 1995.